

No CGT on assets disposed of through divorce

When assets are transferred between spouses, tax consequences can sometimes arise because the transfer may ordinarily be treated as a disposal. However, the Income Tax Act (ITA) provides special treatment where an asset is transferred between spouses as part of a divorce settlement. In such circumstances, the law provides that no gain or loss arises from the disposal of the asset, implying that the disposal of such an asset is outside the scope of Capital Gains Tax (CGT). We will analyse this matter in detail below. In this article, words importing the masculine shall be deemed to include the feminine.

Transfers during divorce

The rule is particularly important when spouses are dividing their property after a divorce. For example, a house, plot, shares or another asset may be transferred from one spouse to the other as part of the divorce settlement. Normally, transferring an asset can result in a gain or loss for tax purposes. However, where the transfer is made as part of a divorce settlement or separation agreement, the ITA prevents a gain or loss from being recognised at that point. This is provided for in section 114(1)(a) and it reads, '(1) For purposes of this Act and subject to subsection (2), no gain or loss shall be taken to arise on the disposal of an asset — (a) between spouses as part of a divorce settlement or separation agreement;'

There is an important condition

The exemption is not available in every situation. The ITA provides an important condition under subsection (2) of the same section which states that the special treatment will not apply if the person receiving the asset will not be subject to tax under the ITA when they later dispose of that asset. This prevents the rule from being used to transfer an asset to someone who would fall outside the Botswana tax system and thereby avoid tax completely. This simply means the spouse receiving the asset must not be exempt from CGT, a condition which cannot really apply on the ground as the ITA does not provide CGT exemptions specific to any particular person.

Tax is deferred

The important point is that the rule does not necessarily make the future gain disappear. Instead, it defers the tax consequences until the receiving spouse eventually disposes of the asset. If the spouse receiving the asset later sells that asset, the relevant tax calculation will be based on the tax value carried over from the husband, subject to the applicable rules of the ITA. The tax value is the amount used to calculate the taxable gain or loss when the asset is later sold. For example, if the husband bought an asset for P500,000 and it is transferred to the wife during divorce, the wife's tax value remains P500,000 even if the asset is now worth P800,000.

As Yours Truly and team say goodbye, remember to pay to Ceaser what belongs to him!

Tax hint: If you have never had a tax audit/review conducted by a tax consultancy firm to check whether you are tax compliant, or should it be apparent that you are not certain that your tax affairs are good order, then don't wait for the taxman to pounce on you, as that can be very costly. Contact us today so we can help you fix your tax affairs whilst you still have time.

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