Taxation Implications in family law property settlement

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Several tax considerations often arise during family law property settlements, whether it is settlement by consent or the matter goes to trial in the Family Courts. In this blog, we explore some of the important things to consider when selling or transferring real estate and also look at how to address any existing tax liabilities of the parties prior to finalising the property settlement.

Tax considerations during property settlement negotiations can often be complicated for a number of reasons:

- corporate and trust structures may have been used by one or both of the parties;
- the parties may have owned or controlled commercial interests, individually or jointly;
- Federal taxes like Capital Gains Tax ("CGT") and income tax, and state taxes like stamp duty and land tax, will likely need to be considered. This includes for the transfer or sale of real estate, motor vehicles, shares (public and private companies) and payment or transfer of monies.

Selling real estate

Both federal and state tax consequences may need to be considered for the sale of real estate, including the sale of the former family home.

If real estate is used as the main residence for a family, it will likely be exempt from CGT for the period of time the property was used as the main residence. This means if the family home is sold as part of a property settlement, it is likely that no CGT would be payable upon its sale.

However, complications may arise if the former family home was not used as the main residence or the property was rented out for a period of time.

For other real estate, such as investment properties, CGT will likely be a more prevalent issue, as any profits made from the sale of an investment property may incur CGT.

However, discounts for the amount of CGT may be available depending on circumstances, such as the duration of ownership of the property.

Transferring property – stamp duty and tax obligations

When transferring property (including real estate and motor vehicles) between spouses due to the breakdown of their relationship, it is often the case these transfers do not attract stamp duty.

Transferring property ownership from one person to another typically attracts CGT liability. However, specific legislative provisions can provide rollover relief for CGT that would otherwise be payable on property transfers between spouses and former spouses in certain circumstances.

These provisions effectively roll over any CGT that would be payable upon the transfer of property pursuant to Court Orders until a time when the property is either sold or transferred again.

There may be tax exemptions available in certain situations. Consent Orders from the Family Court, or a certified copy of a financial agreement demonstrating the terms of the property settlement, are generally required to be provided to the relevant state government department to meet the specific requirements to qualify for taxation exemptions.

Considering tax liabilities in the property pool

Existing taxation liabilities of the parties, or commercial interests controlled or owned by the parties, will form part of the joint asset pool and will need to be considered in the assets available for division.

In relation to CGT liabilities, the following circumstances are likely to be considered in a property settlement:

- when property is ordered to be sold pursuant to Court Orders; or

- if the sale of property is probable to occur in the near future.

The Family Court has discretion underthe *Family Law Act 1975*to consider CGT liabilities in circumstances where it believes there is a risk property will need to be sold to affect any Orders being made.

Evidence of any estimated CGT to be incurred as a result of the sale or transfer of any asset or liability, should always be obtained before a settlement has been finalised. This allows for any taxation consequences to be accurately identified and reflected in the available asset pool for division.

Seek professional assistance from a family lawyer

If you are unsure of the potential impact of any tax consequences or exemptions that may arise with your property settlement, it is important to seek appropriate legal advice from a lawyer and tax advice from an accountant.

To avoid potentially costly oversights when structuring aproperty settlementor seeking an Order from the Court, it is vital to ensure this is done with the benefit of an experienced family law solicitor.

Meillon & Bright’s team of experienced family lawyers can alert you to the circumstances in which there are likely to be taxation consequences and direct you towards appropriate providers of taxation and financial advice.

Property settlements can be crafted in a way that maximises the practical outcomes for the parties and minimises taxation consequences.
