

***Sandini Pty Ltd atf the Karratha Rigging Unit Trust & Ors v Ellison & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors -***

## Decision impact statement

### Sandini Pty Ltd atf the Karratha Rigging Unit Trust & Ors v. Ellison & Ors v. Commissioner of Taxation of the Commonwealth of Australia & Ors

<b>Court citations:</b>	High Court: [2018] HCA Trans 190 Federal Court: [2018] FCAFC 44; 2018 ATC 20-651
<b>Venue:</b>	Federal Court
<b>Venue reference no:</b>	High Court: P22 of 2018 Federal Court: WAD 172 and 173 of 2017
<b>Judges:</b>	High Court: Bell; Gordon JJ Full Federal Court: Jagot; Siopsis and Logan JJ
<b>Judgment dates:</b>	High Court: 14 September 2018 Federal Court: 27 March 2018
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Favourable to the Commissioner

## Impacted advice

 The ATO is reviewing the impact of this decision on related advice and guidance products.

- Taxation Determination TD 1999/48 *Income tax: capital gains: if a court makes an order under the Family Law Act 1975*
- Taxation Ruling TR 2014/5 *Income tax: matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder (or their associate)*
- Guide to capital gains tax 2018

## Précis

This case concerns the availability of marriage breakdown roll-over under Subdivision 126-A of the *Income Tax Assessment Act 1997* (ITAA 1997) where an asset owned by the trustee of a trust controlled by one former spouse was transferred to the trustee of a trust controlled by the other former spouse.

## Brief summary of facts

On 21 September 2010, the Family Court made orders by consent under section 79 of the *Family Law Act 1975* that within seven days, Sandini Pty Ltd (Sandini) as trustee of the Ellison Family Trust, do all acts and things and sign all documents necessary to transfer to the wife 2,115,000 Mineral Resources Limited (MIN) shares.

Sandini was not the trustee of the Ellison Family Trust. Sandini was the trustee of the Karratha Rigging Unit Trust (KRUT) and, in that capacity, owned over 35 million MIN shares.

On 29 September 2010, Ms Ellison asked that the MIN shares be transferred to Wavefront Asset Pty Ltd (Wavefront) as trustee of the Felstead Family Trust rather than to her. The share transfer was completed on 30 September 2010 and registered on 4 October 2010.

## Issues decided by the court

### **Did the Family Court order result in a change of ownership of the MIN shares for the purposes of CGT event A1?**

The majority of the Full Court held that the Family Court order did not result in a change of ownership of the MIN shares. Rather, CGT event A1 in section 104-10 of the ITAA 1997 happened either on the execution of the share transfer form or, at the latest, the registration of that transfer.<sup>1</sup>

In reaching this decision the majority observed that the orders were ineffective because Sandini was not the trustee of the Ellison Family Trust, and could not be ordered to do anything.<sup>2</sup>

Although it was not necessary to decide, the majority did consider whether an order applying to Sandini as trustee of the KRUT might have resulted in an immediate change of ownership of the MIN shares.

### **Were the roll-over requirements in section 126-15 of the ITAA 1997 satisfied when CGT event A1 happened to the MIN shares?**

#### ***The 'involvement' issue***

The Court determined that rollover under section 126-15 applies only if the transferee is one of the parties to the marriage (a spouse or former spouse).<sup>3</sup>

As the shares were not transferred to Ms Ellison, this requirement was not satisfied.

#### ***The 'because of' issue***

The Court considered that a CGT event will occur because of a Family Court order if the order requires the event to occur and it does occur.<sup>4</sup>

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<sup>1</sup> Refer to *Sandini* [2018] FCAFC 44 at 173 and 174.

<sup>2</sup> *ibid* at paragraphs 171 and 194.

<sup>3</sup> *ibid* at paragraph 156.

<sup>4</sup> *ibid* at paragraph 190.

In this case, the Family Court order was 'inefficacious in all relevant respects'. It required Sandini, in a non-existent capacity, to do things. The fact that Mr and Ms Ellison may have agreed that Sandini do things in another capacity does not mean that the orders had any effect.<sup>5</sup>

As the shares were not transferred because of the order, this requirement was not satisfied.

### **Did section 103-10 of the ITAA 1997 apply so that subsection 104-10(2) of the ITAA 1997 and/or paragraph 126-15(1)(a) of the ITAA 1997 are deemed to apply to Ms Ellison because she directed the transfer of the MIN shares to Wavefront?**

The Court accepted the Commissioner's submission that section 103-10 of the ITAA 1997 does not operate at large to apply the whole of Parts 3-1 or 3-3 of the ITAA 1997 to a person if money or other property has been applied for that person's benefit or as that person directs. Rather it operates so that provisions which are engaged by the receipt of money or property (such as section 124-95 of the ITAA 1997) apply if money has been applied for the benefit of a person or as they direct.<sup>6</sup>

## **ATO view of decision**

### **Change of ownership**

CGT event A1 in section 104-10 of the ITAA 1997 is triggered by a change of ownership of a CGT asset. The type of change that is relevant will depend on the type of ownership the holder of the CGT asset has and what the purported acquirer obtains and whether, for example, their ownership is recognised at law or in equity. Most transactions give rise to clear changes in ownership without needing to address considerations that arise because ownership has been divided.

It is clear that CGT event A1 in section 104-10 of the ITAA 1997 does not happen if:

- there is a mere change in the trustee of a trust (as subsection 960-100(2) of the ITAA 1997 provides that the trustee of a trust is taken to be an entity consisting of the person who is the trustee at any given time)
- a person transfers legal ownership but continues to be the beneficial owner (an exception in CGT event A1 itself).

Consistent with the decision of the majority of the Full Court, we consider that triggering CGT event A1 in section 104-10 of the ITAA 1997 does not require a change in legal as well as beneficial ownership.

Further, we consider that a change in beneficial ownership does not occur unless the purported acquirer of the CGT asset has full dominion over it that a court of equity would enforce. This is akin to the rights to specific performance a purchaser of land obtains upon paying the settlement sum. It is not sufficient for a change in beneficial ownership that the purported acquirer of the CGT asset has some form of proprietary

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<sup>5</sup> *ibid* at paragraph 194.

<sup>6</sup> *ibid* at paragraphs 207 and 208.

interest, or equitable or beneficial interest in the asset falling short of beneficial ownership, and the purported seller has retained rights to deal with the asset, including powers of disposition over it.

## Effect of Family Court order

CGT event A1 in section 104-10 of the ITAA 1997, rather than CGT event E1 in section 104-55 of the ITAA 1997, happens if an order creates a trust over an asset because the change of ownership happens by operation of law. CGT event E1 does not happen as there is no relevant 'you' as contemplated by that event.

## Other

We note the Court's conclusions that:

- roll-over is only available under section 126-15 of the ITAA 1997 if the transferee is a spouse or former spouse
- a CGT event occurs because of a Family Court order if the order requires the event to occur and it does occur, and
- section 103-10 of the ITAA 1997 does not operate at large to apply the whole of Parts 3-1 or 3-3 of the ITAA 1997 to a person if money or other property has been applied for that person's benefit or as that person directs.

## Implications for impacted advice or guidance

We are reviewing our public advice and guidance products to determine what effect (if any) the decision may have on them. To date we have identified that the following public rulings might be affected:

- Taxation Determination TD 1999/48 *Income tax: capital gains: if a court makes an order under the Family Law Act 1975 declaring or altering a spouse's interest in property, do CGT events happen to CGT assets of the spouse for the purpose of section 126-5 or 126-15 of the Income Tax Assessment Act 1997*

We will consider updating TD 1999/48 to address

- comments of the Court about the effect of an order under section 79 of the *Family Law Act 1975* (for example, in some instances, a CGT event might happen when an order is made)
- the 'because of' issue considered by the Court.
- Taxation Ruling TR 2014/5 *Income tax: matrimonial property proceedings and payments of money or transfers of property by a private company to a shareholder (or their associate)*

We will consider updating the Ruling to address comments of the Court about the effect of an order under section 79 of the *Family Law Act 1975* (for example, in some instances, a CGT event might happen when an order is made).

- The [Guide to capital gains tax 2018](#).

## Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

<b>Date issued:</b>	27 November 2018
<b>Due date:</b>	21 December 2018
<b>Contact officer:</b>	Contact officer details have been removed as the comments period has expired.

### Legislative references:

*Income Tax Assessment Act 1997*

Pt 3-1  
Pt 3-3  
103-10  
104-10(2)  
124-95  
126-A  
126-5  
126-15  
126-15(1)(a)  
960-100(2)

*Family Law Act 1975 (Cth)*

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### Case references:

*Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* [1948] HCA 28; (1948) 77 CLR 143  
*Bellinz Pty Ltd v. Commissioner of Taxation (Cth)* (1998) 84 FCR 154; (1998) 155 ALR 220; 155 ALR 220; 98 ATC 4634  
*Chan v. Cresdon Pty Ltd* (1989) 168 CLR 242; (1989) 89 ALR 522; [1989] HCA 63  
*Chang v. Registrar of Titles* (1976) 8 ALR 285; (1976) 137 CLR 177; [1976] HCA 1  
*Ellison v. Sandini Pty Ltd* [2018] FCAFC 44; 2018 ATC 20-651  
*Herdegen v. Federal Commissioner of Taxation* [1988] FCA 699; (1988) 84 ALR 271; (1998) 20 ATR 24; 88 ATC 4995  
*Hunter v. Moss* [1993] EWCA Civ 11; [1994] 1 WLR 452  
*Jones v. Daniel* [2004] FCAFC 278; (2004) 141 FCR 148; (2004) 212 ALR 588  
*Kennon v. Spry* [2008] HCA 56; (2008) 238 CLR 366; (2008) 251 ALR 257  
*Kent v. Vessel 'Maria Luisa' (No 2)* [2003] FCAFC 93; (2003) 130 FCR 12  
*KLDE Pty Ltd v. Commissioner of Stamp Duties (Qld)* (1984) 155 CLR 288; (1984) 56 ALR 337; (1984) 15 ATR 1214; 84 ATC 4793; [1984] HCA 63  
*Lavin v. Toppi* [2015] HCA 4; (2015) 254 CLR 459; (2015) 316 ALR 366  
*Lionsgate Australia Pty Ltd v. Macquarie Private Portfolio Management Ltd* [2007] NSWSC 371; (2007) 62 ASCR 522  
*Mullane v. Mullane* [1983] HCA 4; (1983) 158 CLR 436; (1983) 44 ALR 291  
*Official Trustee in Bankruptcy v. Mateo* [2003] FCAFC 26; (2003) 127 FCR 217; (2003) 202 ALR 571  
*Pearson & Ors v. Lehman Brothers Finance SA & Ors* [2010] EWHC 2914  
*Pilmer v. The Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165; (2001) 49 ATR 324

*Priest v. Ross Asset Management Limited (in liq)* [2016] NZHC 1803  
*R v. Toohey; Ex Parte Meneling Station Pty Ltd* [1982] HCA 69; (1982) 158 CLR 327;  
(1982) 44 ALR 63  
*R v. Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 29 ALR 289; (1980)  
144 CLR 13; [1980] HCA 13  
*Sandini Pty Ltd v. Commissioner of Taxation* [2017] FCA 287; 2017 ATC 20-610;  
(2017) 105 ATR 495; (2017) 251 FCR 543  
*Sandini Pty Ltd v. Commissioner of Taxation (No 2)* [2017] FCA 905  
*Stern v. McArthur* (1988) 165 CLR 489; (1988) 81 ALR 463  
*Telstra Corporation Ltd v. The Commonwealth* [2008] HCA 7; (2008) 234 CLR 210  
*Wende v. Horwath (NSW) Pty Limited* [2014] NSWCA 170; (2014) 86 NSWLR 674  
*White v. Shortall* [2006] NSWSC 1379; (2006) 68 NSWLR 650  
*Yanner v. Eaton* [1999] HCA 53; (1999) 201 CLR 351; (1999) 166 ALR 258

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