

Some CGT consequences of divorce and relationship breakdown

If you are getting divorced or separated from your spouse, this may involve the transfer of real estate or other assets as part of the settlement of things. Technically, that transfer will trigger capital gains tax (CGT) because there will be a change in ownership of the property.

However, in this case the CGT rules will provide rollover relief so that there will be no CGT to the person who transfers the property (the transferor) to the other party. And that other party will “step into the shoes” of the transferor – so that they will be deemed to have acquired the property at the same time and for the same cost as the transferor.

But this rollover rule is subject to a number of important conditions and provisos.

Firstly, the transfer of the property must take place by way of a relevant court order or a court-sanctioned agreement – or even a pre-nuptial agreement or the like. But the rollover does not apply to transfers under any private arrangement.

Secondly, the transfer can only be made to the former spouse or partner – it can’t be made to their family company or family trust; nor to their estate if they die in the meantime (subject to an apparent exception if the property is transferred to a child maintenance trust).

Thirdly, if an investment property is transferred to a spouse and it becomes their home, then on its sale by that spouse there is a partial CGT liability to take into account the fact that it wasn’t always a CGT-exempt home. And this rule also applies in reverse.

Fourthly, if an asset (eg, shares or real estate owned by the company) is transferred out of a family company to a spouse, then there must be a corresponding reduction in the value of the shares held in the company to reflect the market value of that property transferred.



Fifthly, the rollover is available to the divorce or separation of any type of spouse, including de facto and same sex spouses – provided the divorce or separation is “bona-fide”! And note that the Commissioner has in the past successfully challenged the bona-fides of a divorce (albeit, that was done in connection with a taxpayer trying to move assets out of reach of his creditors).

Now, such matters require careful consideration to take into account the particular circumstances of both parties. For example, the transfer of an investment property which will then be used as a home by the other spouse will require negotiation between the parties for adjustment to the settlement amounts to reflect the CGT liability that that spouse will be responsible for in the future.

And this can be difficult – even if the separating parties are actually talking to each other!

And where, say, one of the parties owns an asset on which they will make a capital loss, they can perhaps agree to transfer that property to the other party to realise the loss – but only if they transfer it under a private agreement independent of any court-approved transfer, etc.

In summary, there are lots of important tax issues associated with transferring assets between former spouses under a divorce or a relationship breakdown that require good advice.

So come and speak to us if you find yourself in this situation. 💰