

SUBMISSION

CGT ROLLOVER - MARRIAGE OR RELATINSHIP BREAKDOWN

Sandini case

As per the original legislative intent (see, for example, original ITAA 1936 equivalent provisions) the roll-over should only be available for a transfer to a spouse or former spouse to prevent the roll-over being abused in any way for tax planning or avoidance etc.

However, an exception should be allowed for the transfer of an asset to a Child Maintenance Trust (CMT) for any children of the marriage or relationship - provided the CMT meets the ATO's requirements for a concessionally taxed CMT as set out in Taxation Ruling TR 98/4.

(Note the wording of the current ITAA 1997 provisions would appear to allow a broader interpretation to allow roll-over for a transfer to a related entity or at the spouse's direction etc, as per dissenting judgment of Logan J in *Sandini*).

Division 7A issue

To the extent that Div 7A applies to an asset transferred out of a private company (Ruling TR 2014/5) then this seems an “anomalous” result. This is not so much because the roll-over is a tax concession which can then penalise a spouse in this way (even though it may be “justified” as the roll-over occurs on the “capital” side of things, but Div 7A occurs on the “revenue” side).

Rather, it is more because other key CGT concessions (eg the “15 year exemption” and the “retirement exemption” in the CGT small business concessions in Div 152) provide that the application of these specific concessions to a company will not result in a payment of the exempt capital gain from the company to a “concession stakeholder” from being treated as a dividend (franked or otherwise): see s 152-125(3) and s 152-35(10). The small business restructure roll-over relief in Subdiv 328-G provides likewise.

In other words, there should be a consistent concessional treatment for taxpayers under CGT concessions.

Retained cost base rule

In relation to the complexities of the "retained cost base" issue (in s 118-178), I wish to make the following points:

- I wrote several articles on this issue before the law was changed which give rise to this measure. (Prior to that change a capital gain that accrued on a dwelling which was not the deceased's main residence, could be sheltered and escape CGT if the dwelling were transferred to a spouse and the spouse then made it their main residence before its later disposal.)
- Under the current rules and principles it does not seem that much can be done about it. Perhaps, it should be addressed by some sort of legislative change to make sure the transferee spouse (and/or their adviser) is made aware of the issue (eg by way of a "Note" to s 118-178) – to try and ensure proper legal advice on the matter is obtained at time of negotiating a property settlement. (But note that the "retained cost base" rule works both ways in that where a main residence is transferred to a spouse who then makes it a rental property, then there will only be a partial capital gain on a later CGT event happening.)
- The rule in s 118-178 has additional complexities (especially re record-keeping and compliance) in terms of its interaction with the "first use to produce income" in s 118-192 and the "absence concession" in s 118-145. These matters were addressed in the EM to *Tax Laws Amendment (2006 Measures No 4) Act 2006* which introduced s 118-178 – and gave examples of the spouses co-operating over these issues at the time of negotiating a settlement. However, this assumed that the parties were talking to each other, let alone co-operating! So, short of a radical change to this rule, this problem will potentially persist

Radical approach!!

Finally, a radical approach – maybe even consider abolishing the roll-over! Instead, recognise any CGT liability in the transferor's hands - and let the parties deal with any CGT liability issue as part negotiations over property settlement (as currently is required for assets under the "retained cost base" rule). There are no doubt "inequities" that would arise under such an approach - but it would certainly remove it from being a CGT concession issue and put it squarely in the separating parties' hands as a property settlement issue instead.