

# Marmer Penner Inc. Newsletter

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## Real Estate Inventory

There are a number of provisions in *The Income Tax Act* (“the Act”) that permit a tax-free or tax-deferred transfer of property between non-arm’s length parties. One of these provisions is subsection 73(1) of the Act with which most of us are familiar because it permits the transfer of capital property at cost on the breakdown of marriage. Another such provision is subsection 85(1). Under subsection 85(1), eligible property may be transferred tax-free into a corporation in exchange for consideration that usually includes shares of the new corporation. However, not all property is eligible for such treatment. The Department of Finance is concerned that inventory can be “sold” tax-free using this rollover provision. In a recent case, a real estate developer was caught transferring real estate inventory via a subsection 85(1) rollover. The rollover was disallowed and the transfer was deemed to occur at fair market value thus triggering taxable business income.

Most family law practitioners are aware that subsection 85(1) rollovers are occasionally used in butterfly transactions when corporate assets are divided into separate corporations held by the separated spouses. It is important to remember that this remedy may not be available to real estate developers or home builders, where the most significant assets may be real estate held as inventory.

The more common transfer mechanism for family law practitioners is the rollover provision allowed under subsection 73(1). However, like

subsection 85(1), this subsection does not allow for the transfer of real estate inventory because real estate inventory does not qualify as capital property. There are creative ways around this restriction. Tax planners have rolled real estate held as inventory into a partnership, as that is permitted. The partnership interest is itself capital property so the partnership interest can then be transferred under either subsection 73(1) or subsection 85(1).

This goes to show that while the rules are complex, proper tax planning can in many cases still achieve the sought after results.

This newsletter is intended to highlight areas where professional assistance may be required. It is not intended to substitute for proper professional planning. The professionals at Marmer Penner Inc. will be pleased to assist you with any matters that arise. Please feel free to visit our website at [www.marmerpenner.com](http://www.marmerpenner.com).