international FAMILY LAW GROUP LLP

A Guide to the Taxation of Spouses on Marriage and on Separation and Divorce 2023/2024

1. INTRODUCTION

1.1 Taxation of Spouses

One definition of marriage is the coming together of a man and a woman as ‘*one flesh’.* For many years Parliament has recognised this special marital united relationship (and the family unit created as a result) by giving it favourable tax treatment. During marriage, spouses should take maximum advantage of this special treatment to minimise the overall tax payable by them both.

In this Guide I start with a brief summary of the various UK taxes. I then describe how spouses are taxed, and the opportunities available during the marriage to reduce the tax bill of the family. I refer to the major changes introduced in April 1990 of Independent Taxation. I also mention the taxation of a couple who choose to cohabit rather than marry. Marriage in this context now includes same-sex marriage. There is equivalent treatment to civil partners.

If spouses separate or divorce, they may be able to benefit from certain tax provisions that apply in such circumstances and in certain time periods. They can be very valuable indeed and so I describe them in some detail.

In any event, the high rate of divorce in England at present demands that any tax planning measures during marriage should take account of the impact of any divorce and the likely divorce financial settlement.

Particular provisions apply where a taxpayer is either not resident or not domiciled in England and Wales. These detailed provisions are outside the scope of this Guide. It is essential that no admissions are made to the tax authorities about your residence or your domicile until you have first discussed the matter in detail with your advisers. Moreover, this Guide does not cover tax payers who may be eligible for reliefs for the elderly, nor cover tax or welfare benefits relevant for those entitled to state benefits. Increasingly some tax reliefs and allowances are linked with the welfare benefits system. This Guide does not deal in detail with such reliefs.

For ease of reference, I have assumed that it is the husband who is paying the maintenance to his wife, the child lives primarily with the wife, that it is the husband who is the first to leave the matrimonial home, and that it is he who is personally responsible for all its outgoings. In practice this is most definitely not necessarily so, but the principles outlined in this Guide nevertheless apply.

Tax reliefs, allowances and exemptions usually change each tax year. The figures in this Guide apply for the tax year 2023/24. I have taken account of the autumn statement by the Chancellor of the Exchequer of 22 November 2023 as it relates to this tax year. I update the Guide each tax year, so you should make sure you have the latest edition.

This Guide provides general information only. Professional advice should always be taken, and I cannot accept any liability for reliance on it. Copyright in this document is with me.

1.2 Summary of taxes

1.2.1 Income Tax

This is the annual taxation of income arising in the tax year (6th April to 5 April). It applies to income and profits from all employment, trade, business (including self-employment), property (for example, rent), investments and interest on loans. From this gross income certain personal allowances and reliefs can be deducted and what remains is the taxable income.

The tax payable is calculated as a percentage of this taxable income. There is a personal allowance up to £12,570 on which no income tax is payable. The basic tax rate for the tax year 2023/24 is 20%, on the first slice of taxable income (currently up to £50,270) and the higher rate (presently 40%) is charged on any taxable income exceeding this total figure. In addition, there is a so-called additional rate of 45% on taxable income over £125,140. Income tax is often deducted at source, for example by the employer who then accounts to the Inland Revenue. Trust income and some savings income may be taxed separately. Savings income is automatically tax deducted at 20% but can be reclaimed if low income. There are distinctive income tax arrangements regarding pensions. Allowances on taxation of dividends fell from April 2023.

There are personal allowances and marriage allowances and see 2.1.1 below:

1.2.2 Capital Gains Tax

Capital Gains Tax is levied on the tax payer's chargeable gains (after deduction of certain capital losses) accruing since 31 March 1982 on the disposal of assets in a tax year. The tax is charged only on the disposal although this may include gifts and sales at undervalues. The calculation of the CGT rates has changed in the last couple of years from a fairly standard across-the-board rate to one now dependent upon the nature of the gain.

There is a different rate for gains on residential property than on other assets. There is normally no CGT on selling a property although see 3.5.1 below in the context of selling as part of a separation and divorce. If a higher or additional rate taxpayer, the rate is 28% on gains from residential property and 20% on gains from other chargeable assets. If a basic rate income taxpayer, the CGT will depend upon whether it is from residential property or other assets and on the amount of the gain. If income and gains are within the basic tax band then the rate will be 10%, or 18% on residential property, otherwise 20% or 28% residential property on any amount above the basic tax rate. There is an annual exemption for individuals on the first £6,000 of chargeable gains (reducing to £3,000 from April 2024). The disposal of certain assets are exempt; these assets include cars, chattels of £6,000 or less, one's own home (elected to be the principal private residence when the tax payer owns more than one property), and gifts to charities and to certain national institutions. There are reliefs including what used to be known as Entrepreneurs Relief being 10% rate for disposing of a business if a sole trader or partnership and other conditions are satisfied. Tax rates for trusts and other entities are also different.

There is an additional surcharge of 8% to be paid on residential property other than the principal private residence if a higher or additional rate income taxpayer.

The amount of the gain is calculated by reference to the value of the asset at the time of disposal, less the original acquisition price. This acquisition price will include not only the price at which the asset was purchased, but also certain costs of the purchase and some cost of works of improvement to the asset.

Furthermore, in recognition that assets may increase purely because of inflation, the original cost price was previously *'increased'* by virtue of an indexation allowance. This allowance was based on the increase in the retail price index between the date of purchase of the asset and the date of disposal. It therefore had the effect of reducing the chargeable gain for tax purposes. However, this indexation allowance ceased to be available from 6th April 1998. It will be given to that date but then frozen. It was replaced by a more complex tapering relief which reduces the gain depending on how long the asset has been owned. Professional advice must be taken on this issue.

There may be an obligation to pay CGT even if the asset is abroad.

There are special rules for UK residents who are not domiciled and claim a so-called remittance basis. If a person is resident abroad for tax purposes, they will still have to pay capital gains tax on residential property in the UK although not on some other UK-based assets unless returning to the UK within five years. These are complex provisions and specialist advice should be taken in this international context.

From April 2021, the CGT must be paid within 60 days of the sale of a real property. This is significantly quicker than the previous requirement.

1.2.3 Inheritance Tax

Inheritance tax, introduced on 18 March 1986, is a highly complex and technical tax. Although it deals mainly with the tax payable on the death of an individual, which is outside the scope of this Guide, gifts made within seven years of the date of death are added to the value of the estate at the date of death and taxed accordingly. Gifts made within three years of the date of death are taxed at the full rate but gifts between three and seven years are charged at lower rates and on a reducing scale, if taxable. The income tax threshold for 2023/24 is £325,000. Gifts made by one individual to another are totally exempt from Inheritance Tax as long as the person making the gift survives seven years.

In April 2017 changes came in to charge inheritance tax on all UK residential property indirectly held through offshore structures. Also, non-UK domiciled individuals will be deemed domiciled in the UK for tax purposes where they have been UK resident for 15 of the previous 20 years. Additionally, individuals born with a UK domicile of origin but have acquired a domicile of choice elsewhere will be deemed UK domiciled for all tax purposes whilst they are UK resident.

1.2.4 Stamp Duty

This tax is charged according to the value of certain transactions such as the transfer of property. Payment of the tax is evidenced by the stamping of the document recording or implementing the transaction. Normally, stamp duty is calculated according to a fixed percentage. The stamp duty land tax threshold for houses, land and other residential real property is 0% up to £250,000, (up from £125,000 following the September mini-budget), 5% on £250,000 up to £925,000, 10% on the next £575,000 i.e., up to £1.5 million and 12% for the remaining amount. For a first-time buyer there is a relief of no stamp duty up to £425,000 and then 5% on the portion up to £625,000. This eligibility prevails if buying jointly and only one is a first-time buyer. There are distinctive rates for new residential leasehold sales and transfers. There is an additional 3% if buying a new residential property means that one owns more than one although there are provisions for 36 months to allow for a period of time if one property is in the process of being sold. There are special rates for non-UK resident purchasers. These rates will change from April 2025.

1.2.5 Council Tax

This replaced the poll tax and is based on values of property. Where there is only one adult resident, there is a 25% reduction. Second properties with no permanent residents, depending on the local authority, may benefit from a reduction of up to 50%. The tax is based on two residents: there is no higher tax if three or more residents live in the same property.

1.2.6 Value Added Tax

This tax is levied on a number of goods and services passing from one business to another or to a private consumer, so has little direct relevance to the taxation of a family. It is 20%. VAT is chargeable on most professional services unless the paying party is resident outside the UK.

1.2.7 Corporation Tax

A tax on the profits of companies, it has no significant bearing on the taxation of husbands and wives and so not dealt with in this Guide.

1.2.8 National Insurance Contributions

These payments are made by employees and employers towards the cost of providing certain state benefits. Changes were made in the autumn statement of 22 November 2023. Except for the situation where one spouse employs the other, this will have no direct bearing on the taxation of spouses.

2. TAXATION OF SPOUSES DURING MARRIAGE

2.1 Income Tax

2.1.1 Personal Allowances

6 April 1990 saw the introduction of a radical change in the taxation system of spouses: Independent Taxation. Until then, spouses were looked upon for tax purposes as one person – and the Revenue saw only the husband! The spouse's incomes and gains were added together and the couple were treated as if the total income was that of the husband; he was responsible for completing the annual tax return and for paying all tax due including that on his wife's income and gains.

With the introduction of Independent Taxation, spouses were treated as separate individuals for tax purposes and, for the first time, married women enjoyed privacy in and responsibility for their own tax affairs. In addition, some married couples were paying more tax because they were married than if they cohabited and this was contrary to public policy. Independent Taxation abolished the former tax advantages of cohabitation and it is now marginally fiscally beneficial to marry.

Each individual is now entitled to a Personal Allowance, £12,570 for the year 2023/24, to set against their own taxable income and higher rate tax threshold at £50,271 and top rate over £125,140.

A married couple also received a 'Married Couple's Allowance but this was abolished from April 2000 except for the elderly. But it was later reinstated in a different albeit very limited form. A person who is the lower earner can transfer 10% of their personal allowance which is £12,570 i.e., £1,260 to their spouse or civil partner so he or she would then have a personal allowance of £12,570 plus £1,260. Neither can be a higher rate or additional rate income taxpayer and both must have been born after 6 April 1935.

Account should also be taken of Child Tax Credit and Working Tax Credit which are outside the scope of this Guide.

The tax bands and rates are applied to spouses separately as individuals.

Higher Personal and Married Couple's Allowances are available to those over 65 years of age along with other various reliefs and allowances for those over 65, not covered in this Guide.

2.1.2 Joint Declarations of Beneficial Interest

A spouse will often have income or gains produced by a jointly owned asset e.g. rental income, share dividends, interest on building society accounts. In such cases, it will be presumed by the Revenue that the income or gains belong to the parties in equal shares and they will be taxed accordingly.

However, a couple may jointly elect and declare to the Revenue that they hold the asset in unequal shares e.g., 75%:25%, and so they are taxed on proportionate income or gains (75%:25%). This may produce significant tax savings if one spouse has unused Personal Allowance or if one spouse pays only basic rate tax and the other pays higher rate tax.

Such declarations should be in advance – before a large tax bill is received! They should be *'reflected in reality'* (the Revenue's terminology). The declaration is not possible if the income entitlement differs from the beneficial interest in the asset. It is only effective from the date of the declaration which must be given to the Inspector of Taxes within 60 days. If the couple own the asset jointly before they marry, the provision will only apply to them from the date of marriage. It ceases if the husband and wife no longer live together or interests in the asset vary.

Although it presents good tax saving opportunities during marriage, I must caution that on any separation and divorce, such declarations as to beneficial interests in assets may be influential in divorce proceedings and might affect the terms of any divorce financial settlement. The high rate of divorce demands that any tax planning measures during marriage should always take account of their impact on any divorce and divorce financial settlement. I refer to this aspect of the declaration in more detail below in 3.2.1.

Furthermore, whilst transferring an asset such as a deposit account into joint names to equalise income is another tax saving opportunity available by Independent Taxation and may allow excellent life-time tax saving, it may produce increased liability to Inheritance tax. This is one aspect to consider in deciding whether such a step was advantageous.

2.1.3 Conclusion

Independent Taxation created a number of tax saving opportunities. I would be pleased to discuss these opportunities. Some couples have continued with their joint completion of tax returns. However, many spouses wish to take advantage of the privacy and independence that the system offers. I work closely with specialist tax law firms and accountants which can help with the preparation and completion of tax returns or simply guide and advise.

2.2 Capital Gains Tax

In a similar way to the old income tax arrangements, the gains of a married couple living together used to be calculated separately but charged to the husband so that both sets of gains were added together to determine the total capital gains tax payable.

Under Independent Taxation, each spouse is now taxed separately. Each spouse has their own annual exempt gains limit (£6,000 for 2023/24 but decreasing to £3,000 from April 2024). CGT is levied at 10%, or 20% for higher or additional rate taxpayers with an additional 8% on residential property along with other rates as referred to above at 1.2.2. One spouse's annual exemption is not transferable to the other. Similarly, one spouse's capital losses cannot be transferred to be set against the gains of the other – this was a change brought in by Independent Taxation.

It is sensible tax planning to ensure that each spouse uses their full annual exemption and that the spouse who pays the lower rate of CGT realises any capital gains. The existing tax legislation helps married couples to achieve this as genuine transfers of assets between spouses while they are living together take place on a no gain/no loss basis. The transferee spouse takes over the asset at the transferor spouse's acquisition cost. So, on the final disposal, the chargeable gain will be based on the entire period of ownership by both spouses, taking into account the indexation allowance up to April 1998.

Each spouse is responsible for their own annual tax returns including details of chargeable capital gains.

Certain assets are exempt from CGT. One of the most important exemptions is the tax payer's principal private residence. A tax payer may have only one such property, but it need not be the property in which he lives for most of the year. It is obviously advantageous to elect the property which will increase the most in value (as distinct from the greater percentage increase). Where a taxpayer owns two properties, the election of a second property as principal private residence must be made within a fixed period of the date of acquisition of the later property. While the spouses are living together, they may in general only have one principal private residence.

There are many steps that are available to maximise the CGT saving opportunities arising from Independent Taxation.

Distinctive issues for CGT arise on separation and see 3.5 below:

2.3 Inheritance Tax

Transfers between spouses during their lifetime and on death are exempt from inheritance tax when they are both domiciled in the UK. Other lifetime gifts are usually treated as *'potentially exempt transfers'*, which are transfers upon which inheritance tax will be payable only if the transferor dies within seven years of the date of transfer.

2.4 Stamp Duty

There is no stamp duty on lifetime gifts, including gifts between spouses. In certain circumstances, duty of £5 may be levied on the document or instrument of transfer.

2.5 Council Tax

Where a family home is in joint names or the sole name of one person who is married or living with another as if spouses, both are equally liable to the local authority for the whole council tax.

2.6 Co-habitants

Two people living together in a household, with or without a child of the relationship or of previous relationships, are treated for tax purposes as two single persons. Therefore, each cohabitant has their own Personal Allowance and CGT annual exemption.

As a consequence of the Civil Partnerships Act 2004, which gives to same sex and heterosexual couples who register their relationship similar rights of marrieds, such couples are treated for tax purposes the same as married couples. This gives a number of benefits, especially with CGT, inheritance tax and pensions, but it does mean they are connected persons and so brought within a number of anti-avoidance measures.

There are many advantages in entering into a Cohabitation Contract at the start of the relationship and making a will to provide for the other and other provision in respect of pensions or life insurance. I can draw up a cohabitation contract for you and advise you of the matters that it is better to agree at the outset so that there is certainty about what may happen if the relationship breaks down or one person dies.

3. TAXATION OF SPOUSES ON SEPARATION AND DIVORCE

3.1 Separation

When spouses decide to separate for a trial period, it is not necessary for a court order to be obtained or for the Inland Revenue to be informed. They should try to agree financial short-term arrangements between themselves, including payment of any outgoings on properties and other joint liabilities, and the financial support of any children. I recommend that you discuss these arrangements with me or another professional adviser so that they are put on a relatively formal footing and so that there is no uncertainty about the terms of the agreement.

The terms of any financial arrangements for the period of separation can be recorded in a Separation Agreement, which will be evidence of the separation for Inland Revenue purposes. If a final financial settlement is reached, this can be recorded in the agreement, each party undertaking not to make further claims on any subsequent divorce. Such undertakings will often be upheld by a court. As this is very important in relation to your future rights and claims and there are sometimes disadvantages in a separation agreement rather than court proceedings, I would discuss it in detail.

Very different considerations apply for a family with any international connections and even suggesting a separation agreement may be very unwise until it has been established where the proceedings will take place. I can provide urgent advice on this as speed of issuing proceedings is often essential.

3.2 Divorce

The English courts can grant a decree of divorce if there are connections with England and Wales, primarily based on residence, but also domicile. Because admissions of residence and domicile can have serious tax implications, I recommend that this aspect is considered very carefully with your fiscal and financial advisers before the divorce petition is filed.

If the family has international connections of any kind whatsoever, it may be absolutely vital to take urgent action to secure the country in which any family law proceedings will take place.

Please contact me immediately if this may be an issue.

There is only one ground for a divorce, namely the irretrievable breakdown of the marriage.

From April 2022 England has no-fault divorce, based on filing a divorce petition and being able to seek the final divorce 6 months later (subject to service and procedural steps also to be taken). I recommend that you read my *"Guide to Divorce Procedure"* for more details.

3.3 Financial Orders on Divorce

Space does not permit more than a brief comment on the very wide powers of the divorce court in the redistribution of all the assets of either party to the marriage. The court can make the following orders between the two spouses:

- Periodical payments (maintenance) order
- Lump sum order
- Property adjustment order
- Pension sharing orders and other pension orders

Maintenance payments should include not only direct expenses, such as food, clothing, holidays and personal expenditure, but also indirect expenses such as gas, electricity and other housing expenses as well as an allowance for the long-term maintenance and repair of property and depreciation of its contents and of car. I have prepared a document which lists all items of living expenses, including housing costs and provision for depreciation. I find this is invaluable in working out income requirements. It is very easy to underestimate how much it costs to live! I can consider this document with you as an aid to calculating the appropriate level of maintenance.

In deciding the appropriate financial settlement on the breakdown of the marriage, the court has to give first consideration to the welfare of any minor child.

It also takes into account the following matters:

- Income, earning capacity, property and other financial resources which each spouse or child has or is likely to have in the foreseeable future, including any earning capacity a party could reasonably acquire

- Financial needs, obligations and responsibilities of the spouses or child
- The standard of living enjoyed by the family before the breakdown of the marriage
- The age of the spouses and the length of the marriage
- Any physical and mental disability of the spouses or child
- Contributions which either spouse has made or is likely to make in the foreseeable future to the welfare of the family including any contribution by looking after the home or caring for the family
- The conduct of the parties, if that conduct was such that it would in the court's opinion be inequitable to disregard it
- The value of any benefit which, because of the divorce, the spouse would lose the chance of acquiring
- (In the case of child's maintenance) the manner in which the child was being, and in which the parties expected him or her to be, educated or trained.

In all cases, the court must consider the possibility of a *'clean break'* order to terminate the continuing financial obligations (for example, maintenance) of one party to the other. It also has power to limit maintenance payments to the other spouse to a fixed period of time to allow the recipient spouse to retrain, receive further education or gain work experience in order to adjust to the end of the marriage and to become self-sufficient. It has specific regard to loss of sharing in the benefits of pensions built up during a marriage

Caselaw now provides a twofold test. Assets acquired during the marriage including premarital cohabitation are divided equally unless fairness, effectively the needs of one party, determines that there should be an unequal division. Needs is often that of one parent with primary care of the children or other distinctive needs. All other, non-marital acquired assets e.g., pre-relationship, inherited, gifted and similar, are not shared at all unless, again, fairness requires that there is some sharing of these non-marital assets, yet again being in effect needs driven. I can explain in more detail how this operates.

The court has very considerable discretion and flexibility of approach in deciding on the appropriate terms of a financial settlement. I can discuss this with you in more detail, taking into account your own circumstances.

3.4 Income Tax

Spouses are treated by the Inland Revenue as living together unless they are separated by virtue of a court order or by a deed of separation or they are separated in such circumstances that the separation is likely to be permanent. The first two criteria are clear enough, but the third is often very difficult to decide the date on which any separation was *'likely to be permanent'.* It may sometimes depend on a decision taken by one spouse without notification to the other. The Inland Revenue will usually accept a separation as permanent when spouses have lived apart for over a year, but a shorter period of separation may suffice. The matter has to be decided on the facts of each case. It can be very difficult to show that a spouse, while still living together in the same house, are in fact separated. In these circumstances, it will be necessary to demonstrate that the spouses are living totally separate and independent financial lives.

English tax law often treats a *'permanent separation'* as more important than a final decree of divorce. So, for most income tax and capital gains tax purposes, it is the date of permanent separation that matters rather than the date of the decree absolute. I recommend that both spouses consider the tax consequences of separation with their advisers and with each other before the Inland Revenue are notified of the date of separation. For instance, the date on which one spouse leaves the other may not necessarily be the actual date of a permanent separation for tax purposes. Another date may be more advantageous.

Since 6 April 2000, there is now no longer in English law any tax relief on maintenance paid to a former spouse or child on separation or divorce nor is it taxable for the recipient.

As during marriage, so in and after the tax year in which separation takes place, both spouses are taxed as single persons and receive only their Personal Allowances. The recently introduced

Married Couple's Allowance would not apply from separation.

A significant change brought about by Independent Taxation is that on separation, a husband will have no liability for his wife's non-PAYE income and gains and so will not have to seek an indemnity from her for this.

I referred above (2.1.2) to the tax saving opportunities available by Independent Taxation to allow spouses to declare that they own a jointly held asset in unequal shares and thereby take maximum advantage of one spouse paying a lower rate of tax than the other. This works very well during the marriage, but such declarations may backfire at the time of any divorce financial settlement. Although the Divorce Court has complete discretion and power to transfer and redistribute interests in assets, one starting power for consideration of the appropriate financial settlements may sometimes be '*who already owns what'.* Accordingly if, during the marriage, the spouses have declared that a jointly-held asset is owned beneficially 80:20 rather than 50:50, it may be difficult for the spouse with the 20% interest to say that in reality the asset was still equally owned by the two of them. The declaration might therefore affect the terms of any divorce financial settlement. In most cases, strict legal ownership issues may be irrelevant as the court can redistribute assets to provide for a fair outcome.

Special arrangements apply to maintenance paid under a foreign court order or agreement, or by or to an overseas resident pursuant to an English Court order or agreement. This is outside the scope of this Guide, but I would be pleased to advise on its implications.

3.5 Capital Gains Tax

As with income tax, it is the date of permanent separation which is important, although certain of the benefits continue throughout the tax year of separation. However, this is likely to change from April 2023 and see more below.

In the tax year of separation, the spouses will continue to enjoy their individual annual CGT exemption (£6,000 for 2023/24) and be responsible for their own tax returns for chargeable gains.

As spouses can continue to make chargeable transfers between themselves on a no gain/no loss basis during the tax year of separation, there are often advantages in any final financial settlement which involves the transfer of assets being concluded in the tax year of separation, if this should prove possible and in their overall best interests. As before, this is a further reason why it is important that you should discuss the date of final permanent separation with your advisers. The recipient of the transfer of the asset will then, of course, be responsible for the chargeable gains during the entire period of ownership when he or she comes to dispose of the asset. Nevertheless, this can be an important benefit. Note this has been extended to 3 years from the end of the tax year separation from April 2023 and extended even further if there is a formal divorce agreement or court order.

After the end of the tax year of separation but before the decree absolute of divorce and/or final financial divorce order, it may be difficult to avoid a chargeable gain arising on a transfer of assets between spouses which will be deemed to be at market value.

The mere fact that a transfer of assets is pursuant to a divorce court order does not, of itself, protect it from CGT, subject again to the changes from April 2023 as below. There are however certain ways to avoid payment of CGT on inter-spouse transfers after the tax year of separation and I will discuss these with you should they be applicable and available.

3.5.1 The Matrimonial Home

Because gains on a principal private residence (PPR) are exempt, any transfer of the former matrimonial home will not attract CGT provided the owner or owners (in other words whether it was in sole name or held jointly) lived there throughout the period of ownership. Moreover, the Inland Revenue may ignore any absence by the transferor spouse with specific provisions applying. Great care should be taken otherwise this period of absence may not count for CGT relief on being the principal private residence throughout.

In addition, there is a distinctive relief known as s225b (TCG Act 1992) relief which may assist for the transferor spouse but it is complicated and professional advice should be taken. The transferor spouse will be deemed to be in continuous residence after any departure provided that the property remains the principal private residence of the transferee spouse, it was the transferor spouses main home before he or she left, that the transferor does not elect another property as his principal private residence, it is pursuant to a divorce, the election for this treatment is applied for, and that the property or interest in the property is then transferred to the transferee spouse. (A sale will not provide this CGT exemption.) These are quite considerable and advantageous concessions for both the transferor and the transferee spouse. However, it is dependent on the transferor not electing another property for his principal private residence. Since it is possible that he will have left the former matrimonial home many months or years before the eventual sale or transfer to his spouse or former spouse, it is quite likely that he will have purchased another property. Before he elects this new property as his principal private residence, he should consider the implications with his advisers, particularly taking account of the tax consequences on any matrimonial settlement.

One of three situations usually arises in respect of the former matrimonial home in the final financial settlement on separation and/or divorce although, as above, this came into force on 6 April 2023:

- The property is sold as the PPR of both and the proceeds divided. If it is sold within a fixed period of one of them leaving, no CGT will be payable on the sale proceeds. Thereafter the departing spouse may have to pay CGT on some of his or her gains.
- The property is transferred from joint names into the sole name of the remaining spouse, or there is an outright transfer from one spouse to the remaining spouse. If the transferor spouse has not elected another property for his or her principal private residence and the other provisions apply, there should be no liability to CGT on the transfer to the remaining spouse. If the transferor spouse has elected another property as his principal private residence, he is likely to be liable to CGT on some of his gain at the date of transfer. The remaining spouse will not be liable for any CGT at the date of transfer to her.
- The property is held in joint names or in the sole name of the remaining spouse, but it is agreed that it will not be sold until the happening of certain events. This often includes the death or remarriage of the remaining spouse or the youngest child concluding full-time education. At this point, the non-occupying spouse receives on sale either a share of the net proceeds or repayment of a charge granted to him on the property to secure his

interest in the net proceeds. The sale of the property will result in a chargeable transfer. As far as the remaining spouse is concerned, it will probably be her principal private residence, and so her gain will be exempt from payment of CGT. But if the sale is sometime after separation, the non-occupying spouse will usually be liable for CGT on some element of the share of proceeds or the repayment of the charge if it is for a proportion of the value of the property. (It can sometimes be argued by specialist tax lawyers that the court order created a settlement so the gain would be exempt. Advice should be taken. In practice, the non-occupying spouse has frequently purchased an alternative property in which to live and for which he has made an election as his principal private residence; he will therefore be liable for CGT. Such orders allowing the wife to continue to live in the former matrimonial home until a later sale are quite popular so the tax implications for the departing spouse should always be carefully considered before agreeing with this form of settlement. (They are known as Mesher orders after the first case in which such orders were made.) There can sometimes result in considerable hardship to the wife who on sale many years later is unable then to afford to purchase similar or reasonable accommodation from her share of the proceeds so care is needed before adopting this form of settlement.

3.5.2 Other Assets

These include:

- Contents of the matrimonial home and of any other properties owned by the spouses.

These items unfortunately usually decrease in value, so a gain rarely arises! If each chattel is valued at less than £6,000, any gain is exempt.

- Cash, cars and surrender value of life policies are exempt from CGT.
- Stocks, shares, valuable silver, paintings, jewellery, antique furniture etc. are subject to CGT.
- Second properties. It may be that a second property has gone up more in value than a main residence. As an election for a property as the principal private residence can be made within a period of the date of purchase of the later property, it may be worth electing the second property as the principal private residence, because this will result in a saving of CGT. There may also be considerable advantages in the spouse who leaves the former matrimonial home on separation going to live in the second property. Appropriate transfers of both properties in the tax year in which the spouses separate, together with an election by each of them that the property that they are occupying is their principal private residence, may ensure that gains on both properties are exempt or reduced. Unless this can be arranged, one spouse or both will be liable to CGT on the proceeds of sale of the second property.

3.5.3 Reforms from April 2023

Important changes in CGT came into force from April 2023 regarding separation and divorce. These should be considered very carefully as there will be benefits for some people in delaying the finalisation of financial arrangements or the making of court orders until April 2023 onwards.

Previously, chargeable transfers must take place between spouses in the tax year of permanent separation to have the *'no gain no loss'* benefit. Lawyers and accountants had been arguing for decades that this was very unfair and quite artificial. In the new changes, a separating couple has 3 years from the end of the tax year in which they separate to transfer chargeable assets and benefit from the *'no gain no loss'* CGT treatment. This is hugely beneficial. Many couples don't immediately sort out their finances upon separation or, if they do, sometimes cannot reach agreement within the same tax year. This gives much more opportunity.

Moreover, CGT is not chargeable on assets which divorcing couples, or civil partners transfer as part of a formal divorce agreement or order. So, this extends the 3 years even longer but does require a formal agreement or court order which can be obtained by lawyers or can be done by consent by parties themselves. This is another excellent reform for which lawyers and accountants have been campaigning for decades and is the same as many other countries. It will increase the importance of having a final financial order, thereby enabling transfers between spouses and civil partners without a CGT liability arising.

A further reform is that either spouse who has an interest in the former family home has the option to claim the principal private residence exemption on the sale of the matrimonial home, provided the sale and their absence from the family home was owing to separation and divorce. It does not only apply to the spouse who has remained in residence. This benefits the spouse who may have moved out of the property as long as they haven't elected another property as their PPR.

Finally, in the situation where one spouse retains the property in which to live e.g., with the children during their minority and the interests of the other spouse is transferred to the resident spouse on the basis that they will have a sum of money, perhaps an interest in the proceeds, when the property is eventually sold e.g., on the children attaining majority or leaving full-time education, there will be no CGT applied to those proceeds i.e., the *'no gain no loss'* principle, if the transfer was immediately upon the divorce or separation. This again is hugely welcome. This is the context of the so-called Mesher order, used significantly since the 1970's to enable continuity of accommodation for the children with one parent. The other parent would then receive their share when the property was subsequently sold but found they had to pay CGT on any increase of their share in the value of the property. This was a real disadvantage of these arrangements which otherwise works well. Again, from April 2023 there will be no CGT applying.

3.5.4 Conclusion

From 6 April 1990, spouses have each been taxed independently. Separation now has less effecton the taxation of their capital gains.

However, considerable care should be taken over the timing of steps taken in relation to CGT. In particular, the date of permanent separation is very important. Furthermore, I recommend that whatever the other personal and financial differences between the spouses after separation, they and their advisers should ensure that no steps are taken, such as election of another property as a principal private residence, which might be financially disadvantageous to either or both spouses in any final settlement, without first consulting the other spouse and his or her advisers.

3.6 Inheritance Tax

Unlike income tax and capital gains tax, the impact of inheritance tax is from the date of decree absolute of divorce and not from the date of permanent separation. Until decree absolute, transfers between husband and wife are exempt from inheritance tax except that if the transferor spouse is domiciled inside the United Kingdom and the transferee spouse is domiciled outside the United Kingdom, this exemption is limited but specific advice should be taken on spousal transfers between spouses who may be non-domiciled or non-resident.

Property adjustment orders in divorce proceedings for the transfer of real and personal property can be made effective only from the decree absolute. However, the Inland Revenue accept that transfers of money, property or other assets after decree absolute but pursuant to court orders made in divorce proceedings are specifically exempt from inheritance tax, as long as there is no intention to confer any gratuitous benefit on the transferee – which is unlikely in divorce proceedings!

Maintenance to a former spouse and a relevant child of the family is also exempt from inheritance tax.

But transfers of property to children, other than for their maintenance, education or training, are unlikely to be exempt, so I recommend that you discuss this with me if you contemplate such a step in the divorce action.

3.7 Stamp Duty

Although a transfer of property on separation or divorce might strictly be a *'sale'* of an interest in property based on its market value and therefore attract stamp duty, relief is granted to transfers pursuant to an order in divorce or judicial separation proceedings or pursuant to an agreement in contemplation of or connection with divorce, nullity or judicial separation proceedings. In such circumstances only £5.00 duty is payable on the document. However, a mere agreement to separate is not sufficient.

3.8 Council Tax

During marriage, a spouse is responsible for any non-payment of the other spouse's overall council tax on their family home and/or jointly held property.

If, after separation, the property is in joint names, each continues responsible for the whole council tax unless one elects another property as his sole or main residence whereupon the other would be solely liable. The 25% discount would apply if there was only one adult resident. Liability for the council tax should be part of the terms of any separation.

Where the home is in the sole name of the departing spouse, liability continues on that spouse unless/until he elects another property as his sole or main residence whereupon the remaining spouse would be solely liable as non-owner resident. Further, until the election, the departing spouse may be solely liable as the local authority are in practice unlikely to look for payment from the remaining separated spouse who has no interest in the property. Liability through marriage (rather through joint ownership) ends on separation so local authorities should be informed.

4. CONCLUSION

It is very easy to pay too much tax! I hope that this Guide has shown some of the relatively easy and straight forward ways to reduce the tax on marriage and also on separation and divorce.

If your marriage is in difficulties and/or a separation seems likely or you would just like to discuss your personal finances in the context of your marriage, I can advise on steps to take including taking account of these tax aspects in any settlement or rearrangements with your partner. I encourage a conciliatory and constructive approach to the resolving of any disputes or difficulties involving families. I pay particular regard to the interests of children in any arrangements.

If you do not have a solicitor dealing with your personal or financial affairs but would like to discuss with me any aspect of this Guide or your general relationship affairs, please contact me and my firm. We work closely with tax and trust lawyers.

This Guide is intended solely as summary information. Summarising is inevitably inconsistent with total accuracy; no responsibility can therefore be accepted for the completeness or accuracy of the contents or for any observations or views expressed. For further information on Family Law or Family Law Taxation in England and Wales, please contact me.

Prof David Hodson OBE KC(Hons) MCIArb
dh@davidhodson.com
+44 (0)7973 890 648
The International Family Law Group LLP
www.iflg.uk.com