



REVENUE RULING

DA 15.0

DUTIES TRANSFER OF MATRIMONIAL OR DE FACTO RELATIONSHIP PROPERTY INVOLVING A TRUST OR COMPANY

This revenue ruling applies to transactions entered into on or after 3 June 2014.

INTRODUCTION

1. The purpose of this ruling is to advise the Commissioner's interpretation of *matrimonial property* or *de facto relationship property* as defined in the *Duties Act 2008* ('Duties Act') and the application of duty to certain transactions involving a trust or company where the trust or company can be taken to be the *alter ego* of one or both of the parties to the marriage or de facto relationship.
2. The concept of *alter ego* can be applied to circumstances in which effective control of a trust or company is established to allow a natural person the capacity to use and direct the company's or trust's assets as if they were their own personal assets.¹ "Under the doctrine of 'alter ego', [the] court merely disregards corporate entity and holds [the] individual responsible for acts knowingly and intentionally done in the name of corporation."²

The doctrine of alter ego does not require a finding that the establishment of the trust or company was a sham, merely that the parties to the marriage or de facto relationship have sufficient effective control over the entity and its assets for the assets to be considered matrimonial or de facto relationship property.
3. The Commissioner's adoption of the alter ego principle applies only to the application of duty to matrimonial or de facto relationship property established in a family law context.
4. The application of the alter ego principle does not apply to transactions in which property is transferred to a trust or company where that trust or company is taken to be the alter ego of one or both of the parties to the marriage or de facto relationship.

BACKGROUND

5. Under section 128(1) of the Duties Act:
 - (a) matrimonial property of a marriage is defined as being the property of the parties to the marriage or of either of them and includes a superannuation interest; and
 - (b) de facto relationship property of a de facto relationship is defined as being the property of the de facto partners to the relationship or of either of them. In Western Australia, de facto relationship property does not include a superannuation interest.

¹ Under section 111J of the *Corporations Act 2001* (Cwth), 'a company has a separate legal existence that is distinct from that of its owners, managers, operators, employees and agents'.

² Black's Law Dictionary [6th ed] (1990) West Publishing Co: St Paul, Minnesota.

6. The Duties Act provides that a matrimonial instrument that deals with matrimonial property includes:
 - (a) s129(a) - a maintenance agreement registered under the *Family Law Act 1975* (Cwth) ('Family Law Act') section 86 or approved under the Family Law Act section 87;
 - (b) s129(b) - a financial agreement made under the Family Law Act section 90B, 90C or 90D;
 - (c) s129(c) - a splitting agreement; and
 - (d) s129(d) - an order of a court under the Family Law Act.
7. The Duties Act provides that a de facto relationship instrument that deals with de facto relationship property includes:
 - (a) s130(a) - a financial agreement or former financial agreement within the meaning of those terms in the *Family Court Act 1997* ('Family Court Act') section 205T; and
 - (b) s130(b) - an order of a court under:
 - (i) the Family Court Act Part 5A; or
 - (ii) a law of the Commonwealth or another State or Territory that substantially corresponds to the Family Court Act Part 5A.
8. Under section 113 of the Duties Act, duty is not chargeable on a dutiable transaction to the extent that it is effected by a matrimonial instrument mentioned in section 129(b) or (c) of the Duties Act or a de facto relationship instrument mentioned in section 130(a) of the Duties Act.
9. Section 131 of the Duties Act provides that, under certain circumstances, nominal duty is chargeable on a dutiable transaction that is:
 - (a) effected by a matrimonial instrument referred to in section 129(a) or (d) of the Duties Act or a de facto relationship instrument referred to in section 130(b) of the Duties Act; or
 - (b) in accordance with a matrimonial instrument referred to in paragraph section 129(b) or (c) of the Duties Act or a de facto relationship instrument referred to in section 130(a) of the Duties Act.
10. Sections 113 and 131 of the Duties Act apply if the relationship between the parties has ended and under the transaction, the property is, or is to be, transferred to:
 - (a) either or both of the parties to the marriage or de facto relationship; or
 - (b) a child³ or children of either of the parties to the marriage or de facto relationship, or a trustee of such a child or children; or
 - (c) in the case of a marriage, a trustee of a superannuation fund.

³ Section 128(1) of the Duties Act provides that, in this subdivision – *child* means a person who is under 18 years of age.

RULING

Orders That Have Been Arbitrated

11. Court orders are the decisions or judgments of judicial officers.⁴ They can include an order made after the parties have reached their own agreement and have applied to a court for consent orders,⁵ which, if they become formal court orders, have the same status as if the order had been made after a hearing by a judicial officer.
12. Where an application is made for consideration of nominal duty on the transfer of matrimonial or de facto relationship property under an order of the court, where the transfer is from a trust or company and that trust or company is taken to be the alter ego of one or both of the parties to the marriage or de facto relationship, the Commissioner will accept the transfer as stated and will apply the nominal rate of duty to the transfer unless, in the case of consent orders, there is evidence to indicate that the property is not matrimonial or de facto relationship property.

Example: Company

Under an order of the Family Court, Mr Brown and his ex-wife, Ms White, are required to transfer a property on Smith St to their child. The property is owned by Company XYZ Pty Ltd of which Mr Brown and Ms White are the only shareholders. As the transfer has been effected by a court order, the Commissioner will accept that the court has considered the facts and evidence in order to find the company to be the alter ego of the parties and therefore the Smith St house to be matrimonial property. As such, the nominal rate of duty will be applied to the transfer of the Smith St property.

All Other Instruments

13. Where an application is made for consideration of nominal duty or exemption from a duty liability on the transfer of dutiable property in which:
 - (a) the property is deemed to be matrimonial or de facto relationship property;
 - (b) the property is, or is to be, transferred to one or more of the parties specified in paragraph 10; and
 - (c) the transfer is effected by or in accordance with a matrimonial or de facto relationship instrument other than an order of the court,the Commissioner will consider the supporting documentation and, where it is evident that the property to be transferred is matrimonial or de facto relationship property, will apply nominal duty (under section 131 of the Duties Act) or an exemption from a duty liability (as per section 113 of the Duties Act).

⁴ <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Court+Orders/What+are+orders/>.

⁵ Family Law Act s80(1)(j) (FLA-75); *In the Marriage of Scarborough* (1978) FLC 90-501.

Definition and Ownership of Property

14. For the purpose of paragraph 5, matrimonial or de facto relationship property may include dutiable property owned by, or vehicles licensed in the name of, either or both of the parties to the marriage or de facto relationship, or owned or held by:
- (a) the trustee of a discretionary or unit trust, in circumstances where one or both of the parties to the marriage or de facto relationship has the effective control or influence over the trust; or
 - (b) a company which is effectively controlled by either or both of the parties to the marriage or de facto relationship,
- but may only be transferred to the parties specified in paragraph 10 in order to be considered for the application of nominal duty or an exemption from a duty liability.
15. If effective control is determined such that the trust or company can be seen as the alter ego of one or both of the parties to the marriage or de facto relationship, and therefore the property attributed to the trust or company should be attributed to the party or parties, the Commissioner will apply nominal duty or an exemption from duty to the transfer as applicable.
16. The issue of effective control will be assessed on a case-by-case basis.

Establishing Effective Control and Alter Ego

17. A trust is taken to be the alter ego of one or both of the parties to the marriage or de facto relationship if one or more of the following criteria are satisfied:
- (a) no person other than the parties has any real interest in the property or income of the trust except at the will of the parties,⁶ and as such, the assets of the trust should be treated as the parties' assets;⁷
 - (b) the assets of the trust fund are dealt with and treated by the parties as if they are the parties' absolute property, regardless of whether the parties are named beneficiaries of the trust;⁸
 - (c) the trust is being administered for the benefit of the parties regardless of whether the parties are in charge of the day-to-day management of the trust;⁹
 - (d) the parties' control of the trust is such as to enable them to direct the income and capital from the trust entirely for their own benefit should they choose to do so, regardless of any moral obligation that they may or may not have to the other beneficiaries;¹⁰ and

⁶ Kelly and Kelly No. 2 (1981) FLC 91-108.

⁷ Goodwin v Goodwin [1990] FamCA 147.

⁸ Ashton v Ashton [1986] FamCA 20; (1986) FLC 91-777 11 Fam Lr 457.

⁹ Goodwin v Goodwin [1990] FamCA 147.

¹⁰ Ibid.

- (e) the terms of the trust are such that, as to both income and capital, the trust assets are held upon trust by a company that is considered to be the alter ego of the parties.¹¹
18. To determine whether either or both of the parties to the marriage or de facto relationship has effective control over a trust, the Commissioner will have regard to:
- (a) the terms of the trust deed;
 - (b) the history of the parties' treatment of the trust property;
 - (c) the history of the distributions made by the trust;
 - (d) how the trust property was accumulated;
 - (e) the past exercise of powers and involvement in variations or amendments to the trust deed;
 - (f) the degree of the parties' affiliation and interest in the trust including the trustee (or directors of a corporate trustee), the appointor and the guardian etc;
 - (g) whether the parties have benefited from the trust (via drawings, loans, salaries, payment of expenses, use of motor vehicle etc);
 - (h) whether the parties have capacity to borrow on trust funds; and
 - (i) who the beneficiaries of the trust are when the trust vests.
19. To assess the extent of effective control over a trust, the Commissioner may seek the following documentation, amongst others, from the parties to the marriage or de facto relationship or from third parties:
- (a) documents relating to the structure of the trust (including trust deeds, deeds of variation, and the constitution of the corporate trustee);
 - (b) minutes of meetings of the trustees;
 - (c) taxation returns and financial statements for the trust in order to show patterns of distributions of income, payment of expenses etc; and
 - (d) banking records relating to the trust.

¹¹ As determined in *Commissioner of Stamp Duties v Bryan* (N.S.W.) [1989] 89 ATC 4529, the combination of the equitable interests of the parties in the trust property, the absence of any interest of anyone else, and the practical control enjoyed by the respondent produced the consequence that the home unit was *property of the parties to the marriage* and, accordingly, *matrimonial property* as defined in s74CA of the Family Law Act.

Example: Discretionary Trust

Following the breakdown of the marriage between Mr and Mrs Fisher, Mr Fisher agrees to the direct transfer of a property on High St to his ex-wife under a maintenance agreement. The property to be transferred is being held by a discretionary trust of which Fisher Corporation Pty Ltd is the trustee.

Mr and Mrs Fisher are equal shareholders in Fisher Corporation Pty Ltd and the primary beneficiaries of the trust. Mr Fisher is the guardian and appointor of the trust.

By virtue of their joint control over the corporate trustee, Mr and Mrs Fisher have been able to direct the trustee to distribute the income and capital from the trust as they see fit, and have, on a number of occasions, distributed assets from the trust to themselves as the primary beneficiaries of the trust.

After examination of documents relating to the transaction history of the trust assets, the exercise of powers over the trust deed, and the structure and interests of parties in the trust, the Commissioner is satisfied that Mr and Mrs Fisher have been joint decision makers, including in the discharge of Mr Fisher's roles as guardian and appointor of the trust, and have dealt with the trust assets as if they are their personal property.

The trust can therefore be taken to be Mr and Mrs Fisher's alter ego because they are seen to have effective control of the trust. As such, the property held in trust can be seen as matrimonial property. The transaction will be effected by or in accordance with a matrimonial instrument (section 129(b) or (c) of the Duties Act) and the dutiable property transferred to Mrs Fisher with duty charged at the nominal rate.

Example: Unit Trust

A financial agreement under section 90D of the Family Law Act provides that Colin will make a transfer of land to his ex-wife, Cathy. Colin holds the land as trustee for the CC Unit Trust, in which he owns 99% of the units and Cathy owns 1% of the units. Under the trust deed, the trustee is required to distribute the income of the unit trust to the unit holders at the end of the financial year, so each year Colin adjusts his salary and allowances resulting in the trust having no distributable income. The unit trust trades as CC Accounting, with Colin being paid a salary by the trust for performing accounting services. He is the only employee of the business. Colin drives a vehicle owned by the unit trust and has borrowed a considerable amount of money from the trust. Cathy is not employed by the trust, is not paid a salary and does not benefit in any other way from the trust's income and property.

In this case, Colin has the necessary degree of control over the unit trust such that it is his alter ego, and the property of the trust can be considered Colin's matrimonial property. The transfer of the property from Colin to Cathy would therefore be the transfer of matrimonial property in accordance with a matrimonial instrument and be chargeable with nominal duty.

20. A company is taken to be the alter ego of one or both of the parties to the marriage or de facto relationship if:
 - (a) the parties' shareholding or voting rights would enable them to exercise such powers for their own personal purposes;¹²
 - (b) the financial affairs of the parties and the company are interdependent; or
 - (c) the parties are able to utilise the financial resources of the company at their discretion and for their own personal benefit.

21. To determine whether one or both of the parties to the marriage or de facto relationship has effective control of a company, the Commissioner will have regard to:
 - (a) the identity of the shareholders and directors of the company; and
 - (b) the voting strengths of the parties to the marriage or de facto relationship relative to the other shareholders and the composition of the board.

22. The Commissioner may seek documentation to assess the extent of effective control of a company, including:
 - (a) the company's constitution; and
 - (b) special resolutions of the shareholders that have amended the constitution since incorporation.

23. If a company is taken to be the alter ego of one or both parties to the marriage or de facto relationship, a property owned by the company is deemed to be owned by the party or parties regardless of any rental or usage agreements in place.¹³

Documentation Required in Support of an Application

24. Information required to be provided to the Commissioner in support of an application of nominal duty or an exemption from a duty liability relating to any transfer of dutiable property that is made in accordance with a matrimonial or de facto relationship instrument is specified in Information Requirement '[Break-up of a marriage or de facto relationship](#)' which can be accessed through the Duties section of the [Office of State Revenue website](#).

RULING HISTORY

Revenue Ruling	Issued	Effective Dates	
		From	To
DA 15.0	3 June 2014	3 June 2014	Current

¹² Ascot Investments Pty. Ltd. v Harper and Harper (1981) FLC 91-000.

¹³ Foda v Foda [1997] FamCA 25.