



Representing Family Lawyers Throughout Australia

15 February 2013

Ms Lydia Lucas
Board of Taxation Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600

By email: louise.lucas@treasury.gov.au

Dear Ms Lucas

Post implementation review of Division 7A of Part III of the *Income Tax Assessment Act 1936*

1. I refer to your email to Family Law Section Director, Maureen Schull, of 1 February 2013.
2. The Family Law Section of the Law Council of Australia appreciates the invitation to provide comments and submissions in relation to those parts of the post-implementation review discussion paper¹ ("Paper") which impact on the family law jurisdiction. Particular regard has been had to the matters set out on pages 1 – 2, 5, 12 - 13, 21 – 24, 31 – 39, 45 – 46 and Q4.2 of the Paper.
3. The vast majority of family law cases are settled by agreement. This is generally embodied in Orders made by consent by a court exercising jurisdiction under the *Family Law Act*, or by a Financial Agreement under the same legislation. Less than 5% of cases proceed to final determination by a Judge or Federal Magistrate.
4. When Orders are made by consent of the family courts², this will generally involve a Minute of Order being submitted by agreement of the parties or their lawyers to a Registrar or a Federal Magistrate sitting in Chambers. It is not the role of that Judicial Officer or a Registrar exercising delegated power, to provide

¹ The Board of Taxation, Post Implementation Review of Division 7A of Part III of the *Income Tax Assessment Act 1936*, Discussion Paper

http://www.taxboard.gov.au/content/publications_and_media/media_releases/downloads/043.pdf

² Family Court of Australia, Family Court of Western Australia and Federal Magistrates Court

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legal advice or taxation or commercial advice as to the consequences (intended or unintended) of the Orders they are asked to make. That is the responsibility of the lawyers for the parties (where they are legally represented) or of the parties themselves if they are acting without legal representation. The Judicial Officer or Registrar making the Orders must be satisfied that the Orders for property settlement are appropriate and that relevant considerations have been taken into account such that it is just and equitable to make an Order.

5. Whilst there are a number of reported family law cases that have given consideration to whether a particular taxation liability should be included in the Balance Sheet for property settlement purposes, this is in circumstances where there is expert evidence before the Court as to the liability or the extent of it, such that the Court can make a finding based on that expert evidence. In the absence of expert evidence about those matters or them being brought to the attention of the judicial officer, in proceedings between only the parties to the marriage or defacto relationship the Court will ordinarily not (whether dealing with the matter by consent or in making a decision in adversarial proceedings) have regard to the question of the taxation effects under Division 7A of the *Income Tax Assessment Act* of the order they are asked to make.
6. In proceedings where orders binding on third parties are sought under Part VIII AA of the Family Law Act, however, the Court is expressly required to take into account the taxation effect (if any) of the order on the parties to the marriage, and the taxation effect (if any) of the order on the third party.
7. The Family Law Section is not able to refer the Board of Taxation to any reported case where the Court has given consideration, of its own volition, to the question of a potential liability arising under Division 7A as a consequence of how particular Orders have been drafted. There are certainly instances where there are issues arising as to whether the particular Division 7A liability should be included in the Balance Sheet or the quantum of it, but that is a different issue.
8. Further, the Family Law Section is not able to refer the Board of Taxation to any reported decision where, as a consequence of the unintended effect of Orders that have been made, an Application has been made whether pursuant to s79A or s79A(1A) of the *Family Law Act*, to try and set aside Orders that have previously been made under the *Family Law Act* for property settlement as a consequence of unanticipated Division 7A consequences arising. Anecdotally, we are certainly aware of one instance where a substantial Division 7A issue arose following a transfer of real property from a corporate structure (wholly owned by the parties) to one of the parties to the marriage which was later ascertained to give rise to a substantial deemed dividend liability under the taxation legislation, such that a joint application was made by the parties (and granted by the Court) to set aside by consent the Orders under s79A(1A) of the *Family Law Act* and substitute it with new Orders that did not have the effect in question.

9. Again, and whilst we are not able to point the Board of Taxation to reported decisions to this effect, we are aware anecdotally of a difference in approach being taken by the Australian Taxation Office to Orders where the obligation for the payment of monies from a private company to an individual under the *Family Law Act* takes place where the private company has been joined as a party to the proceedings (such that the Order is made as against the company itself) as distinct from circumstances where the Order is directed to the husband and/or wife in their capacities as directors and/or shareholders of the same private company but where the private company has not been joined. Anecdotally the Australian Taxation Office is more inclined to look favourably on transactions under the *Family Law Act* where the private company has been joined as a party, as distinct from circumstances where the Orders are made as between husband and wife only.
10. The power of courts under the *Family Law Act* to alter property interests of the parties, often involves a mixture of cash payments, asset transfers, retention of existing properties and transfers of real property. It is often not practicable or achievable to satisfy a parties' entitlement to property settlement by means of cash payment alone, and a transfer of real property is necessary or required to give effect to it. It is incongruous that payments out of a private company by way of payment of monies are seemingly treated differently to transfers of real property from that private company in circumstances where the company is wholly owned by the parties to the marriage. In those circumstances the family courts disregard the corporate veil and treat the net value of company as being matrimonial property on the "Balance Sheet" to be divided between the husband and wife.
11. The Family Law Section doubts whether it would be cost effective or practicable to undertake an education campaign that would better inform litigants, solicitors and accountants of the potential problems caused by the current application of Division 7A. Similarly, the Family Law Section does not regard it as the role of the courts to provide advice to the parties or their advisers, in respect of Division 7A taxation matters they have overlooked in formulating the proposed Orders.
12. Where unintended taxation consequences arise, then there may be a remedy available to those parties by virtue of the provisions of s79A of the *Family Law Act* (and there are mirror provisions that apply to de facto couples).
13. In those circumstances where that remedy may not be available, there may also be the opportunity for a party to take action against legal or accounting advisers (where they have been so represented) for professional negligence.
14. Where unintended consequences arise by virtue of the strict application of Division 7A, the Family Law Section recommends that it is otherwise proper for the Commissioner to exercise the discretion under s109RB to disregard the deemed dividend that may otherwise arise.

15. We are also aware of and support the comments made in paragraphs 31 and 32 of the letter from the Law Council's Business Law Section, which was lodged yesterday.
16. The Family Law Section welcomes the opportunity to provide comments to the Board of Taxation and is available to further discuss or meet with representatives of the Board or any working group at a mutually convenient time and date.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized loop on the left and a horizontal line extending to the right, ending in a small dot.

Rick O'Brien
Chair