

# 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      30 September 2022 .

## 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. <sup>1</sup> "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." <sup>2</sup>  

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 as defined in the Family Law Act 1975 (Cth) (Family Law Act) section 90XD 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 and includes a superannuation interest as defined in the Family Law Act section 90 YD.

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

<sup>2</sup>



## Ruling

### Orders that have been arbitrated

10. Court orders are the decisions or judgments of judicial officers. <sup>6</sup> They can include an order made after the parties have reached their own agreement and have applied to a court for consent orders, <sup>7</sup> 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.
11. Where an application is made for consideration of nominal duty on the transfer of matrimonial or de facto relationship property in accordance with 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.

### All other instruments

12. Where an application is made for consideration of nominal duty 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 9 and
  - (c) the transfer is 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).

### Definition and ownership of property

13. For the purpose of paragraph hriurt Tw 1.3 ( t)8 0 T3 (h)6.MC /LBody <</MCID 41 >>BDC 0 g06 Tw 4.58 0.37)12Tt)-0 t.-T /Artifact.51(Bottom ]/BBox Figure561)1 78 (8 6m(y64 1s)5).75 w 8 M 84 (y57)1026 4550 i s27crH45619

(b) a company which is effectively controlled by either or both of the parties to the marriage or de facto relationship,

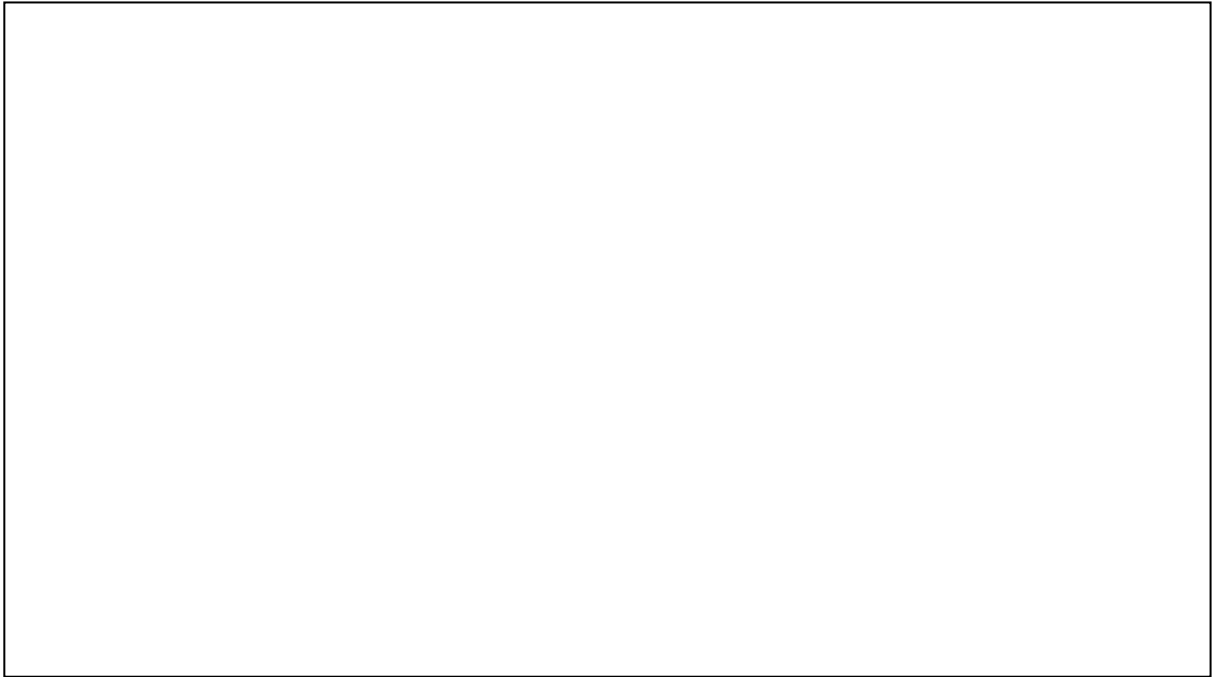
but may only be transferred to the parties specified in paragraph 9 in order to be considered for the application of nominal duty.

14. 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

- (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.

18. 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 (as defined in s 91-74 of the ITA 1997) 4.1 (c)-9.2 (l)-4.8 (h)-3.7 (s)g (et) 2.1 (c)-6. (f) 591 Tf 0 s00 (no

(a)



19. 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 <sup>14</sup>
  - (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.
  
20. 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.
  
21. 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.
  
22. 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 .<sup>15</sup>

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<sup>14</sup> Ascot Investments Pty. Ltd. v Harper and Harper (1981) FLC 91 -000.

<sup>15</sup> Foda v Foda [1997] FamCA 25 .

Documents required in support of an application

23. 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](#)'.

Ruling History

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