



WEEKLY TAX BULLETIN

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Adviser risks when attempting to remedy errors

by *Matthew Burgess, Director, View Legal*

Having a family home owned in the joint names of a couple can be important for a range of reasons - including both for emotive and legal motivations.

Often, one of the key legal drivers is to achieve intended holistic estate planning outcomes, by understanding the nuances between owning property as joint tenants (where the surviving owner secures ownership automatically, unless the notional estate regime, relevant only in NSW, applies) and tenants in common (where the estate plan regulates ownership of a deceased's interest).

Asset protection from business misadventure is often also a driver for having a co-owner who carries no, or at least comparatively less, risk than the other owner.

In situations where one spouse owns 100% of a family home, most Australian jurisdictions allow a stamp duty exemption where the spouse transfers 50% (but no more or less) to their spouse.

Subject to meeting specific requirements, the Victorian regime is an outlier in this regard in that it potentially allows the transfer of up to 100% of a home to a spouse without duty cost.

Historically there are situations that have arguably fuelled an urban myth (anecdotally promoted by some advisers) that other jurisdictions permit an analogous duty free outcome as is available in Victoria on full ownership transfers of homes.

The decision in *El Chami v Chief Commissioner of State Revenue* [2025] NSWCATAD 266 perhaps provides at least one example of how the rumours of duty free transfers of 100% interests in family homes outside Victoria have gained traction.

In this case the transfer of 100% of a family home from a husband to a wife was stamped no duty payable, due to (arguably) a gap in the Electronic Duties Return of the NSW State Revenue Office (Revenue NSW), which permitted the law firm lodging the transfer to claim a full exemption, when in fact no exemption was available.

On discovering the error the law firm, rather than cancelling the transfer (which was immediately registered on title), simply transferred 50% of the home from the wife back to the husband, successfully - and correctly - applying the relevant duty exemption for the transfer (in NSW) of 50% of a family home to a spouse.

When Revenue NSW later investigated the initial transfer it imposed full ad valorem stamp duty, as well as penalties and interest on the initial transfer (totalling almost \$126,000).

The law firm raised a range of arguments as to why no duty (nor penalties or interest) should be payable including:



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(a) the law firm should not have been held responsible given the system allowed the transfer of 100% of the property without bringing up an error - if the system provided an error notice (or flagged the duty payable) this would have alerted the firm to the incorrect inputting of 100% instead of 50% into relevant the date field;

(b) the data entry reflected a genuine mistake;

(c) the demand for payment of the stamp duty was 'unjust and breathtakingly opportunistic' and contrary to the motto and statement of objectives of Revenue NSW, being a 'fair and prosperous NSW'.

In rejecting all arguments in relation to cancelling the primary duty assessment, the tribunal did however remit 50% of the interest and penalties, and confirmed:

1. there was no ability for the tribunal to waive the statutory requirements - even if the outcome is unfair or unjust (see *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109);
2. the legislation required a deregistration or cancellation of the first transfer to remove the dealing (see *Marilyn Elizabeth Trethowan v Chief Commissioner of State Revenue* [2013] NSWSC 576) - the failure to do so meant the first transfer was an effective transfer (which was fully dutiable) and became the starting point for the second transfer;
3. although it may not have been the transaction intended, the registration also meant that the first transfer was not 'an instrument that fails in its intended operation and becomes useless' (which was required to allow a reassessment of duty);
4. the law firm did not take reasonable care, as they failed to engage with Revenue NSW (or the titles office) to ensure that the error was appropriately corrected - rather unilateral steps were taken which caused separate valid and binding transactions to occur (see *Re Melteal Pty Ltd and Chief Commissioner of State Revenue* [2010] NSWADT 116);
5. in this context, 'reasonable care' was confirmed to mean to require a determination of 'whether a person exercised the care that a reasonable person would be likely to have exercised in the circumstances of that person (including in respect of enquiries made and advice sought or received)' (see *Qualweld Australia Pty Ltd v Chief Commissioner of State Revenue* [2014] NSWCATAD 227); and
6. ultimately, while the relevant stamp duty provisions may have been difficult and complex, it was important for the tribunal to promote attempts at compliance which are both sincere and careful, hence the only (relatively minor) concessions given to the taxpayers here (see *O'Neill Tyres Gateshead Pty Ltd & Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue* [2020] NSWCATAD 314).

