Marriage — A Tax Shelter ?

Jack Bernstein*

Introduction

Many women, as well as their fiancés and husbands, are unaware of the fact that the Canadian *Income Tax Act* [1] treats the act of marriage as a fiscal metamorphosis. The tax provisions confronting newlyweds are numerous and complex, for tax consequences will be produced by their every activity, from their choice of matrimonial regime to their banking arrangements to their business relationship. Further tax effects will be experienced upon death or dissolution of the marriage. This article focuses on the various provisions of the *Income Tax Act* and the succession duty and gift tax legislation of Quebec and Ontario, as they apply to spouses.

Date of Marriage

The first decision which a couple must make which has tax consequences is the choice of the date on which the marriage is to take place. Paragraph 109(1)(a) I.T.A. provides that an individual who, during the year, was a married person who supported his spouse, may deduct from his or her annual income an amount equal to $1,600 plus $1,400 less the amount by which the dependent spouse's income for the year while married exceeds $300. It should be noted that:

(i) paragraph 109(1)(a) does not stipulate that the individual claiming the deduction must be married throughout the year; and

(ii) the maximum deduction is only reduced by every dollar of taxable income in excess of $300 earned by the dependent spouse "while married".

---

* B.C.L. (McGill). I wish to extend my thanks to Nat Boidman, C.A., for his helpful comments.

[1] S.C. 1970-71-72, c.63 as amended (hereinafter referred to as I.T.A.). It is to be noted that the Act is an example of a statute in which the legislators have at least in theory succeeded in extending the application of the law to both sexes (who are ubiquitously referred to as "the taxpayers" or "the spouses") in an even handed manner. *Cf.* the article by Ritchie in this Special Issue of the McGill Law Journal.

For example, assume Ms A, a successful executive, and Mr B, an impoverished law student, are contemplating marriage during the first week of January 1976. Provided that a great inconvenience would not ensue, it could be to their advantage to move the marriage date ahead to December 31, 1975. This would enable Ms A to claim the maximum $3,000 marital status deduction for 1975, notwithstanding the fact that Mr B has net taxable income for the year in excess of $300, as the dependent spouse did not earn any income in 1975 "while married". Assuming Ms A would have paid tax of $700 on $1,400 of income, the tax savings could pay for the honeymoon.

Choice of Matrimonial Regimes in Quebec

The question of matrimonial regimes is very current and controversial. While others in this Special Issue of the McGill Law Journal have discussed the topic in detail,[2] the author would note at this point that the tax consequences of such a choice should also be considered. We may look to Quebec for illustration of the tax effects of the various options.

In Quebec, spouses married without a marriage contract prior to July 1, 1970 are under the legal regime of community of property, and spouses married thereafter are under the legal regime of partnership of acquests.[3] The legal regime may be varied by marriage contract entered into either before or after marriage.[4] The matrimonial regime will normally take effect from the day the marriage is solemnized.[5]

Separation of Property

If the spouses choose to be separate as to property, each spouse will be taxed on the entire taxable income derived from property in his or her name. Where the spouses are joint owners of an income producing property, it may be possible for each spouse to pay tax on

[2] See the articles by Freedman, Hahlo and Jacobson in this Special Issue of the McGill Law Journal.

[3] Arts.1260 and 1268 C.C.

[4] Art.1265 C.C.

[5] Art.1261 C.C.; but see, Caparros, *Le problème de la date d'entrée en vigueur du nouveau régime lors d'une mutabilité conventionnelle de régime matrimonial* (1973) C.de D. 335.

one half of the annual revenue provided that both spouses contributed equally in acquiring the property.[6]

Community of Property

Under the Quebec regime of community, community property comprises all moveables of the spouses whether acquired prior to or during the marriage, all immoveables of the spouses acquired during the marriage, the revenue derived from immoveable property owned by the husband at the date of marriage and the husband's remuneration during the marriage.[7] The balance of the property of the spouses is divided into private and reserved property[8] and the income and capital gains derived therefrom is taxed in the hands of the spouse owning the property. The issue has arisen as to whether each spouse should be taxed on one half of the total revenue derived from community property.

The Supreme Court of Canada in the case of *Sura* v. *M.N.R.*[9] concluded that only the person legally entitled to receive property income will be taxed upon it. Prior to 1969, it was the husband alone, as sole administrator of the community, who could freely dispose of such property; the right of the wife with respect to the community property did not crystallize until the dissolution of the marriage.[10] The Court thus concluded that all revenue derived from community property during the subsistence of the marriage must be taxed solely in the hands of the husband, as only the husband was empowered to collect the revenues, and income tax is levied on the recipient of revenues rather than on the property itself.[11] The *Sura* case has been repeatedly followed in cases where spouses have attempted to split their income on this basis.[12]

In 1969, the husband's right to freely dispose of community property was fettered by an amendment to article 1297 C.C. Although the husband remained the sole administrator, he is now required to

---

[6] If the property registered in the names of both spouses was purchased with funds provided by one of the spouses, the entire annual income of the property will be taxed in the hands of the true purchaser by virtue of I.T.A. s.74(1) (discussed, *infra,* under "Transferring Funds to a Spouse Without Incurring Income Tax Liability").

[7] Art.1272 C.C.

[8] Arts.1275 and 1425a C.C.

[9] 62 D.T.C. 1005.

[10] Art.1338 C.C.

[11] I.T.A., s.2(1).

[12] *Skelton* v. *M.N.R.* 56 D.T.C. 147; *No.676* v. *M.N.R.* 60 D.T.C. 42; *Pope* v. *M.N.R.* D.T.C. 456; *Bedford* v. *M.N.R.* 64 D.T.C. 411.

obtain the prior concurrence of his wife in order to validly make a gift *inter vivos* of community property or to alienate any immoveable property belonging to the community. The restrictions imposed on the husband's powers as administrator may serve as a basis for distinguishing the *Sura* case and could open up new avenues for income splitting. Alternatively, since the spouses now are entitled to contractually modify the community regime,[13] a provision might be inserted entitling both spouses to administer the community property.

The *Sura* case might also be attacked on the ground that it is inconsistent with the application of subsection 74(1) I.T.A.[14] and sections 38 and 39 I.T.A. For example, as far as subsection 74(1) I.T.A. is concerned, should the wife's investment portfolio form part of the community property, the income derived therefrom would be taxed solely in the hands of her husband by virtue of the *Sura* case. However, if the fact that the husband is the beneficial owner of one half of the moveable property of his wife (by virtue of the spouses choosing the community regime) is viewed as a "transfer" of property to the husband, then subsection 74(1) I.T.A. should operate to attribute one half of the income to the wife. Sections 38 and 39 I.T.A. define the terms "taxable capital gain" and "capital gain" with reference to the disposition of any property "of the taxpayer". It thus appears that it should be possible to split this source of income between the spouses who, under the community regime, are viewed as co-owners.

Where a gift is made from community property, each spouse is considered to have made one half of the gift.[15] Where spouses have paid the premiums on a life insurance policy with community funds, it has been held that only one half of the proceeds of the policy will be subject to succession duties.[16] A spouse is not entitled to bequeath more than his or her share in the community,[17] and upon dissolution through death or otherwise, the capital of the community property

[13] Arts.1384, 1258 and 1259 C.C.

[14] *Supra*, f.n.6.

[15] *Leduc* v. *M.N.R.* 67 D.T.C. 501; *Taxation Act*, S.Q. 1972, c.23, s.932.

[16] *Bernier-Frégeau* v. *M.N.R.* 57 D.T.C. 1005. The *Succession Duties Act*, S.Q. 1964, c.70, s.26(3) provides that:

> "Whenever the deceased was common as to property and no beneficiary was designated, one half only of the proceeds of such policy shall be included in the estate."

However, if instead the beneficiary of the life insurance policy had borne all of the premiums, no succession duty would arise by virtue of s.26(1).

[17] Art.1293 C.C.

is divided equally between the spouses or their representatives.[18] Income tax and succession duty liability is only computed on the portion of the community property allocated to the deceased. Although it may not be possible to utilize the community regime as a vehicle for income splitting in Quebec, it is an effective mechanism for capital splitting.

Partnership of Acquests

Where no marriage contract is entered into, since July 1970 the spouses will automatically be governed by the regime of partnership of acquests. This regime resembles separation of property during the marriage and community of property on its dissolution. Each spouse has full powers of administration and alienation over his or her private property and acquests during the subsistence of the marriage; however, neither spouse may dispose gratuitously of his or her acquests without the consent of the other spouse.[19] If the spouses were to be regarded as undivided owners of the acquests, the capital gains liability derived therefrom would be shared by the spouses. On death, the estate of the deceased will only comprise one half of the acquests.

M.N.R. v. *Faure Estate*

The recent case of *M.N.R.* v. *Faure Estate*[20] has added a new dimension to the use of matrimonial regimes as a means of estate planning in Quebec.[21] The deceased and his spouse had entered into a marriage contract at the time of their marriage in Belgium which provided that the spouses were to be in community of property. However, the spouses inserted an additional clause in the contract which stipulated that the surviving spouse was entitled, on the death of the deceased spouse, to all the community property. The issue before the Federal Court of Appeal was whether this provision in the marriage contract divested the deceased of any right in respect of the community property after his death. As the laws of Belgium and Quebec with respect to the community regime are similar, it was agreed that the case should be determined according to the pro-

[18] Art.1361 C.C.

[19] Art.1266o C.C.

[20] 75 D.T.C. 5076. The case is presently being appealed to the Supreme Court of Canada.

[21] No succession duty liability is levied in Ontario on an estate passing to a spouse by virtue of *The Succession Duty Act*, R.S.O. 1970, c.449, s.7(3).

visions of the Quebec Civil Code.[22] The contractual provision was regarded as valid by the Court and given full effect from the day the marriage was solemnized. Accordingly, the widow of François Faure was the owner of all of the community property from the date of the marriage and no taxes were exigible pursuant to the *Estate Tax Act* [22a] as no property passed on death. If the Supreme Court of Canada maintains this decision, it will be possible for spouses to insert the same provision in their marriage contracts before or even after their marriage in order that no succession duty liability will arise on death. The case is, however, of limited practical importance as the rate of Quebec succession duties is declining annually and income tax liability on death may be avoided by a direct bequest to a spouse or spousal trust.[23]

Gifts in Marriage Contracts

Gifts in marriage contracts will attract deferred tax liability. Prior to 1970 when article 770 C.C. was repealed and article 1265 C.C. was amended, it was only possible to make a gift to a spouse via a marriage contract. It was and still is quite common for marriage contracts in Quebec to contain a gift *inter vivos* (a gift of furniture and household effects up to a fixed amount and/or a cash gift payable within a term of five to ten years) and a gift *mortis causa* (a cash gift made in contemplation of death).[24] Unless the marriage contract contains a clause, not contrary to public order and good morals, which nullifies the gifts on separation or dissolution of the marriage, the gifts will subsist.[25] The gift tax provisions of Ontario [26] and Quebec [27] provide that the transfer of property to a person in consideration of marriage will constitute a gift. However, a person is not deemed to have made a gift in the year solely by entering into a marriage contract.[28] Upon actually tranferring the funds or property to the spouse in fulfillment of the covenants of the marriage contract, the transfer will trigger gift tax as well as the attribution rules of subsection 74(1) I.T.A.

[22] Art.1406 C.C.
[22a] *Estate Tax Act,* R.S.C. 1970, c.E-9.
[23] I.T.A., s.70(6) discussed *infra* under "The Death of a Spouse".
[24] Art.1257 C.C.
[25] Art.208 C.C.
[26] *The Gift Tax Act, 1972,* S.O. 1972, c.12.
[27] *Taxation Act,* Part VIII, S.Q. 1972, c.23.
[28] Quebec, *ibid.,* s.908(a); Ontario, *supra,* f.n.26, s.3(a).

Joint Bank Accounts

The spouses should also be aware that joint bank accounts may result in a gift tax being payable. The spouses may contribute equal or unequal amounts to such an account, or only one spouse may contribute. The purpose of a joint account may be economic convenience or to provide a benefit for the other spouse; whether the deposit of funds by one spouse in a joint account will constitute a gift to the other will depend upon the presumptions of advancement and resulting trust in the common law jurisdictions [29] and in Quebec upon the provisions of the Civil Code relating to gifts [29a] and alimentary obligations.[29b] The operation of a joint bank account by spouses does not create the relationship of a commercial partnership.[30] It should be noted that a taxpayer has been successfully assessed for gift tax where he deposited the proceeds of a winning ticket of the Irish Sweepstakes in a joint bank account with his wife.[31] What if a Quebec resident were to win the Olympic lottery and deposit the one million dollar prize in a joint bank account? The gift tax exigible on the deemed gift of $500,000 is approximately $206,250![32]

A problem also occurs on the death of a spouse where the consorts are separate as to property and a joint bank account exists. Where only one spouse contributed to and made withdrawals from the joint account during his or her lifetime, it has been held that the other spouse acquired a beneficial interest in the bank account and therefore estate tax would only be levied on one half of the balance in the account.[33] Where both spouses have contributed unequal amounts to a joint bank account and the capital thereof has been used for investments, it is an almost impossible task for the executor to ascertain the precise interest of the deceased

---

[29] Waters, *Law of Trusts in Canada* (1974), 301.
[29a] Arts.761 *et seq.* C.C.
[29b] Arts.165 *et seq.* C.C.
[30] *Brunell* v. *M.N.R.* 58 D.T.C. 545.
[31] *Goeglein* v. *M.N.R.* 68 D.T.C. 5271.
[32]

Deemed Gift	$500,000
Exempt Portion (upon adoption, the Budget of Apr. 17, 1975 will have retroactive effect to Jan. 1, 1975)	(15,000)
Taxable Value of Gift	485,000
Tax Payable — subsection 906(h) of the *Taxation Act* (Qué.)	63,750
50% x 285,000	142,500
	$206,250

[33] *Conway Estate* v. *M.N.R.* 65 D.T.C. 5169.

spouse in the substituted property. For these reasons, joint bank accounts ought to be used as seldom as possible and at no time should large amounts be accumulated in such accounts.

Transferring Funds to a Spouse Without Incurring Income Tax Liability

The Act contains several provisions which are intended to prevent the taxpayer from diverting income to a spouse and thereby reducing the overall tax liability of the spouses.

Fair Market Value

As spouses do not deal at arm's length[34] before or during marriage, it is essential that transfers of property to a spouse be at fair market value where subsection 73(1) does not provide relief.[34a] Paragraph 69(1)(a) I.T.A. provides that the person acquiring property is deemed to acquire the property at fair market value notwithstanding that a lesser amount was actually paid by the transferor, and where a person disposes of property for less than fair market value or by way of gift the vendor/donor is deemed to receive proceeds equal to the fair market value of the property. This latter provision may have the adverse consequence of increasing the income or capital gains liability of the vendor/donor without increasing the actual proceeds paid. Moreover, no provision exists for adjusting the cost base of the property to the transferee accordingly. This would result in double taxation upon the subsequent disposition of the property by the transferee. For example, assume capital property acquired after 1971 and having an original cost of $100 is transferred to a non-qualified spousal trust for $100. The property has a fair market value at the time of transfer of $110, and the Department of National Revenue intervenes and deems the transferor to have received $110, resulting in a taxable capital gain of $5. If the transferee disposes of the property for $110, a taxable capital gain of $5 will be realized.

As it may be very difficult to determine the fair market value of a property, and in order to avoid the adverse tax consequences outlined in the previous paragraph, it is becoming increasingly popular to insert price adjustment clauses in sale agreements when parties are not dealing at arm's length. The Department of National Revenue has expressed the view that these clauses will be respected

---

[34] I.T.A., ss.251(2)(a) and 251(6)(b).

[34a] See discussion *infra* "Methods of Income Splitting".

where the parties have manifested an intention to transfer the property at fair market value and advance notice is given to the Department.[35] It is the writer's view that where the parties attempt to transfer the property at fair market value (for example, where an independent valuation is obtained) notice need not be given to the Department in order that the clause be effectual.

Attribution of Income and Losses

Subsection 74(1) of the Act provides that where a person has transferred property either directly or indirectly by means of a trust or by any other means whatever to his spouse, or to a person who has since become his spouse, any income or loss for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be the income or a loss of the transferor and not of the transferee. The income derived from the transferred property will be attributed to the transferor until such time as the transferor dies or ceases residence or the marriage is dissolved.[36]

This provision is very broad and would encompass most transfers to spouses. A transfer of property occurs whenever one spouse is divested of property and as a result the property vests in his or her spouse.[37] A "genuine" loan of money to a spouse, even on an interest free basis, does not constitute such a transfer.[38] The general phrase "by any other means whatever" does encompass the transfer of property pursuant to a marriage contract. As outlined above, gift tax will be exigible on a transfer of property pursuant to a marriage contract, and the income derived from the property transferred will be attributed to the transferor. At one time, it was possible to transfer property to a spouse prior to the marriage and successfully avoid the attribution rules;[39] however, the insertion of the phrase "or to

[35] Interpretation Bulletin IT-169. Interpretation bulletins, published under the authority of the Deputy Minister of National Revenue, comprise the Department of National Revenue's interpretation of the *Income Tax Act*. The bulletins are neither binding upon the Department of National Revenue nor upon the courts.

[36] Where capital property is transferred to a spouse pursuant to a separation agreement, the income derived from the property will only be attributed to the transferor until the decree absolute.

[37] *Fasken Estate* v. *M.N.R.* 4 D.T.C. 491.

[38] Interpretation Bulletin IT-136, Para.6; *Weiser* v. *M.N.R.* 55 D.T.C. 221; *Dunkelman* v. *M.N.R.* 59 D.T.C. 1242; *Robins* v. *M.N.R.* 63 D.T.C. 1012; *Oelbaum* v. *M.N.R.* 68 D.T.C. 5176.

[39] *Connell* v. *M.N.R.* 2 D.T.C. 903.

a person who has since become his spouse" has specifically provided for this situation. It should be noted that a sale of property between spouses even at fair market value would not prevent the attribution of the income derived from such property to the transferor.[40] The provision also applies to impute to the transferor the income derived from property substituted for property transferred by him.[41]

An interesting question arises as to whether the phrase "transferred property" contained in subsection 74(1) I.T.A. would include the transfer of a business to a spouse. The Act distinguishes between income derived from a business and income derived from a property.[42] Subsection 248(1) I.T.A. defines "property" to include real, personal, corporeal or incorporeal property and "business" to include a profession, calling, trade, manufacture or undertaking of any kind, including an adventure or concern in the nature of trade but not an office or employment. It appears that the definition of property is broad enough to encompass the transfer of a business or of income from a business. However, paragraph 7 of Interpretation Bulletin IT-136 recognizes this distinction and provides that subsection 74(1) does not apply to business income even if the business operates with some or all of the property obtained originally from the transferor.[43]

The wording of subsection 74(1) is also broad enough to encompass the situation where a spouse has saved up sufficient funds from housekeeping savings to make an investment. The income derived from such an investment would be attributed to the spouse who made all contributions to the housekeeping funds. It should be noted that such a transfer renders the transferor and transferee jointly liable for the resulting taxes, pursuant to section 160 I.T.A.

In the case of *Nailberg* v. *M.N.R.*[44] three individuals, each owning one third of the issued stock of each of four companies, attempted to avoid the attribution rules by each selling shares in the companies to the wives of the other shareholders. No money changed hands and the purchase price was satisfied by each wife issuing a demand non-interest bearing promissory note in favour of her husband. The Court, relying on the principles that it is the substance and not the form of the transaction which must be regarded and that a taxpayer

---

[40] Interpretation Bulletin IT-136, Para.5.

[41] *Bethune* v. *M.N.R.* 58 D.T.C. 1038; contra, *MacInnes* v. *M.N.R.* 54 D.T.C. 1031 (decided before substituted property was inserted in I.T.A., s.74(1)).

[42] I.T.A., ss.3, 9 and 12.

[43] *Robins* v. *M.N.R., supra,* f.n.38; *Wertman* v. *M.N.R.* 64 D.T.C. 5158.

[44] 69 D.T.C. 361.

cannot do indirectly what he is prohibited from doing directly, applied section 74.

Attribution of Capital Gains

Subsection 74(2) of the Act provides for the attribution to the transferor of taxable capital gains realized, or allowable capital losses incurred, as a result of a disposition of property which has been transferred pursuant to subsection 74(1).[45] Paragraph 14 of Interpretation Bulletin IT-136 provides that

> ... where a capital gain realized on disposition of transferred property by the transferee has been attributed to the transferor and a substituted property has been acquired by the transferee, the funds representing the portion of the capital gain which accrued after the property was transferred to the transferee are not considered as part of the substituted property.

For example, assume that a wife transfers shares to her husband having a cost to her of $10,000 and a fair market value of $20,000. Subsection 73(1) provides that upon a transfer of capital property to a spouse, there will be a deferral of capital gains and the transferee acquires the property at the same cost base as the transferor. Her husband later disposes of the property for $40,000 and the capital gain of $30,000 is attributed to his wife. If more shares are acquired by the husband at a cost of $40,000, only one half of any income or capital gain realized from the substituted property will be attributed to the wife.

Spousal Employees

Subsections 74(3) and 6(8) I.T.A. are designed to prohibit a taxpayer from attempting to split his or her income by remunerating his or her spouse. Where a taxpayer is employed by his spouse who is carrying on a business as a sole proprietor, no deduction may be made for salary paid to the employee and no amount may be included in the income of the employer. Unfortunately, no exception is made for *bona fide* employment and these provisions will apply notwithstanding the fact that the spouse is receiving remuneration commensurate with his experience and efforts. However, as a corporation is regarded as a distinct entity for corporate and fiscal purposes,[46]

---

[45] Until the recent amendment to I.T.A., s.74, the transferor was taxed on the income or capital gains derived from transferred property but was prohibited from claiming resulting capital or non-capital losses. *E.g., Martens* v. *M.N.R.* 64 D.T.C. 191; *Stratton* v. *M.N.R.* 66 D.T.C. 5422.

[46] *E.g., Saloman* v. *Saloman* [1898] A.C. 22; *Sazio* v. *M.N.R.* 69 D.T.C. 5001.

a taxpayer may be employed by a corporation controlled by his spouse without triggering the application of subsection 74(3) I.T.A. Only that portion of the salary paid by the corporation to the spouse which is reasonable in the circumstances will be deductible by the corporation.[47]

It is becoming increasingly popular for artists, athletes, entertainers and businessmen to form personal service corporations. The corporation will be taxed at an effective annual rate of 25% [48] on its first $100,000 of active business income and funds may be diverted to a spouse by way of salary or dividend. Professionals may similarly, to the extent permitted by the respective professional codes,[49] incorporate certain aspects of their professional practice into what is commonly known as a management corporation. The advantages are the same as those of the personal service corporation. Care must be exercised in the structuring of these corporations in order to avoid a challenge from the Department of National Revenue on the ground that the corporation is a sham and an attempt to artificially reduce income.[50] In *Murphy* v. *M.N.R.*, the only case which has been concerned with management corporations *vis-à-vis* spouses, a doctor paid a management fee to a company owned by his accountant in return for nursing services provided by his wife.[51] As Ruling Decision TR-14 indicates, the Department of National Revenue is prepared to accept professional management companies in which a spouse will be a controlling shareholder and a *bona fide* employee.

A formula is provided in subsection 74(4) I.T.A. to be used in computing the portion of the salary of a spouse employed by a partnership which may be attributed to the consort who is a partner. The amount attributed is proportionate to the partnership interest of the spouse. For example, in the case of *176* v. *M.N.R.*[52] a husband was employed by a partnership consisting of his wife and her two brothers. One third of the income received by him was deemed to be income of his wife.

Subsection 74(5) I.T.A. is designed to prohibit the spouses from splitting their income by entering into a partnership agreement. This subsection grants the Minister of National Revenue the dis-

[47] I.T.A., s.67; *Mulder Bros. Sand & Gravel Ltd.* v. *M.N.R.* 67 D.T.C. 475.

[48] I.T.A., s.125(1). The tax reduction will be very attractive where the individual is in the top marginal tax rate of approximately 63%.

[49] The practice of medicine may only be carried on by a natural person; see *Kindree* v. *M.N.R.* 64 D.T.C. 5248.

[50] I.T.A., s.245(1).

[51] 68 D.T.C. 5178.

[52] 54 D.T.C. 298.

cretionary power to attribute the income of a spouse derived from the partnership to the other spouse. The discretion accorded the Minister pursuant to subsection 74(5) is in respect of the entire income derived by a spouse. Accordingly, the Minister is not empowered to redistribute the profits between the husband and wife partners, but must either accept the division of profits or reassess the entire profit as the income of a sole spouse. Although this provision was not intended to apply to the case where husband and wife are *bona fide* partners, the Minister has nevertheless often exercised his discretion in this situation.[53] Despite this frequent exercise of ministerial power, there has been only one case where the facts revealed an apparent scheme for avoiding income tax.[54] Evidence is required by the taxpayer demonstrating that the Minister has wrongly or injudiciously exercised his discretion, and the absence of such evidence is sufficient ground for the court to conclude that the Minister's ruling should not be interfered with.[55] Where, however, the Minister has invoked his discretion without considering all the facts of the particular case, the court may refer the case back to the Minister for further consideration.[56]

Even where a *bona fide* partnership is found to exist between husband and wife, the allocation of profits between the spouses must be fair and reasonable in the circumstances.[57] Interpretation Bulletin IT-231, dated June 30, 1975, provides that subsection 74(5) I.T.A. is applicable where one of the spouses neither actively engages in nor invests his or her own proprety in the business of the partnership. This would apparently include the situation where a spouse borrows the money necessary to invest in the partnership and the loan is obtained on the strength of credit of the other spouse or the business of the partnership, and is repaid out of his or her share of the partnership profits. The Minister will consider the qualifications of a spouse and the amount of services rendered in determining whether the spouse is actively engaged in the business of a partnership. Notwithstanding the foregoing, where the spouses would otherwise be regarded as *bona fide* partners but the principal reason for their agreed apportionment of profits is for tax purposes, the court may reallocate the profits pursuant to subsection 103(1) I.T.A.

---

[53] *No. 246* v. *M.N.R.* 55 D.T.C. 188; *Margolis* v. *M.N.R.* 56 D.T.C. 426; *Harper* v. *M.N.R.* 57 D.T.C. 549; *Shack* v. *M.N.R.* 60 D.T.C. 187; *Greene* v. *M.N.R.* 60 D.T.C. 355; *No.733* v. *M.N.R.* 61 D.T.C. 392; *Funk* v. *M.N.R.* 61 D.T.C. 590; *Henri* v. *M.N.R.* 71 D.T.C. 162.

[54] *Shack* v. *M.N.R.*, *ibid.*

[55] *Henri* v. *M.N.R.*, *supra*, f.n.53.

[56] *Robins* v. *M.N.R.* 62 D.T.C. 331.

[57] I.T.A., s.103(1).

In light of the jurisprudence and the discretionary power of the Minister, a partnership is not the most appropriate vehicle for a husband and wife venture. Interpretation Bulletin IT-231, comforting as it may be, does not have the force of a legislative amendment to section 74 and cannot be relied on in court. It is evident that where, prior to marriage, a taxpayer's fiancée is employed by the taxpayer or a partnership in which the taxpayer is a member or the couple are in partnership, thought should be given to incorporation in order to avoid the undesirable tax consequences outlined above.

Superficial Losses

It would be attractive if a spouse could dispose of capital property in order to realize a capital loss and reacquire the same or identical property directly or have his or her spouse acquire it shortly thereafter. For example, assume it is December 1975 and a wife has realized a taxable capital gain of $10,000 in the year from the disposition of certain marketable securities. Her other holdings include shares of the capital stock of a public corporation, the value of which could increase substantially at any time but which is presently trading at a value substantially less than the cost to her. She would like to realize sufficient capital losses for the year to offset her capital gains, yet due to her faith in this corporation, she would not like to divest herself of the shares. The wife therefore sells the shares on the market at fair market value with a view to having her husband reacquire the property in a day's time at approximately the same value. This would enable her to "have her cake and eat it too". Unfortunately for her, subparagraph 40(1)(g)(i) and paragraph 54(i) of the Act operate to deem the superficial loss realized when an identical property is acquired within 30 days of the disposition by the taxpayer, his spouse or a controlled corporation, to be nil. The adjusted cost base of the substituted property will be increased by the amount of the superficial loss.[57a] It is therefore necessary for spouses to keep a close watch on each other's investments to avoid accidentally triggering a superficial loss. The simplest manner of avoiding this provision is to have one's children acquire the property and hold it for more than one month prior to its retransfer.

Indirect payments

Subsection 56(2) I.T.A. operates to prevent an indirect transfer of property or income to a spouse. Assume that a wife directed her

---

[57a] *Ibid.*, s.53(1)(f).

employer to pay a portion of her salary directly to her husband. Subsection 56(2) of the Act could be invoked in order to include the amount of the salary in the wife's income for the year.

Subsection 56(4) I.T.A. prevents the transfer or assignment of a right to income to a person with whom the transferor or assignor does not deal at arm's length, such as a spouse. For example, if a wife who owns an apartment building instructs the tenants to make the rental payments to her husband directly, subsection 56(4) I.T.A. would include the rental payments in her income. It is also possible that double taxation may result where this subsection is applicable, as it only provides for the inclusion of the income in the hands of the transferor and not for the corresponding reduction of the income of the transferee. It is thus conceivable that the tranferee will have included the amount received in income and that the transferor will be obligated to do the same when reassessed. Subsection 74(1) I.T.A., which deals with the attribution of income from a property transferred to a spouse, provides specifically that the income from such a property will only be taxed in the hands of the transferor.

Section 55 I.T.A. is a catchall provision designed to prevent any transaction which results in an artificial increase in the taxpayer's losses or an artificial decrease in the taxpayer's gains.

Methods of Income Splitting

Despite the mesh of provisions designed to prevent income splitting among spouses, there are still several means by which this can be done successfully. For example, rather than transferring funds to a spouse in order that a capital property may be acquired, it is preferable that the funds be loaned to the spouse. The attribution provisions will not apply even if a demand non-interest bearing note is received as consideration for the loan.[58] The loan may gradually be repaid with annual cash gifts from the transferor. The fact that interest is not charged on a loan to a spouse will not result in a gift tax assessment.[59]

As outlined above, a taxpayer may draw a salary from a corporation controlled by his or her spouse, and spouses may pool their assets by virtue of a *bona fide* partnership arrangement.

---

[58] *Supra*, f.n.38.

[59] Information Circular 73-18. If a demand note is not used, failure to charge interest may result in a gift tax assessment pursuant to the *Taxation Act*, *supra*, f.n.27, ss.899 and 899.1, and *The Gift Tax Act, 1972*, Ontario, *supra*, f.n.26, s.1(27).

It is also possible to make annual cash gifts to a spouse without incurring a gift tax liability. In Ontario, absolute and indefeasible gifts made by the donor to his spouse are exempt from gift tax pursuant to subsection 10(g) of *The Gift Tax Act, 1972.*[60] In Quebec, annual gifts of $5,000 may be given tax free to a spouse pursuant to subsection 919(g) of the *Taxation Act.*[61] The recent Quebec Budget has proposed that tax free gifts to spouses be increased to $15,000 a year.[61a] It must be borne in mind that although no gift tax may result on the transfer of funds to a spouse, the attribution rules of section 74 I.T.A. will continue to apply. However, because of the attribution rules it may be advisable for a spouse to borrow an amount equal to the gift from the bank and to use these funds to acquire the desired capital property. The bank loan can then be repaid with gift money. The capital property which was acquired would not then be viewed as property substituted for property transferred and no attribution would occur.

Section 73 I.T.A. enables a taxpayer to transfer capital property to an *inter vivos* trust in respect of which his or her spouse is the sole income and capital beneficiary during the lifetime of the transferee, or to the spouse directly, without incurring any income tax liability. In order for the "rollover" to apply, both the taxpayer and the spouse or spousal trust must be resident in Canada at the time of transfer of the property. The transferor is deemed to have disposed of the property for proceeds equal to the tax cost of the properties (*i.e.* the cost computed for tax purposes rather than the actual cost) and the transferee is deemed to acquire the property at a cost equal to the deemed proceeds. It should be noted that a clause enabling the trustees to encroach on the capital for the benefit of children or a clause which restricts the wife's rights upon remarriage would have the effect of "tainting" the trust and section 73 would be inapplicable. The income derived from the transferred property is attributed to the transferor by virtue of subsection 74(1) I.T.A.

Where both spouses are independently employed and enter into business dealings with one another, all transactions must take place at fair market value.[62]

In summary, it is apparent that great care must be exercised in structuring any transfer of property or funds between spouses in

---

[60] *Supra*, f.n.26.

[61] *Supra*, f.n.27.

[61a] Budget Speech by the Minister of Finance on April 17, 1975, to take effect from January 1, 1975; *Journal des Débats*, Assemblée Nationale, 17 avril, 1975, vol.16, no.13, 368.

[62] I.T.A., s.69; *Edward* v. *M.N.R.* 69 D.T.C. 738.

order that no income or gift tax liability arise as a result of such a transfer.

Death of a Spouse

Upon the death of a spouse, the aggregate value of the estate of the spouse must be computed for provincial succession duty purposes. The share of the surviving spouse in the community property or acquests will not be included in the estate of the deceased. Moreover, upon death there is a deemed realization of all of the capital property of the deceased pursuant to subsection 70(5) I.T.A., resulting in recapture of capital cost allowance and capital gains, unless the property is bequeathed directly to a spouse or spousal trust. This is in reality only a deferral of income tax as the recapture and capital gains tax will be triggered on the death of the second spouse.

In Ontario, no succession duty arises on property bequeathed to a spouse.[63] In Quebec, estates having an aggregate value of up to $150,000 are exempt from succession duty.[64] In order that no Quebec succession duties arise, the *situs* of the assets of the deceased must be located outside of Quebec at the time of death and the assets must be bequeathed to a non-resident of the Province so that there is no transmission of property in Quebec on death.[65] For example, term deposits are situate at the bank branch where the money is on deposit. It is not very difficult to instruct the bank, within a short time prior to the death of the spouse, to transfer the account to a branch in a non-succession duty province. The funds may then be bequeathed to an *inter vivos* spousal trust set up in such province. Similar steps may be taken with respect to jewelry, insurance policies, bonds, debentures, shares (of corporations having share-transfer offices outside Quebec) and promissory notes.

Where a spouse is desirous of obtaining a life insurance policy on his or her life and having the other spouse as a beneficiary, the premiums should be borne by the beneficiary in order to avoid succession duty liability on death.[66] If the beneficiary does not have sufficient income to pay the annual premiums, the insured spouse could provide the beneficiary with funds through an annual gifting

[63] *The Succession Duty Act*, R.S.O. 1970, c.449, ss.7(2) and 7(11)(d).
[64] *Succession Duties Act*, R.S.Q. 1964, c.70, s.11(1).
[65] *Ibid.*, ss.4 and 6.
[66] *Ibid.*, s.26; *The Succession Duty Act*, *supra*, f.n.63, s.1 (r)(v).

program. However, the exchange of cheques should not be simultaneous nor should the amounts correspond exactly.[67]

Both the Quebec and Ontario succession duty Acts contain provisions which include gifts made during the five years prior to the death of the deceased in the aggregate value of the estate.[68] Both Acts provide that the succession duty otherwise payable shall be reduced by the amount of gift tax previously paid.[69]

Where the deceased has capital property, the deemed disposition of which would result in substantial recapture and capital gains liability, provision should be made in his or her will to bequeath this property either directly to his spouse or to a spousal trust as is contemplated by subsection 70(6) I.T.A.[70] Where the property is bequeathed directly to the spouse or a spousal trust, a rollover is effected and the spouse or spousal trust acquires the properties transferred at the same tax cost as the deceased and no tax liability arises. It should be noted that the property must be vested indefeasibly in the trust, with the surviving spouse as sole income and capital beneficiary during his or her lifetime. A bequest to the trust made conditional upon the spouse not remarrying will have the effect of tainting the trust and subsection 70(6) I.T.A. will be applicable.[71] A possible modification of this clause which will not have the effect of tainting the trust is to provide that the surviving spouse will continue to receive all of the income of the trust until his or her death but will cease to have any right to the capital of the trust at the time of his or her remarriage. The capital of the trust will be

---

[67] The cases of *M.N.R.* v. *Cox Estate* 71 D.T.C. 5150 and *Estate H.B.L. Wittal* v. *Minister of Finance of B.C.* 75 D.T.C. 401 held that an insured taxpayer must not sell his or her life insurance policy to his or her spouse in consideration for funds provided by the insured taxpayer, in order to avoid the succession duties arising on the death of the insured. It is submitted however, that the initial undertaking of the beneficiary in paying the annual premiums on the life insurance policy in respect of which his or her spouse is the insured, even with funds provided *by* the insured, would be permissible and would avoid succession duty liability for the proceeds from such a policy.

[68] *Succession Duties Act, supra,* f.n.64, s.22(1); *The Succession Duty Act, supra,* f.n.63, s.5(1)(g).

[69] *Succession Duties Act, ibid.,* s.22(a); *The Succession Duty Act, ibid.,* s.9.

[70] Where it is anticipated that the capital properties will appreciate following the death of the first spouse, thought should be given to bequeathing the properties directly to the children or to a non-spousal trust in respect of which the spouse and children are beneficiaries. There will be an immediate capital gain and/or recapture which will be less than that which would be realized on the death of the second spouse if a spousal trust was utilized.

[71] *Dontigny* v. *M.N.R.* 73 D.T.C. 5398.

allowed to accumulate and will not be used by anyone prior to the death of the surviving spouse.

Where a testator has failed to bequeath capital property solely to his spouse or a spousal trust, and substantial recapture and capital gains liability will result pursuant to subsection 70(5) I.T.A., it may still be possible for the spousal trust to qualify for the rollover provided in subsection 70(6). Subsection 70(6.1) of the Act provides that a trust shall be considered to be created by a taxpayer's will if the trust is created by a disclaimer by a beneficiary under the taxpayer's will. In order for a disclaimer not to amount to a gift or disposition in favour of another beneficiary, such as the spouse, the disclaimer must be worded in general terms and not be made in favour of specific beneficiaries.[72]

Where a taxpayer ceases to carry on a business, subsection 24(1) I.T.A. permits the deduction for tax purposes of the balance of the expenditures made in acquiring cumulative eligible capital which is comprised of certain intangibles such as goodwill, patents, and trademarks. However, when the business is subsequently carried on by a spouse (as on the death of a spouse) no deduction is permitted; instead, the balance of the eligible capital account is transferred to the spouse carrying on the business.[73]

Where it is anticipated that the deceased will have substantial installments owing to him for services rendered or property sold prior to his or her death, a specific bequest should be made to the spouse or the spousal trust of the right to receive these amounts in order that the beneficiary may elect pursuant to subsection 72(2) to continue to take the various reserves allowed by the Act (and thus only pay tax on amounts actually received).

If the deceased spouse has a Registered Retirement Savings Plan, provision should be made to transfer the refund of these premiums to the surviving spouse in order that he or she may be entitled to defer

---

[72] No gift or assignment; *Smith Estate* v. *M.N.R.* 58 D.T.C. 1015; *Herman* v. *M.N.R.* 61 D.T.C. 700; contra, *Plaxton* v. *M.N.R.* 60 D.T.C. 38; *Bulman* v. *M.N.R.* 62 D.T.C. 593.

[73] I.T.A., ss.24(2) and 70(5.1). An interesting question is whether the spouse will be considered to have carried on the business throughout the period commencing January 1, 1972 for the purposes of I.T.A.R. 21(1) which sets out a formula by which a portion of goodwill proceeds are taxed where a sale occurs. It is the writer's opinion that the wording of I.T.A., s.24(2) is not specific enough for the spouse to be deemed to have carried on the business from January 1, 1972. Consequently, upon the sale of the goodwill of the business, one half of the proceeds from the sale will be included in the income of the spouse.

payment of tax on the amount transferred. This is effected by claiming a deduction pursuant to subsection 60(j) I.T.A. and either purchasing an income averaging annuity as allowed by paragraph 61(2)(d) I.T.A. or transferring the funds into a registered retirement savings plan under which the surviving spouse is an annuitant, pursuant to subsection 60(l) I.T.A.[74]

Dissolution of Marriage: Separation and Divorce

Upon a separation or divorce, the *Divorce Act*[75] provides that interim[76] and permanent[77] corollary relief may be granted. Fiscal implications should be considered by both spouses prior to entering into a property settlement.

In order to qualify alimony as deductible to the payer and taxable to the payee, the following criteria must be met:

(i) the amount must be paid pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement;

(ii) the amount must be payable on a periodic basis;

(iii) the amount must be paid for the maintenance of the recipient, the children of the marriage or both the recipient and the children of the marriage; and

(iv) the recipient must be living apart from the spouse or former spouse making the payments, and be separated pursuant to a divorce, judicial separation or written separation agreement.[78]

Almost identical criteria must be satisfied in order for maintenance payments to be deductible by the payer and be taxable to the payee.[79] Maintenance payments must be made pursuant to a court order, but the separation need not be pursuant to a written separation agreement, judicial separation or divorce.

There is no doubt that the maintenance provisions encompass all court orders made pursuant to the *Divorce Act* and pertaining to interim or permanent corollary relief. An interesting question is whether payments made following a decree of nullity will qualify

---

[74] Interpretation Bulletin IT-240 published August 11, 1975.

[75] R.S.C. 1970, c.D-8.

[76] *Ibid.*, s.10.

[77] *Ibid.*, s.11.

[78] I.T.A., ss.56(1)(b) and 60(b).

[79] *Ibid.*, ss.56(1)(c) and 60(c).

as deductible maintenance payments. If the marriage is void *ab initio*, the marriage is regarded as never having taken place. As the parties never were "spouses", it is doubted that maintenance payments would be deductible.

Written Agreement

The agreement must be written.[80] The amounts paid prior to a written agreement are not deductible to the payer nor must they be included in the income of the payee;[81] nor are payments made pursuant to an agreement in anticipation of the dissolution of the marriage contemplated in section 56 I.T.A.[82] An undated and unsigned document does not constitute an acceptable agreement within the meaning of section 56;[83] furthermore, letters evidencing negotiations between a spouse and the other spouse's attorney do not constitute a written separation agreement.[84]

Periodic Basis

It is settled law that a lump sum settlement is neither deductible to the payer nor taxable to the payee.[85] Interpretation Bulletin IT-118 defines periodic payments to mean "payments which are made periodically, recurring at fixed times, not at variable periods, not in the exercise of the discretion of one or more individuals, but from some antecedent obligation". A distinction must be made between a lump sum settlement payable in installments and regular maintenance payments. Only the latter will be deductible to the payer and taxable to the payee. The specific wording in the order or agreement dictates whether such payments can properly be considered as "periodic" or simply as installments of a lump sum settlement. Regular payments will be deductible where they are made over an extended period and are stated to be for the purpose of the support and maintenance of the spouse and/or children.[86] Where a separation agreement and/or court order is retroactive in wording and effect and provides for payments on a periodic basis, it has been held that the lump sum payment of the arrears is fully deductible to the payer and must

---

[80] *Haigh* v. *M.N.R.* 71 D.T.C. 308.
[81] *Pezet* v. *M.N.R.* 74 D.T.C. 1246.
[82] *Cooey* v. *M.N.R.* 52 D.T.C. 132; *Ellis* v. *M.N.R.* 55 D.T.C. 393.
[83] *Reid* v. *M.N.R.* 72 D.T.C. 1540.
[84] *Griep* v. *M.N.R.* 70 D.T.C. 1661.
[85] *Veliotis* v. *M.N.R.* 74 D.T.C. 6190; *McWhirter* v. *M.N.R.* 68 D.T.C. 197; *Stewart* v. *M.N.R.* 71 D.T.C. 326; *Wilton* v. *M.N.R.* 71 D.T.C. 87.
[86] Interpretation Bulletin IT-118, Para.8.

be included in the income of the payee.[87] If property is transferred pursuant to a separation agreement, the attribution rules of subsection 74(1) I.T.A. will apply until the decree absolute.

Whether a lump sum payment or periodic payments will be more attractive to the payer or the payee from a tax point of view will depend upon the amounts involved in each case. The payee may initially find a lump sum payment more attractive as it will be received on a tax free basis and removes any worry about default in periodic payments. However, the payee should first consider whether the investment of the lump sum could yield an annual after-tax profit of at least the same amount which would be realized in each year from the receipt of periodic payments. The payer, on the other hand, should compute whether a reinvestment of the lump sum payment would yield an annual amount greater than the periodic payment otherwise payable.

Maintenance for the Spouse and/or Children

Payments made for the support of the spouse and children will qualify for the deduction. However, payments made in settlement of the spouse's property interests are regarded as capital and not as maintenance payments.

It has been held that mortgage payments on a jointly owned house do not constitute payments for the maintenance of a spouse or children and are therefore not deductible by the payer.[88] The courts have held that payment for music lessons,[89] car and legal expenses,[90] and education and insurance[91] are not periodic payments made for the maintenance of a spouse and are therefore not deductible.

An interesting question is whether payment of premiums for the life insurance policy on the life of the payer may be deductible as periodic payments made for the maintenance of the spouse, where the spouse is a beneficiary under the policy. In order to ensure that the payments will be deductible, where an insurance policy forms part of the separation agreement, the amount of the periodic payment should be increased to incorporate the cost of the premiums and should be paid directly to the spouse.

---

[87] *Flett* v. *M.N.R.* 65 D.T.C. 761.

[88] *Cussion* v. *M.N.R.* 66 D.T.C. 297; *Houg* v. *M.N.R.* 71 D.T.C. 564; *Grace* v. *M.N.R.* 74 D.T.C. 1248.

[89] *Taylor* v. *M.N.R.* 71 D.T.C. 10.

[90] *Stafford* v. *M.N.R.* 71 D.T.C. 247.

[91] *Golightly* v. *M.N.R.* 70 D.T.C. 1120.

Payments Made Directly to the Spouse

A strict reading of paragraphs 56(1)(b) and (c) and subsections 60(b) and (c) I.T.A. and a review of the earlier jurisprudence would imply that payments, to be deductible by the payer and taxable to the payee, must be made directly to the payee.[92] However, the recent addition of section 60.1 I.T.A. resolves this issue. This provision provides that periodic payments of amounts to "or for the benefit" of the spouse, former spouse or children of the marriage are deemed to have been paid to, and received by, the spouse or former spouse at the time the payment was made.This amendment is complementary to Interpretation Bulletin IT-118 and the recent jurisprudence deciding that payments made directly to third parties with the concurrence of the payee constituted payments to the payee.[93]

Living Apart from the Spouse

It is possible for spouses to be living separate and apart while residing in the same household.[94] However, when the spouses are living physically apart and co-habitation is resumed within a year, no part of the alimony payments will be deductible to the payer.[95]

Other Tax Consequences of Dissolution of Marriage

A spouse making deductible alimony or maintenance payments may no longer claim a deduction for his spouse and children.[96]

In virtue of the interpretation of the phrase "ordinarily inhabited" provided in paragraph 6 of Interpretation Bulletin IT-120, it appears that following separation and until decree absolute, the payer may continue to designate the home occupied by a spouse and children as his or her principal residence, notwithstanding the fact that the payer no longer resides there. It is thus possible for the payer to dispose of the principal residence, subsequent to the separation, without incurring any tax liability.

The provisions of the *Income Tax Act* and the gift tax and succession duty legislation pertaining to spouses do not provide any

---

[92] *Taylor* v. *M.N.R.* 71 D.T.C. 10; *Roper* v. *M.N.R.* 71 D.T.C. 442; *Sproston* v. *M.N.R.* 70 D.T.C. 6101.

[93] *Raymond* v. *M.N.R.* 60 D.T.C. 469; *Brown* v. *M.N.R.* 71 D.T.C. 77; *Belanger* v. *M.NR.* 74 D.T.C. 1130; *Berlin* v. *M.N.R.* 74 D.T.C. 1185; *M.N.R.* v. *Hastie* 74 D.T.C. 6114.

[94] *Boos* v. *M.N.R.* 61 D.T.C. 520.

[95] *Wallace* v. *M.N.R.* 63 D.T.C. 128; *Griffith* v. *M.N.R.* 66 D.T.C. 448.

[96] I.T.A., s.109(4).

relief for transfer of property made subsequent to the divorce. However, the former spouses will be dealing at arm's length and need not concern themselves with the indirect transfer and anti-avoidance provisions outlined above.

The timing of property transfers may have some interesting tax consequences. If a spouse transfers capital property to his or her spouse prior to decree absolute, no capital gain or recapture is realized as a result of the transfer by virtue of subsection 73(1) I.T.A. Any income or capital gain derived from the property transferred prior to decree absolute will be attributed to the transferor. Any income or capital gain realized subsequent to decree absolute will be taxable to the transferee. The timing of property transfers is important in ensuring that any income or capital gains realized are taxed in the hands of the spouse in the lower marginal tax bracket and that any capital or non-capital loss is incurred by the spouse in the higher tax bracket.

Miscellaneous Provisions

If the spouses own both a country and a city home, each spouse should, at the time of disposition, designate a separate home as his or her principal residence in order that all proceeds be received tax free.[97]

Depending upon whether one or both of the spouses owns a home in a given year, or has ever previously been a beneficiary under a Registered Home Ownership Savings Plan, a maximum of ten annual deductible contributions of $1,000 may be made to one or two such Plans.[98]

A spouse may, to the extent that he or she has not made the maximum annual deductible contribution to a Registered Retirement Savings Plan, make annual deductible payments to the Registered Retirement Savings Plan of his or her spouse.[99]

Where a taxpayer would otherwise be able to claim the full deduction for his or her spouse pursuant to paragraph 109(1)(a) I.T.A. were it not for the taxable dividends received by the spouse, the taxpayer may elect to personally pay tax on the dividends received by the spouse.[100]

---

[97] *Ibid.*, ss.54(g) and 40(2)(b).
[98] *Ibid.*, s.146.2.
[99] *Ibid.*, s.146(5.1).
[100] *Ibid.*, s.82(3).

Each spouse may now claim an annual deduction of $1,000 investment income pursuant to section 110.1 of the Act.

If each spouse controls a corporation and upon marriage, one spouse acquires a 10% interest or more in the other's corporation, the corporations will be deemed associated and the small business deduction will have to be prorated.[101]

Conclusion

It is apparent from the foregoing that in addition to the many serious consequences one normally considers in contemplating marriage, there may be significant fiscal advantages or disadvantages to be considered before taking the step. Often the tax ramifications may be turned to advantage if one is aware of the options and their effect on tax liability. As has been seen, the legislators have assiduously foreseen and prescribed the tax consequences of practically every aspect of the matrimonial partnership, from gifts in a marriage contract to the disposition of property upon the surviving spouse's death.

---

[101] *Ibid.*, s.256(1)(d).