A TAXATION ROADMAP FOR FAMILY LAWYERS

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As family lawyers, we are neither qualified, nor insured to provide our clients with expert taxation advice. We are, however, required to understand the potential tax consequences of property settlements and to know when to refer our clients to their accountants for taxation advice. The purpose of this paper is not to give you a lesson in tax law, but rather to assist you in identifying when and how tax can be an issue when you are negotiating a property settlement.

When considering the "taxation roadmap" that we must navigate, there are two main highways – federal taxes and state taxes. For our purposes, the main federal taxes we need to be aware of include income tax, with particular reference to Division 7A of the *Income Tax Assessment Act* 1936 (**ITAA**), capital gains tax (**CGT**) and the goods and services tax (**GST**). State taxes include stamp duty, land tax and landholder duty.

By way of practical example, the following case study highlights the tax consequences that may arise from adjusting the property interests of the parties to a marriage, or de facto relationship. After the case study is a further exploration of the "taxation roadmap".

Facts:

- H and W have been married for 25 years and recently separated. They are engaged in proceedings in the Family Court and have been ordered to attend mediation.
- They have two teenage children. They live mostly with W.

- H works in his family's business, which is importing and wholesaling food products.
- The business has been valued at $15million by a forensic accountant appointed as a single expert. This figure includes the value of the real estate, being two distribution warehouses and office premises, as well as the business itself.
- The business is owned by a unit trust.
- The trustee of the unit trust is a company of which H and his two brothers are the directors.
- The unit holders of the unit trust are three companies, being the corporate trustees of discretionary family trusts. Each one of those discretionary family trusts is controlled by one of the three brothers.
- During their marriage, the parties' income was derived from H's director's fees and from trust distributions from their family trust.
- H and W are both directors and shareholders of the corporate trustee of their family trust and H is the appointor of the trust.
- The beneficiaries of their family trust are H and W and their two children.
- The assets of their family trust include an investment property, a share portfolio and the units it holds in the unit trust.
- H and W both drive company cars, registered in the name of the corporate trustee of the unit trust. Both cars are subject to leases.
- H and W have debit loan accounts in both the corporate trustees of the unit trust and their family trust.
- The matrimonial assets comprise the family, which is registered in joint names and subject to a mortgage, a holiday house registered in W's name, artwork valued at $100,000 and the assets of the family trust.
- Shortly after separation, H moved out of the matrimonial home and bought another house using money borrowed from the unit trust.
- The parties also have a self-managed superannuation fund. The trustee is the same company as the trustee of their family trust. The assets of the fund are publicly listed shares and cash. They have equal entitlements in the fund.

Proposed Settlement:

At mediation, the parties decide to settle property matters between them on the basis that W will receive 60% of the net matrimonial assets and retain her entitlements in the self-managed superannuation fund. The terms of the settlement are as follows:

- H will transfer the matrimonial home to W – query whether she will receive the full main residence exemption;
- W will retain the holiday house – she may have a future CGT liability;
- They will split their art collection equally as to value – they may each have future CGT liabilities, subject to increases in value in the artwork each receives;
- W will resign as a director of the trustee of their family trust and transfer her shares in the company to H;
- The trustee of the unit trust will transfer the car W drives into her name, unencumbered – this may require an adjustment of the GST input tax credit claimed when the car was purchased;
- The loan accounts in the parties' names shall be assigned, or novated to H – if they are forgiven, it will create a deemed dividend;
- H will pay W $1.25m, which he will borrow partly from a bank, using his new house as security and partly from the unit trust – query whether the loan is a complying loan under Division 7A;
- H's brothers are unhappy about having to sell any of the assets of the unit trust to fund his settlement with W. Instead, they insist that H arrange for the trustee of his family trust to transfer two-thirds of the units it holds in the unit trust equally to their family companies – query whether there will be CGT and landholder duty.
- W's entitlements in the super fund will be rolled out in specie to an alternative fund being set up for her by her accountant – CGT rollover relief will apply.

The parties should receive independent accounting advice before proceeding.

Capital Gains Tax

CGT is a form of income tax. Basically, CGT is payable on the difference between the capital proceeds from the disposal of an asset and the "cost base". The cost base is the original purchase price, as well as the acquisition and disposal costs and the costs of owning and maintaining the asset (unless such holding costs have already been claimed as a tax deduction). The rate of CGT depends upon whether the owner of the asset is a company or an individual, the taxpayer's other sources of income and any capital losses incurred by the taxpayer that may be offset against the capital gain. If an asset is held for at least one year, then any gain is at first discounted by 50% for individual taxpayers and 33.3% for superannuation funds.

Not all disposals of assets are subject to CGT. The following assets are exempt:

- Main residence (the family home);
- Assets acquired before 20 September 1985;
- Cars and motor cycles;
- Collectables worth less than $500;
- Certain personal use assets costing less than $10,000;
- Compensation payments for personal injury;
- Gambling wins;
- Assets used to produce an income. Note, there are also GCT exemptions for small businesses.

The main residence exemption can be tricky. It will not always be the case that the former matrimonial home will be free from CGT. The exemption may only be partial if the home was used as the taxpayer's main residence for only a part of the period he or she owned it. There may also be only a partial exemption if the home has been used for income producing purposes. Further, since 13 December 2006, the ATO takes into account the way in which both the transferor and the transferee spouses have used the home when applying the main residence exemption, not only how the transferee has used it. This means that from the date of acquisition of the home by the transferor spouse until the date of transfer pursuant to Court Orders, the transferee is deemed to have used the home in the same way as the transferor.

This can have significant consequences if, for example, the transferor spouse moves out of the matrimonial home and buys another house before final settlement. The main residence exemption for the transferee who retains the matrimonial home may be partly lost, which may result in CGT being payable by the transferee if the home increases in value between the parties' physical separation and the transfer of the home pursuant to Court Orders. Conversely, if the property purchased by the spouse who moves out of the home is later transferred to the other spouse as an investment property as a part of the final property settlement, then the transferee will have the benefit of the main residence exemption for the short period it was lived in by the transferor.

Note, for income tax purposes, an individual taxpayer can elect which property is his or her main residence. Accordingly, if a party moves out of the matrimonial home, he or she may still elect to treat the home as his or her main residence (indefinitely if the property is not income producing). A person cannot have two main residences, except for a short period of time pending the sale of one of them. To protect the transferee from exposure to the payment of CGT on the eventual disposal of the matrimonial home, it may be advisable in some cases to make the transferor's main residence election the subject of negotiation and Court Orders.

Any transfer of an asset between spouses or de facto partners pursuant to a Court Order or binding financial agreement made under the Family Law Act or State or territory legislation that would ordinarily be subject to CGT is subject to compulsory rollover relief (see s.126.5 ITAA). The rollover relief also applies to transfers of a CGT asset from a company or trust to an individual pursuant to a Court Order or binding financial agreement (see s.126.15 ITAA), but note that it does not apply in the reverse to transfers from an individual to a company or trust.

Whilst the spouse receiving the CGT asset will not be liable to pay CGT upon the transfer of the asset, her or she may have to pay CGT on the eventual disposal of the asset. The deemed cost base of the asset upon disposal will be cost base to the transferor spouse at the time it was transferred pursuant to the Order or financial agreement. If you are acting for a party who is receiving an asset in a property settlement that may attract CGT in the future, it is important to ensure that your client has the documents relating to the purchase and holding costs of the asset, as these may be needed as evidence of the cost base of the asset upon its eventual disposal. The consequences of rollover relief can be more far-reaching if the asset is being transferred from a company or trust to one of the parties, as the transfer of the asset out of the entity may reduce the cost base of the company shares or trust units.

Since 1 July 2007, CGT rollover relief also applies to self-managed superannuation funds if assets that would normally attract CGT are transferred in specie from one fund to another pursuant to Court Orders or a superannuation agreement, within the meaning of the *Family Law Act* 1975.

Obviously, if an asset must be sold to effect a property settlement, or has been sold, then the CGT crystallises and it is clearly a matrimonial liability that must be taken into account. The situation is more complicated where an asset is "pregnant" with CGT and may be sold in the foreseeable future, but need not be sold to effect the settlement between the parties. Then the question arises, should CGT be taken into account and how?

The starting point to gain an understanding of CGT in the family law context is the case of *Rosati & Rosati* [1998] FamCA 38. In relation to the issue of whether or not potential CGT should be taken into account as a liability when assessing the pool of assets available for division between the parties, the Full Court of the Family Court said as follows:

> *It appears to us that although there is a degree of confusion, and possibly conflict, in the reported cases as to the proper approach to*

be adopted by a court in proceedings under s.79 of the Act in relation to the effect of potential capital gains tax, which would be payable upon the sale of an asset, the following general principles may be said to emerge from those cases:-

(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.*

To some extent, *Rosati* has lulled practitioners into thinking that unless an asset must be sold pursuant to Court orders, or is going to be sold imminently, then CGT may not be taken into account and need not be calculated. That way of thinking was perhaps reinforced when the automatic capital gains tax rollover provisions were introduced in 1997. A vague assertion that CGT may be payable at some unspecified time in the future is unlikely to be given any weight by a Court. However, a submission that CGT should be taken into account, at least under sections 79(4)(e) and 75(2) of the *Family Law Act,* may succeed if an asset was purchased during the marriage for investment purposes and it has substantially increased in value. Any such submission must be supported by expert valuation and accountancy evidence about the estimated CGT. There may also need to be evidence of the course of the parties' dealings with their property during the relationship and their financial circumstances, with particular reference to the likelihood of that the CGT asset will be sold.

A lack of evidence can be fatal to a submission that CGT should be taken into account. In *J & J* [2006] FamCA 951 where the Husband unsuccessfully sought to have his accountant's CGT estimates upon the sales of the parties' investment properties taken into account, the Full Court at paragraphs 35 to 38 said the following:

> *35. Many factors mitigate against the admission of this evidence. First, is the calculation of CGT itself. In order to determine whether a capital gain has been achieved, it is necessary to determine the cost base of the CGT asset. The elements of the cost base are set out in the Australian Taxation Office's Guide to Capital Gains Tax 2006 (pages 12 to 13). They include:*

- *the money paid for the asset and the market value of property given to acquire the asset;*
- *a range of nine incidental costs of acquiring the CGT asset or of the CGT event (including remuneration of professional advisers, costs of advertising, and conveyancing, stamp duty and borrowing costs);*
- *the costs of owning the asset, including rates, land taxes, repairs and insurance premiums;*
- *capital costs to increase or preserve the value of the asset or to install or move it; and*
- *capital costs of preserving or defending the ownership of or rights to the asset.*

36. In addition there are three different methods of calculating CGT of which one enables increasing the cost base by applying an indexation factor and another which allows discounting of the gain.

37. Secondly, even if the liability could be more accurately estimated (which absent the matters referred to, it cannot), the impact on the parties or either of them depends upon their own income in the year in which the capital gain occurs (including all capital gains for that year), any and all capital losses for the year, any unapplied net capital losses from previous years, and any concessions to which they might be entitled.

38. Given the complexity of the calculation of CGT, the inadequacy of the estimates sought to be put before us can hardly be clearer.

By comparison, in *IABH & HRBH* [2010] FamCA 110, there was detailed expert evidence about the potential CGT (over $1m) that may be payable upon the sales of properties in the future and His Honour Justice Watts made an adjustment of 7.5% in the Husband's favour under section 79(4)(d)-(g) to take this into account. His Honour said at paragraphs 359 to 364 of his judgment:

359. .....There is a proper basis, adopting the principles in Rosati to make a significant adjustment under s 79(4)(d)-(g) FLA for notional *capital gains tax, sale expenses and tax on retained earnings.*

360. *As I have already said, although I have not accepted that an amount should be placed on the balance sheet for capital gains tax on a discounted basis, I am attracted to taking Mr ON's discounted rate as a starting guide for making a s 75(2) adjustment arising out of potential capital gains tax and tax on retained earnings. However I also accept that there is no current necessity to sell and there are variables dependent upon future events which may or may not come to pass.*

361. *Using Mr ON's assumptions and calculations and looking ahead five years, the present value calculation of capital gains tax and realisation costs if all properties were disposed of (apart from the villa) would be in a sum of $1,313,688 ($1,367,015 - $590,695 - $122,482 + $552,522 + $107,328). The present value of capital gains tax and realisation costs of the sale of all properties in a ten year time frame will be $1,131,339.*

362. *Those amounts are 15.5 percent and 13.4 percent respectively of the overall pool of net assets. Mr ON's present day calculations, of course, assume that the properties actually will be sold within either of those time frames. I accept that there is some possibility that the sales and winding up contemplated by those assumptions will not occur in the predicted time frames. There is also some force in the argument that the husband will wait and sell the income producing properties only when they have substantially improved in value. Mr ON's calculations cannot be an exact indicator of what costs might be incurred but they do indicate that the 2.5 to 3 percent adjustment suggested by senior counsel for the wife is inadequate. I am mindful of some of the variables referred to in J & J, but most of those concerns have been addressed in the expert evidence. As I have already said, there is no current necessity to sell any of the properties and there are variables depending on future events which may or may not come to pass.*

363. *At the end of the day future predictions need to be balanced in the context of current factual circumstances and what has happened*

historically.

364. The properties might be kept by the husband and in trust by his estate, for a very long time. Capital losses might be incurred in future investments which offset the gains and reduce the current incidence of tax on the current gains. As Nicholson CJ said in Carruthers and Carruthers [(1996) FLC 92-707](#) at para 83,486:

> *"...tax law is not a constant and differing views have been taken in this country to rates and incidents of capital gains tax from time to time....the person who holds the property may, over a period, be able to arrange his or her affairs as to heavily reduce, if not completely eliminate, the liability. This history of tax minimisation schemes....in this country is not such as to make one able to say with any confidence that this will not occur".*

In the case of *Carruthers v Carruthers* the husband sought to have anticipated CGT and notional sale costs on the sales of various properties brought into account as matrimonial liabilities, on the basis that he would need to dispose of properties to fund the purchase of another property that he was committed to buying. Nicholson CJ allowed "a substantial proportion of these costs", but not all of them. Timing was important. His Honour said, "the longer the likelihood of particular property being retained, then in my view the less justifiable to treat the property as being subject to a present notional liability".

Another case in which only a partial allowance was made for CGT was *JEL V DDF* (2001) FLC 93-075, perhaps best known for what the Full Court said in that case about "special contributions". It was a large asset pool. The husband was a geologist and created the largest gold mine in Queensland. The effect of the trial Judge's Orders was the wife would be liable for 35% of any CGT incurred as consequence of the sale of assets to satisfy the Orders. This was upheld on appeal. The assets had mostly been acquired for investment purposes and had been valued on a net realizable basis. Further, the assets were held in a trust structure, which meant that they would have to be transferred out of the trust, or liquidated for either party to access them. Nevertheless, Justice May at trial did not make any allowance for CGT in relation to assets that were not to be sold or transferred pursuant to her Orders, as it was far from clear that the potential CGT would ever arise.

Two cases in which an allowance for CGT was contended for at trial and an adjustment was made under section 75(2) to take potential CGT into account by the trial Judge are *Jarrott & Jarrott* 92012) FamCAFC 29 and *Lovine & Connor and Anor* (2012) FamCAFC 168. The Full Court allowed the appeals in each of those cases on the basis that there was insufficient evidence upon which the trial Judge made the adjustments for CGT and the sales of the properties that would attract CGT were not inevitable. Instead, the Full Court found in each of those cases that a contingent Order should have been made, which provided for how the parties would pay the CGT if it actually arose in the future.

This may be seen as a more just and equitable approach than making a speculative adjustment in favour of one party when dividing the presently available assets, however, it has the disadvantages of causing a potential delay in the severing of the financial ties between the parties. It also has potential enforcement problems for a party seeking to enforce an indemnity from the other spouse with respect to the payment of a percentage of the CGT when it eventually crystallises.

Division 7A of the ITAA

Another form of income that may be taxable and which family lawyers need to be mindful of is deemed dividends. In cases where a private company pays money or transfers property pursuant to a Court Order to party to the marriage/de facto relationship who is a shareholder, or to the spouse of a shareholder, apart from CGT implications, the payment or transfer may be treated as a taxable dividend. The dividend may be franked, at the discretion of the directors, to the extent that it is paid out of the company's profits, which may ameliorate the tax consequences for the recipient spouse. To the extent that the dividend is not franked, it will be assessable income in the hands of the recipient.

A payment or transfer of property to an "associate" of the shareholder is a deemed dividend and is treated in the same way as a dividend paid to the shareholder. An associate of a shareholder includes a spouse, relative, trustee of a trust under which the shareholder is a beneficiary and a company under the control of the shareholder.

Essentially, what Division 7A means is that if personal expenses are paid by a family company, company assets are used for personal purposes, or money is withdrawn from the company's bank account and not recorded as a wage or director's fee, then these payments will be treated by the ATO as unfranked dividends and taxed as income. If they are recorded in a loan account, then to avoid being taxable, the money needs to be repaid pursuant to a complying loan agreement, which must be in writing and include details such as the interest rate, term of the loan and the minimum loan repayments required every year.

Further, if payments are made to an interposed entity, such as trustee company, which then makes a payment to a shareholder, or an associate of the shareholder, then the payment will still be caught by Division 7A if a reasonable person would conclude that the payment is intended for the shareholder/associate. The payment will be exempt from Division 7A if the interposed entity pays tax on the payment as a dividend in its hands.

Division 7A applies to debts created or forgiven after 4 December 1997 and to loans in place before that date if the amount or term of the loan is extended. It is common for a family business to be run through a company, or trust structure and upon final property settlement, for one spouse to take over full control of the entity. It is also common for debit, or credit loan accounts to exist in the books of the company, or trust in the names of the husband and wife. These loan accounts need to be dealt with in order to sever the parties' financial ties.

The forgiveness of a debit loan account is a benefit to the person in whose name the loan account is recorded and will be treated by the ATO as taxable income. Hence, loan accounts should be transferred, or novated and not forgiven. The difference between transferring and novating a loan account is that a novation substitutes the person taking over the obligation for the original debtor, who is no longer liable for the debt. If the loan account is assigned, then technically, if the assignee fails to pay the debt, the original loan account holder can still be liable. A debit loan account, as opposed to a credit loan account, really should be "novated" to ensure that the spouse liable for the loan account is off the hook.

Where payments are made or benefits are provided, such as provision of a motor vehicle to a spouse in his or her capacity as an employee, or an associate of an employee, Division 7A does not apply, but fringe benefits tax may apply instead.

There are exemptions from Division 7A. Apart from a complying loan (referred to above), the payment of a genuine debt is excluded from the operation of Division 7A (see section 109J of ITAA). The section 109J exemption has been used in the past in family law matters as a means of getting assets out of a company and into the hands of a spouse tax-free. It required the company to be joined as a party to the proceeding and then being ordered to make a payment to a spouse (as opposed to a transfer of property, which would still be caught by Division 7A). Things changed on 31 July 2014 when the ATO released taxation ruling TR 2014/5, which says that such a payment made to a shareholder under a section 79 Order is an ordinary dividend, to the extent that it is paid out of the company's profits. It is therefore assessable income.

The bottom line for family lawyers is that when dealing with family companies, it is vital to make sure clients receive taxation advice before the final settlement is documented.

Goods and Services Tax

There is no relief from GST on transactions arising from the breakdown of a marriage. GST does not come up often, as it does not apply to:

- The transfer of private assets between spouses who are not registered or required to be registered for GST;
- The transfer of an "enterprise" asset that is made for no consideration. An enterprise asset may be things like trading stock, plant & equipment, motor vehicles and real estate that are used in a business;
- The transfer of an enterprise asset, which may be made for consideration, but is not made in the furtherance of an enterprise.

The trap with GST is that whilst the spouse receiving a transfer of an enterprise asset, such as a company car, may not have to pay GST, the transferor company may have to pay top-up GST. The reason for this is that there may be an adjustment to the input tax credit claimed by the company when it purchased the vehicle, due to the change in use from business to private.

Spousal Maintenance & Child Support

Spousal maintenance and child support payments are not taxable in the hands of the recipient. This is subject, however, to the maintenance being paid from the taxable income of the liable party. If the liable party pays maintenance, or child support by diverting income that would otherwise be taxable, or divesting himself or herself of income producing assets, then the exemption may be lost. It may be important to know if you are acting for the recipient of spousal maintenance what the source of the payments is to ensure that the payments received by the client will be exempt from income tax.

The liable party cannot claim a tax deduction for the payment of spousal maintenance, or child support, which is an incentive for some clients to make those payments as a "wages" from the liable party's business. Section 26.40 of the ITAA provides that deductions cannot be claimed for salary or wages paid to a spouse or child under 16 if such payments are for maintenance or child support, even if there is a proper employment relationship. A client who is receiving spousal maintenance by way of a “wage” from the family business may be at risk of paying tax on that money.

A way of paying child maintenance in a tax effective manner may be through a child maintenance trust. It is beyond the scope of this paper to go into detail about how child maintenance trusts work, but essentially assets are transferred into a trust established for that purpose of which the children are the beneficiaries and the income generated by the trust is paid out for the maintenance of the beneficiaries from time to time. The assets of the trust must ultimately vest in the children. The income of the trust is taxed in the child’s hands at adult marginal rates, rather than the higher rate usually applied to the unearned income of minors of 66%. Child maintenance trusts can be expensive to set up, for example, there may be CGT payable upon the transfer of assets into the trust, and costly to maintain. They are only an attractive option for high net worth individuals, who can afford to place assets permanently beyond their reach.

Stamp Duty & Other State Taxes

Generally, there is no stamp duty payable on the transfer of assets between former spouses or domestic partners and transfers made pursuant to the breakdown of a marriage, or domestic relationship – see sections 43 and 44 of the *Duties Act* 2000 (Vic). Note, domestic relationship means the partners have lived together on a genuine domestic basis, including same sex partners.

There is also no stamp duty payable on the transfer of assets from a company or trust (of which at least one of the parties is a beneficiary) to a party, a dependent child of one or both of the parties, or a trustee of a trust of which there are no beneficiaries other than the parties and their dependent children. Note, the transfer of a company asset must not exceed the value of the parties’ interests in the company and their interests must be reduced by the same amount as the dutiable value of the property transferred.

There is also no stamp duty payable upon a declaration of trust made solely because of the breakdown of a marriage, or domestic relationship, provided the beneficiaries are the parties to the marriage/domestic relationship, or their dependent children. The declaration must be made by one of the parties, or a corporation in which the parties have interests at least to the value of the dutiable property. Again, the parties' interests in the corporation must be reduced by the value of the property subject to the declaration of trust.

There may be stamp duty payable upon a transfer from a party to the marriage, or domestic relationship to a company, or trust. There may also be stamp duty payable upon a transfer to an adult child of the parties, who may, for example, be taking a transfer of property as a part of family arrangements.

There are other State taxes that may be matrimonial liabilities that need to be taken into consideration when assessing the matrimonial asset pool, including land tax where the parties own several properties. Land tax is payable if a person owns non-exempt property (that is, property other than their principal place of residence) with a value of $250,000 or more. Land tax is also payable by the trustee of a trust that owns land valued at $25,000 or more. There may be a surcharge rate on the general rate for land holdings of the trust from $25,000 to $3million.

Practitioners should also be aware of the landholder provisions inserted into the *Duties Act* in 2012 to replace the previous "land rich" provisions. Basically, a "landholder" for the purposes of landholder duty is a listed, or unlisted company or trust, which directly, or indirectly has landholdings in Victoria with an unencumbered value of $1million or more. Duty is imposed on the acquisition of a significant interest (eg. 20% of a private unit trust, or 50% of a private company) in a landholder. The top rate of duty for acquisitions in a private landholder is 5.5%.

There are exemptions under section 89D of the *Duties Act,* which provide that if no ad velorum stamp duty would have been payable on the transfer (of land), then the acquisition is exempt. In other words, the exemptions under sections 43 and 44 of the *Duties Act* may carry through to an acquisition in a landholder.

Reporting of Tax Irregularities

Before issuing Court proceedings, it is advisable to check for "skeletons in the closet" by getting information from the parties' accountant. If the parties have been evading tax, defrauding the ATO, or there are irregularities in company's books, it is vital that the parties are made aware of the potential consequences of bringing such matters before the Court, which can include not only penalties, but criminal proceedings.

Upon hearing evidence of tax evasion, the Court may direct that the Commissioner be provided with a copy of the judgment, or refer the matter to the Commonwealth Director of Public Prosecutions for investigation. The Commissioner has the power under section 263 of the ITAA to access Affidavits sworn by the parties in the proceedings, which may include admissions about their financial positions that are contradictory to information provided to the ATO.

If there are likely to be retrospective tax liabilities and penalties incurred due to the past conduct of one or both of the parties, this may have a significant impact on the size of the matrimonial asset pool available for division between the parties. There may also be an issue about which of the parties should be responsible for any additional tax and penalties that may be assessed upon an audit taking place. Ignorance may be no excuse if the "innocent" spouse has enjoyed the fruits of the tax evasion, however, the parties' relative responsibility for incurring the tax liability will be taken into account. In *Commissioner of Taxation & Worsnop & Anor* [2009] FamCAFC 4 the parties' tax liability exceeded the value of the matrimonial asset pool. The trial Judge ordered that the wife and the Commissioner split the net proceeds from the sale of the matrimonial home equally. This was upheld on appeal. The wife had no knowledge of the tax fraud and the Full Court said she had no choice in it. It was the husband and not she who had driven the parties' extravagant lifestyle.

Once irregularities are unearthed, for example, in the process of having matrimonial assets valued by a single expert, there may need to be discussions between the parties and their advisors about what disclosures should be made to the ATO and when in order to minimize the penalties payable.

If in doubt about the tax consequences of a transaction required to implement a proposed property settlement, it may be advisable to obtain a binding private ruling from the ATO to resolve any uncertainties and unintended outcomes.