

**When reducing the burden of tax and divorce,
what do you ask?**

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RECAP OF BASIC PRINCIPLES

(1) CGT POINTS

- Limited specific provision for intra-spouse disposals
- A transfer which takes place as part of the financial settlement on divorce or breakdown of a civil partnership will generally be treated as made for a market value consideration (see s. 17(1)(b) TCGA 1992)
- Provisions of s. 58 TCGA 1992 for transfer of asset
- Provisions of s. 225B apply to extent the private residence exemption up to the date of the transfer of either the house or an interest in it

(a) Limited application of s. 58 TCGA 1992

- Provisions of s. 58 TCGA 1992 may apply to the effect that the asset passes to the transferee with the same base figure for calculating potential CGT charge. Irrelevant that actual consideration is given for the asset.

- Limited assistance of s. 58 TCGA 1992:
 - (i) applies only on transfer of asset
 - (ii) applies only in circumstances where the spouses have been living together at some point during the year of assessment

(See s. 288(3) TCGA 1992 and s. 1011 ITA 2007 and see *Gubay v Kington (Inspector of Taxes)* [1984] 1 All ER 513).

(b) The Family Home

- ss. 225B TCGA 1992 may extend the private residence exemption up to the date of the transfer of either the house or an interest in it. Only if (i) the transferee has continued to live in the house (ii) the transferor has not elected that some other house should be treated as his main residence and (iii) a specific claim is made

- Postponed interest/deferred charge. What if transferor is left with a postponed interest or a deferred charge?
 - (a) Postponed interest – PPR on initial transfer but CGT on realisation of the interest.
 - (b) Deferred charge – new asset? Does s. 251 TCGA 1992 assist?

(c) *Mesher* Orders

- A *Mesher* order: jointly owned property is held on trust for sale for the benefit of both parties, and under which one spouse has the right to occupation until the children reach a specified age, and postponement of the same until that specified time.
- When the child reaches the specified age then the ex-couple will be deemed to dispose of the trust property at market value to themselves as beneficiaries (see s. 71(1) TCGA 1992).
- PPR should be available to both parties on the deemed disposal, on the basis that one of them has occupied the property under the terms of a trust (see s. 225 TCGA 1992)
- No IHT on creation of settlement (see s. 10 IHTA 1984) but charges under the relevant property regime

(d) Date of CGT disposal

- Care required in ascertaining/controlling date of disposal for CGT purposes
- Where disposal made by agreement (no court order) then may precede or postdate decree absolute:
 - (i) If before decree absolute then s. 18 TCGA 1992 will apply.
 - (ii) If after decree absolute then either s. 17(1)(a) TCGA 1992 or s. 17(1)(b) TCGA 1992 or bargain at arm's length
- If consent order will normally take effect after decree absolute (see ss. 23(5) and 24(3) MCA 1973)

(2) IHT POINTS

- Provisions of s. 10 IHTA 1984 will normally apply to the effect that a disposition on divorce does not constitute a transfer of value (but will not displace charges under relevant property regime)
- If the provisions of s. 10 IHTA 1984 do not apply then the provisions of s. 18 IHTA 1992 may apply to a transfer of value provided conditions satisfied and parties still married (irrespective of whether they are living together or apart)
- Provisions of s. 11 IHTA 1984 may apply but limited use (e.g. would not apply on the creation of a discretionary trust) but continued benefit for maintenance obligations

(3) TRUST DISTRIBUTIONS

- No specific reliefs for distributions from trusts on occasion of divorce (by contrast with s. 10 IHTA 1984 which may assist creation)
- Tax implications of pension sharing orders (see s. 28 WRPA 1999)
- Difficulties under s. 87 TCGA 1992 if distribution made to one spouse to enable satisfaction of liabilities to other spouse under ancillary relief order or compromise (in which regard see *Bowring v HMRC* TC/2011/2258 for width of s. 97(5) TCGA 1992)

OBTAINING TAX SAVINGS THROUGH CAREFUL USE OF PROCEEDINGS

EXAMPLES OF POSSIBLE OPPORTUNITIES

PUMP COURT
TAX CHAMBERS

- Eg. 1 Use of s. 37 MCA 1992 and its retrospective effect for fiscal purposes: see *AC v DC (No. 1)* [2012] EWHC 2032 (Fam)
- E.g. 2 Fiscal effect of variation of maintenance orders under s. 23 MCA 1973 (see *Morley-Clark v Jones (Inspector of Taxes)* [1985] STC 660)
- Eg. 3 Careful planning of remittances for purposes of Chapter A1 Part 14 2007 (e.g. consider timing Order to ensure that property transferred at time when (ex-) spouse is not a 'relevant person')

TAX TRAPS FOR THE UNWARY

- Pre-nups: The risks in pre-nuptial agreements/post-nuptial agreements and avoiding them (CGT on disposal of rights since no s. 58 TCGA 1992) but query value
- Disclosure and FORM E risk: see HMRC application for disclosure on residence issue in *HMRC v Charman* [2012] EWHC 1448 (Fam)
- Basic tax traps. (i) Accurate identification of point of disposal for CGT purposes; (ii) ensuring tax analysis considered prior to agreement of Heads of Terms (otherwise can be too late)

- Source of funds: e.g. (a) risk of charges under TOAA and s. 87 TCGA 1992 for offshore trusts (b) employee benefit trust risks and Part 7A ITEPA 2003;
- Variation of settlements: E.g. risk of destruction of qualifying IIP; (IHT concerns and limited assistance of s. 10 IHTA 1984) but note possible assistance of s. 37 MCA 1973 in certain circumstances
- Mitigation of historic tax liabilities: e.g. proper use of disclosure facilities by HMRC (e.g. F(No.2)A 2018 Offshore Disclosure and Requirement to Correct 200% penalties) - possibility of add-back arguments ?