LEGALWISE ANNUAL TAX STRATEGIES CONFERENCE
MELBOURNE – 31 MAY 2019

SEPARATIONS, FAMILY AND ACCOUNTING: TAX EFFECTIVE SETTLEMENTS

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INTRODUCTION[1]

In any family law matter that is of a financial nature, it is imperative that the practitioners acting for parties have a sound knowledge of key taxation issues arising from separation, the *Family Law Act 1975* (Cth) ("Act") and taxation legislation.

Taxation can have a significant impact upon the pool of assets and liabilities that are available for adjustment, the most appropriate method of structuring a settlement and the orders that are required to achieve the outcome that the parties, or Court, intends. Failure to properly consider taxation can have dire consequences not only for a practitioner's client but also the practitioner personally in respect of claims against them. In the event that there is uncertainty, assistance from an accountant or lawyer who specialises in taxation should be sought without hesitation. In matters involving complex structures and entities, specialist advice should be sought as a matter of course.

This paper addresses the following key taxation topics in the family law context:

1. capital gains tax including its inclusion as a liability of the marriage or de facto relationship, roll-over relief and the main residence exemption;

2. Division 7A of Part III of the *Income Tax Assessment Act 1936* (Cth) ("ITAA 36") and its treatment in family law matters;

3. stamp duty exemptions in Victoria;

4. applicability of goods and services tax.

CAPITAL GAINS TAX

Capital Gains Tax ("CGT") refers to the taxation that is payable where the capital proceeds from the disposal of a specified asset exceed the asset cost base. The rate of taxation depends on whether the owner of the asset is an individual or entity, and their applicable income tax rate for the financial year. The provisions in respect of CGT, review of which is beyond the scope of this paper, are contained in Parts 3-1 and 3-3 of the Income Tax Assessment Act 1997 (Cth) ("ITAA 97").

In the family law context, CGT is relevant and should be considered by practitioners in two respects:

1. firstly, as to whether CGT ought to be classified as a liability of the parties; and

2. secondly, whether transfers and other transactions arising out of a settlement under the Act will crystallise or be subject to CGT.

Is Capital Gains Tax a Matrimonial Liability?

In respect of the first point, the leading decision is *Rosati v Rosati*[2]. That case was an appeal by a husband against a property settlement under the Act. The husband argued,

[1] The author gratefully acknowledges the assistance of Carolyn Cheng, Senior Associate, Chiara Bryan, and Carly Boekee, Associate.
[2] (1998) FLC 92-802.

amongst other things, that the trial judge had failed to take into account CGT implications arising from, on the husband's submissions, the necessary disposal of assets to meet his liabilities. There were three assets which could possibly be sold, but only evidence as to the CGT that would be payable in respect the sale of one of those assets being a real estate business.

The Full Court of the Family Court of Australia reviewed previous cases, and set out the following general principles[3]:

1. *Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.*

2. *If the Court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the proceedings.*

3. *If none of the circumstances referred to in (2) applies to a particular asset, but the Court is satisfied that there is a significant risk that the asset will have to be sold in the short to mid term, then the Court, whilst not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, may take that risk into account as a relevant s 75(2) factor, the weight to be attributed to that factor varying according to the degree of the risk and the length of the period within which the sale may occur.*

4. *There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing that asset. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs.*

In the particular facts of the case, the Court declined the appeal in respect of the CGT issue. It found that the trial judge had not erred in his discretion by declining to make a specific allowance for CGT which would be payable upon the sale of the business when arriving at the value of that business for the purposes of the proceedings. Whilst it would have been open to the trial judge to have done so, the Full Court said it was not a case where the evidence was so clear and the prospects of a sale of the entire business in the short term so likely, that in the absence of an order for its sale, it was an error for the trial judge not to make such an allowance.[4]

The principles in *Rosati* remain correct general statements. It is important to remember, however, that every case will turn on its facts and the evidence that is put before the court.

[3] Ibid, 85043.
[4] Ibid, 85045.

In this regard, the Full Court of the Family Court of Australia stated in *Blake*, that the statements in *Rosati* were *"no more than guidelines for the exercise of the property settlement jurisdiction under s 79 … and must be applied as the justice and equity of [each] case requires*".[5]

Does Roll-Over Relief Apply?

Subdivision 126-A of ITAA 97 contains provisions for roll-over relief from CGT in the family law context.

Specifically, section 126-5 of ITAA 97 provides compulsory roll-over relief if a relevant CGT event happens involving an individual and his or her spouse or former spouse because of:

1. an order under the Act or a corresponding foreign law;
2. a financial agreement under the Act or a corresponding foreign law;
3. an arbitral award under the Act or a corresponding foreign law.[6]

The definition of spouses includes de facto partners. The relevant CGT events are specified to be events A1 and B1 (disposal cases) and D1, D2, D3 and F3 (creation cases).[7] Where the relevant CGT event occurs because of a financial agreement, the parties must be separated with no reasonable likelihood of cohabitation resuming and the event must occur because of reasons directly connected with the relationship breakdown.[8]

Under section 126-15 of ITAA 97, the compulsory roll-over relief is extended to apply where a CGT event *"involves a company (the transferor) or a trustee (also the transferor) and a spouse or former spouse (the transferee) of another individual"* because of an order, financial agreement or arbitral award under the Act or corresponding foreign law.

There was an assumption amongst some practitioners that in order for section 126-15 to apply, the transferee had to be an individual due to the words *"spouse or former spouse"*.

In *Sandini Pty Ltd v Commissioner of Taxation*,[9] the Federal Court of Australia considered the issue.

The case concerned the transfer of shares in a mining company that was owned by a trust controlled by the husband to the corporate trustee of a trust that was controlled by the wife. The transfer was pursuant to consent orders made under section 79 of the Act. As is relatively common in family law matters, the orders were expressed as requiring the husband to *"do all acts and things and sign all documents necessary"* to transfer shares to the wife. The husband sought to rely upon the roll-over relief provisions of section 126-15 of ITAA 97. The commissioner audited the husband and assessed him to pay CGT on

[5] *Blake* [2007] FamCA 10 at paragraph 25
[6] There is also roll-over relief for orders or agreements made under state laws with respect to de facto relationships. These provisions reflect the fact that prior to the referral of powers to the Commonwealth, de facto relationships fell within the jurisdiction of the states.
[7] *Income Tax Assessment Act 1997* (Cth), s126-5(2).
[8] Ibid, s 126-25.
[9] [2017] FCA 287.

the basis that the section did not apply. The husband sought a declaration from the Federal Court of Australia that roll-over relief was available.

The trial judge, Justice McKerracher, delivered his judgment on 22 March 2017. His Honour granted the declaration sought by the husband and held that roll-over relief was available. Justice McKerracher looked at the policy objectives of the section and found that there was no reason for a trust controlled by a spouse to be excluded vis-a-vie a spouse as an individual.

Further, Justice McKerracher held that the effect of the orders of the Family Court were to vest beneficial ownership of the shares to the wife. This change in beneficial ownership or equitable title brought the transfer within CGT event A1. His Honour stated that CGT event A1 is focussed on a change of beneficial and not legal ownership.[10] This was critical because, as stated above, section 126-5(2) does not list the creation of a trust over a CGT asset or transfer of a CGT asset into a trust (CGT events E1 and E2) as CGT events to which roll-over relief applies.

The term "transferee" in section 126-15 of ITAA 97 was found not to require a spouse to be named transferee in the relevant transfer. Rather, the term simply identifies the person to whom the transfer is to be beneficially made and does not prescribe or limit the capacity in which a person can be a transferee.[11] Justice McKerracher found that the wife was a beneficial owner and in effective control of the transfer.

The Federal Court of Australia's decision potentially had wide implications with respect to how property settlements may be structured under the Act, and the ability for parties to transfer assets within protected structures. The Commissioner of Taxation appealed.

In *Ellison v Sandini Pty Ltd* (2018) FCAFC 44 the Full Court of the Federal Court reversed the decision, finding that roll-over relief cannot apply where CGT assets are transferred from a company, trust or spouse to a discretionary trust rather than a spouse or former spouse.

The Full Court held that a change in beneficial ownership is sufficient to trigger CGT event A1. The majority (Jagot and Siopis JJ) then turned to consider whether the Family Court orders effected the change in beneficial ownership of the shares or whether it occurred at some later event. The majority held that the words "change in (beneficial) ownership" required that a person other than the legal owner of the asset be entitled in equity to receive a transfer of the property. The Full Court was not satisfied that the wife's direction to transfer the shares into her trust was a sufficient connection to the transfer for roll-over relief to apply.

The majority ultimately held that the Family Court orders did not effect a change in beneficial ownership of the shares as required by CGT event A1 for roll-over relief to apply. The change in beneficial ownership occurred when Sandini Pty Ltd executed the share transfer form or on registration of the corporate trustee of the trust as the new shareholder. Thus, the parties to CGT event A1 were Sandini Pty Ltd and the corporate trustee, not the wife. Hence, no roll-over relief was available to Sandini Pty Ltd and CGT was payable on the transfer. In addition, the shares transferred to the wife's trust now have a cost base equal to their market value.

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[10] Ibid at 142, 143, 153, 190.
[11] Ibid, 198.

Sandini Pty Ltd applied for special leave to appeal the decision to the High Court. Bell and Gordon JJ refused special leave on 14 September 2018.[12]

Key points to take out of the decision are that for roll-over relief to apply, the CGT assets must be transferred to the spouse or former spouse personally. Assets transferred to a discretionary trust controlled by the spouse will not receive roll-over relief. Further, parties transferring assets pursuant to consent orders must strictly abide by the terms of the orders as failure to do so could mean that roll-over relief will not apply. The case also acts as a reminder to seek advice from a specialist tax lawyer or accountant prior to structuring your family law settlement.

Roll-Over Relief Applies, What Does it Mean?

The fact that roll-over relief is applicable does not mean, of course, the CGT is not payable at all or simply goes away. Rather, sections 126-5 and 126-15 of ITAAA 97, if applicable, mean that there are no CGT implications for the transferee and transferor spouses at the time of the relevant transfer between them. Rather, CGT is deferred or inherited by the transferee. Whether CGT is ultimately payable by the transferee will depend on the difference between the sale price and cost base at the time of eventual disposal.

Specifically:

1. pre-CGT assets being assets acquired prior to 20 September 1985 will retain their pre-CGT status in the hands of the transferee. In order words, CGT will not be payable by the transferee upon the asset's ultimate disposal;

2. for post-CGT assets, the cost base of the asset will be the asset's cost base to the transferor at the time that the transferee acquired the asset.[13]

Holding costs may be able to be added to the cost base when calculating a capital gain, but only where same have not already been claimed as a tax deduction.

Main Residence Exemption

The main residence of taxpayers is generally exempt from CGT. In order to qualify for the full exemption, the taxpayer must be an individual (not, for example, a company or trust), the dwelling must have been the taxpayer's home, the dwelling must have been the tax payer's main residence for their entire period of ownership and the disposal must result from a specified CGT event.[14] A partial exemption may be available if the dwelling was only a main residence for part of the period of ownership or was used to produce assessable income.[15]

In circumstances where spouses have different main residences, each spouse must nominate their main residence for the purposes of the CGT exemption. They may nominate different residences. If this occurs, the exemption will be apportioned so that the maximum exemption for either dwelling is 50%.[16] This has the effect of preventing a

[12] *Sandini Pty Ltd v Ellison* [2018] HCA Trans 190.
[13] As above n 7, s 126-5(4)-(7).
[14] Ibid, s 118-110.
[15] Ibid, ss 118-185 and 118-190.
[16] Ibid, s 118-170.

double main residence exemption. If a person leaves their former main residence to live elsewhere, they may nevertheless elect to treat the former residence as their main residence for an unlimited period (or six years if it is used to produce income).[17]

Where a dwelling is transferred to a spouse and roll-over relief is available to the transferor, eligibility for the main residence exemption takes into account how both spouses used the dwelling. Previously, until 13 December 2006, only use by the transferor had been considered. Under section 118-178 of ITAA 97:

1. the transferee spouse is deemed to have acquired their ownership of the dwelling when the transferor spouse acquired their ownership interest;
2. from the date of acquisition until the transfer:
    (a) the transferee spouse is deemed to have used the dwelling as the transferor spouse had done;
    (b) the dwelling is deemed to be the main residence of the transferee spouse for the same period as it was the main residence of the transferor spouse.

The above rules are extended to transfers from a company or trust under section 118180 of ITAA 97.

Under ITAA 97, a person cannot use the main residence exemption in relation to more than one property at any given time.

The provisions relating to the main residence exemption and the fact that taxation consequences to a transferee spouse will automatically flow from the elections of the transferee spouse mean that instructions should be taken as to the treatment of dwelling prior to and after separation. In particular, where a separated spouse has vacated the former matrimonial home and acquired a new property, it is important to ascertain whether the former matrimonial home or new property has been nominated as their main residence as this is likely to impact on the other spouse. It may be appropriate to record the election in a notation to orders.

DIVISION 7A

Under Division 7A of Part III of ITAA 36 amounts:

1. paid by a private company to a shareholder or shareholder’s associate;
2. lent by a private company to a shareholder or shareholder’s associate; and
3. debts owed by a shareholder or shareholder’s associate to a private company that the company forgives

are deemed to be dividends[18]. They accordingly form part of the assessable income of the shareholder or associate.[19]

[17] Ibid, s 118-145.
[18] Income Tax Assessment Act 1936 (Cth), ss 109B, 109C – 190F.
[19] Ibid, s 44

The definition of a 'shareholder's associate' in s 318 of ITAA 36 is broad, with a spouse falling within the term "relative".[20] Former spouses or spouses who are permanently separated from a shareholder are not included in the definition of 'shareholder's associates' under section 318,[21] but nevertheless fall within the Division 7A regime if a reasonable person would conclude (having regard to all the circumstances) that the payment, loan or debt forgiveness has been made because they have been a shareholder or associate at some time.[22]

Accordingly, where as part of an adjustment of property under section 79 of the Act, a private company controlled by one spouse party is to pay the other spouse party a sum of money (possibly because there are insufficient assets outside of the company to otherwise achieve a just and equitable settlement), the payment will be treated as a deemed dividend to the recipient spouse and subject to income tax.

Division 7A sets out a number of payments which are excluded. They include:

1. loans made from one private company to another private company;[23]
2. payments of genuine debts;[24] and
3. loans made on commercial terms.[25]

Payments of Genuine Debts

Section 109J of ITAA 36 states:

> *A private company is not taken under section 109C to pay a dividend because of the payment of an amount, to the extent that the payment:*
>
> *(a) discharges an obligation of the private company to pay money to the entity; and*
>
> *(b) is not more than would have been required to discharge the obligation had the private company and entity been dealing with each other at arm's length.*

Previously, the exemption of payments of genuine debts had been widely utilised by family law and taxation practitioners to enable parties to legitimately avoid significant income tax. This was because the ATO previously took the view that where a private company had been joined as a party to proceedings under the Act and an order had been made for a payment by a company to a spouse or former spouse in cash (cf. in specie), such payment was a payment of genuine debt under section 109J of ITAA 36.

Effective from 31 July 2014, the ATO completely reversed its position in Taxation Ruling 2014/5. The ATO now takes the view that an order for a private company to pay money

[20] Ibid, s 318 (1)(a). Under section 109ZA of ITAA 36, the definition of 'associate' in section 318 of ITTAA 36 applies to Division 7A of Part III of ITAA 36.
[21] Ibid, s 318(7).
[22] Ibid, ss 109C(1)(b), 109D(1)(d)(ii) and 109F(1)(b).
[23] Ibid, s 109K.
[24] Ibid, s 109J.
[25] Ibid, s109N.

under section 79 does not cause a private company to pay money and there is no binding legal requirement in law imposed on the company. Rather, the binding legal requirement is imposed against the spouse party. There being no binding legal requirement against the private company, there is no obligation to discharge under subsection 109J(a) of ITAA 36.[26] Furthermore, the ATO does not consider payments by a private company, which are gratuitous from the company's perspective, to a current or former shareholder or shareholder's associate to be at "arm's length".[27]

The exclusion under section 109J is therefore no longer applicable and cannot be utilised in family law matters. Taxation Rule 2014/5 states:

> *Where a section 79 order requires:*
>
> *- a private company, or*
>
> *- a party to the matrimonial proceedings to cause the private company,*
>
> *to pay money or transfer property to a shareholder of the private company, the payment of the money or transfer of property in compliance with that order is an ordinary dividend to the extent paid out of the private company profits and is assessable income for the shareholder under section 44 of the ITAA 1936.*

<u>*Commercial Loans*</u>

A loan that is made on commercial terms is excluded from Division 7A of ITAA 1936. In order to qualify under section 109N:

1. the loan must be in a written agreement;
2. the loan must be for a maximum of 25 years (if secured) or 7 years (if unsecured);
3. interest must be charged at a level equal or exceeding the benchmark interest rate;
4. if it is a secured loan, the security must be real property and the market value be at least 110% of the loan advanced;
5. minimum payments must be made annually.

Often payments that have been made to a shareholder or shareholder's associate by a private company will be accumulated in a loan account that is payable back to the private company.

If the requirements of the above are not satisfied, such loan will be treated as a deemed dividend to the shareholder or associate. Thus, detailed instructions should be obtained, enquiries made and documents sought when such a loan account appears and prior to any family law settlement.

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[26] Taxation Ruling – Income Tax: matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder (or their associate), Commonwealth of Australia Taxation Ruling TR 2014/5, paragraphs 86-88.
[27] Ibid, paragraph 113.

STAMP DUTY EXEMPTIONS

Under the Act there are sections which purport to provide broad relief for parties from state and territory duties. Specifically, sections 90, 90L and 90WA of the Act provide that:

1. deeds or instruments executed by a person for the purposes or in accordance with an order for an alternation of property, a declaration as to property or maintenance;
2. financial agreements;
3. termination agreements; and
4. deeds or instruments executed by a person for the purposes or in accordance with a financial agreement or an order made under the divisions of the Act that relate to financial agreements

are *"not subject to any duty or charge under any law of a state or territory or any law of the commonwealth that applies only in relation to a territory"*.[28]

There have been cases with respect to the constitutional validity of the above-mentioned sections.

In *Gazzo v. The Comptroller of Stamps, ex parte The Attorney-General for the State of Victoria*,[29] a decision of the High Court of Australia in 1981, an order was made under Part VIII of the Act for the transfer of a property from a husband to a wife. That transfer was assessed as dutiable by the Victorian Comptroller of Stamps. The wife appealed relying upon section 90 of the Act.

A majority (3:2) of the High Court of Australia held that section 90 was not a valid law to the extent that it sought to apply to the States. The section was found not to have a close or sufficient connection to the Commonwealth's heads of powers and ancillary power under section 51 of the Constitution.

The effect of the High Court's decision is that, whilst sections 90, 90L and 90WA of the Act exist, practitioners cannot rely upon them. Instead, when considering whether a transfer of an item of property that arises out of a family law dispute is exempt from state duties and charges, it is necessary to consult the relevant taxation legislation in the applicable state or territory.

Stamp Duty - Victoria

In Victoria, the *Duties Act 2000* (Vic) ("*Duties Act*") is the most relevant legislation. Section 10 of the Act, defines "dutiable property". The definition includes specified estates or interests in land.

Section 44 of the Duties Act provides that no duty will be charged in respect of otherwise dutiable property if the Commissioner is satisfied that:

1. the transfer of a property; or

[28] *Family Law Act 1975* (Cth), ss 90, 90L, 90WA.
[29] (1981) 149 CLR 227.

2. a declaration of trust in respect of property

has been made *"solely because the breakdown of a marriage or domestic relationship"*.

In each case, in addition to this purposive limb being satisfied, the transferor, transferee, the legal person declaring the trust and beneficiaries must meet the specific requirements in the section. By way of broad overview, in addition to applying where the transferor and transferees are individuals, the section also extends to corporations and trusts controlled by the parties. There are requirements with respect to the dutiable value of the property not exceeding that parties' interests and corresponding reductions in value. It is imperative that practitioners work through each step and sub-section of the Act, rather than broadly assume the exemption will apply.

Under section 235 of the *Duties Act*, there is an exemption from liability to pay stamp duty in respect of an application for registration or transfer of registration of a motor vehicle where same is *"made because of the breakdown"* of a marriage or de facto relationship. As is the case with section 44, there are requirements regarding the transferor and transferee which must be satisfied.

Prior to 1 July 2017, transfers between spouses or domestic partners were exempt from duty pursuant to section 43 of the *Duties Act,* regardless of the type of property, with the consideration on the transfer typically described as "love and affection".

Since 1 July 2017 however, only transfers of a principal place of residence made for no consideration are exempt. Thus, second or investment properties will be subject to duty.

Critically, for family law purposes however, all transfers of property that arise from a relationship breakdown will remain exempt.[30]

GOODS AND SERVICES TAX

The ATO has produced a GST Ruling in relation to asset transfers in family law property distributions.[31] The ruling differentiates between enterprise assets and private assets. Only enterprise assets are potentially subject to CGT.

Enterprise assets are defined as follows:

> *property, tangible and intangible personal property that is owned by either or both spouses or a related entity and used or intended to be used in an 'enterprise' of the 'entity' that is 'registered or required to be registered'. Examples of enterprise assets include trading stock, plant, office equipment, motor vehicles and real property.*

Any asset that is not an enterprise asset is a private asset. The transfer of private assets will not invoke GST consequences.

[30] *Modernising Motor Vehicle and Property Duty Payments* (2017), State Government of Victoria, http://www.premier.vic.gov.au/modernising-motor-vehicle-and-property-duty-payments/ at 9 June 2017.
[31] *Taxation Ruling – Goods and Services Tax: transfers of enterprise assets as a result of property distributions under the Family Law Act 1975 or in similar circumstances*, Commonwealth of Australia Taxation Ruling TR 2003/6.

These principles apply whether a property distribution is effected:

1. privately between spouses in accordance with an informal agreement reached between them;
2. by way of consent orders; or
3. pursuant to a binding financial agreement within the meaning of the Act.

The first step in a family law settlement is therefore to identify if assets to be exchanged are enterprise assets. If so, the next question is whether or not there is a taxable supply.

The ATO explains that "supply" is defined very broadly for GST purposes. It encompasses "any form of supply whatsoever", and encompasses the transfer of assets between spouses, or from an entity under the control of one spouse to the other spouse.

In order to be classified as taxable, a supply must satisfy the following requirements:

1. the supply is made for consideration.
2. the supply occurs in the course or furtherance of an enterprise conducted by one or both spouse parties;
3. the supply is connected with Australia;
4. the supplier is registered, or required to be registered, for GST.

The first two limbs bear further consideration for our purposes.

Consideration is taken to have been paid for a supply where a payment, act or forbearance is offered "in connection with" or "in response to or for the inducement of a supply". There must be a sufficient nexus between the consideration and the supply, to be determined on an objective, rather than subjective, basis. Helpfully, the ATO adopts the general view that even where a family law property settlement entails the exchange of money along with assets, there is "not a sufficient nexus between the consideration and the supply of the asset". This is because the intent, or purpose, of the settlement is not to "exchange or barter" assets, but to redistribute the parties' property holdings in accordance with justice and equity consequent to the breakdown of their relationship.

The character of a supply as being "in the course of furtherance of an enterprise" is also unlikely to be made out in a family law setting. The ATO describes the issue as one of fact and degree, but goes on to observe that there is likely to be no "discernable relationship" between the supply and the ordinary enterprise activities of the supplier. The breakdown of a relationship is a private, not commercial, matter. Also, the asset distribution may occur in accordance with court orders, which incorporate an element of compulsion rather than voluntariness. This militates, from a policy perspective, against settlements being distinguished on the manner to which they are given effect. For reasons of consistency and fairness, it should not matter whether spouses agree informally, enter into consent orders, obtain orders after contested litigation, or contract between themselves under a financial agreement. Thus the ATO explains that:

> *Where the overriding essential character of the supply is that of something being disposed of due to the personal circumstances of the spouse, upon marriage breakdown or otherwise under the FLA, rather than business circumstances of the enterprise, that supply is not made in the course or furtherance of the enterprise.*

It is therefore uncommon for the goods and services tax ("GST") to be levied on asset transfers between separating spouses. This is not because of a particular exemption in the taxation legislation, as with CGT, but rather is a consequence of asset transfers typically taking place within an overall settlement framework where various assets change hands but not for specific consideration. In other words, while parties may exchange ownership of non-liquid assets, they do not pay each other for those assets in a commercial manner This is the case even if cash changes hands between the parties as a component of the settlement. The exchange of money is not directly referable to the transfer of particular goods, nor is it done in the furtherance of an enterprise.

CASE STUDY

One method of structuring a family law settlement for the purpose of avoiding an immediate or short-term tax liability and sharing future tax on retained earnings is known as 'company cloning'.

By way of example, the Husband and Wife are equal shareholders in Company A, and seek to effect an equal division of property. They take the following steps[32]:

1. The parties incorporate a new company, Company B. The parties are equal shareholders. The company fits the definition of an "associate" pursuant to the ITAA 36 and thus roll-over relief applies.

2. Company A issues a redeemable preference share with discretionary dividend rights to Company B.

3. Company A and Company B are joined as parties to the family law proceedings.

4. The parties enter into consent orders which include the following provisions:

   (a) the Wife transfer her shares in Company A to the Husband;

   (b) Company A pay to Company B a dividend comprising 50% of its retained earnings;

   (c) the parties as directors of Company A do all acts and things necessary to ensure that the dividend at 4(b) above is fully franked;

   (d) the Wife resign as director of Company A;

   (e) upon receipt of the dividend, Company A assign to Company B 50% of the joint Division 7A loans. The wife be solely responsible for the Division 7A loans. Company B make a payment to the Wife of an equivalent sum to the value of the loans transferred;

[32] See *Taxing times in property disputes*, Tom Kirk QC and Joe Box (4 October 2018).

(f) Company A redeem the preference share held by Company B immediately upon payment of the dividend;

(g) the Husband transfer to the Wife the shares held by him in Company B and resign as a director.

The parties obviously do not avoid the payment of tax, however are able to divide their future responsibility for tax between them and thus effect a just and equitable settlement. The Husband and Wife can declare a dividend when it suits them to repay the Division 7A loans. In the meantime, they can invest the funds received through Company A and Company B.