

Can a \$4.8M Tax Loss be a Family Law Financial Resource ?

In **Nash [2015] FCCA 1359** the wife submitted that the husband's tax losses to the end of the 2013 year totalling **\$4.8M** were a financial resource available to the husband which should be taken into account as a s.75(2) (future financial circumstances) factor in determining an appropriate property settlement.

After considering the relevant authorities and circumstances as discussed below **Judge Terry** was not persuaded that the tax losses in this case were something she should take into account.

However as a general rule tax losses which can be offset against income are indeed a valuable resource and in **Cromwell (2006) FamCA 1454 Coleman J** took the husband's tax losses into account as a s.75(2) factor.

The husband in **Cromwell's case** conducted a farming enterprise and had carried forward losses of \$834K as a result of the operation of the business. It was common ground that the losses would be applied against an income of \$700K in the following financial year with the result that no tax would be payable on that income and that afterwards the husband would still have tax losses of \$125K to use in the future in the same way.

Coleman J said as follows:

Reference was made earlier in [this] decision to the husband's carried forward losses. The evidence is less than clear as to how that will impact upon the husband's income in the foreseeable or more distant future, but the reality is there is no doubt in such fashion and at such time as he is advised, consistent with the income tax laws of this country, the husband will reap the benefits of those carried forward losses in a tangible way.

It is not without relevance that the losses appear to have been substantially accumulated during the years of cohabitation between the parties. In all the circumstances, to fail to have regard to this resource as it may be considered, would be unfair to the wife. This should feature in the determination of an appropriate s.75(2) adjustment in the wife's favour.

The husband appealed and his appeal focussed on the treatment of the tax losses. The Full Court was satisfied that Coleman J had appropriately dealt with the issue and dismissed the appeal.

Another case involving tax losses to which Judge Terry referred and distinguished from this case was **Wimborne (unreported 1994)**. In that case the tax losses of a company were treated as property by **Nygh J** and the Full Court which heard an appeal in the matter did not criticise his decision to do so.

However it was clear from the appeal decision that Nygh J had before him evidence from two expert accountants. The accountants' evidence and opinions in that case specifically addressed substantive issues such as the value of the losses, the taxable income the company was likely to earn in the future against which the tax losses could be offset and the benefits which the husband would be likely to derive from the tax losses having regard to his life expectancy and the *Income Tax (Assessment) Act*.

Judge Terry noted that in both the *Wimborne* and *Cromwell cases* there was clear evidence that the losses had been incurred in the operation of businesses which were continuing to operate and clear evidence that the losses would be able to offset against income which there was no dispute had already been earned or was likely to be earned in the future whereas the evidence in *Nash's case* was much less certain or comprehensive.

When Judge Terry asked the wife's counsel what the tax losses could be offset against in the future he could not refer to any evidence to indicate that it was particularly probable that the husband would be able to make use of the tax losses in the future to achieve a higher disposable income.

Indeed the Judge commented that if she had to make an assessment of the probabilities of the husband being able to benefit in the future from the tax losses, she would rate it as improbable.