



Topic: "RRSP Tax Discount"
Opinion By: Justice Doug Campbell
Date: February 20, 2015, 2015
See Also: Issue #'s 4, 5, 5A, & 6: Re Marginal Rates Matters

This memorandum was prepared by Justice Doug Campbell in response to the request of ACJ O'Neil as outlined in his Notice to the Bar dated November 6, 2014. It represents Justice Campbell's personal viewpoint and may or may not require some adjustment to conform to the preferences or practices of individual Judges. That will be left up to the Judge and the lawyer, if any, involved. Readers who make use of the within material do so therefore at their own discretion and subject to their own judgment.

- Formulation: 1)** When RRSP's, being taxable Assets, are to be divided "at source" between the spouses, the Income tax on them can be ignored on the theory that both spouses will eventually pay tax when they are liquidated (albeit at potentially, but unknown, different rates).
- 2)** But when RRSP's are to be assigned unequally in specie, their value must be discounted for respective Income Tax liability because it is only the "after tax" value that makes for an equal division.
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Discussion:

My recollection is that it was probably the case of Devenney v. Devenney (1985) 67 NSR 2d 144 (NSSC) that finally put to rest the debate whether assets which will eventually attract tax must be discounted for tax (in that case an RRSP) when dividing Matrimonial Assets. Justice Denny Burchell decided that a discount was appropriate.

Looking back at that decision after these few decades, it is difficult to understand how the concept of a tax discount would be contested. To decline to discount for tax is to compare "apples" to "oranges" (tax-free assets to taxable assets).

How could it possibly be said that a dollar of tax-free assets is equalized between spouses when it is offset by a dollar of taxable assets? Surely, there can be no doubt that assets that either immediately or eventually attract tax are less valuable than assets that will never attract tax.

In Devenney, the Judge was persuaded that a 35% discount should apply not only to the facts of that case but implicitly to Matrimonial Property Act division of assets generally.

I suspect that it was largely because of this case that it became a routine practice to discount RRSP's and other taxable assets and that 30% to 35% became a frequent rule of thumb for the amount of the discount.

There is something to be said for the simplicity of a "rule of thumb". Otherwise, the question of what percentage should govern generates a complicated and speculative inquiry as to the likely Marginal Rates that will apply to the RRSP liquidation in the future.

That inquiry, studiously followed, involves an assessment of the probable Marginal rate or rates at which the RRSP liquidation will attract tax whenever the owner can reasonably be expected to liquidate them. I invite the reader to review Family Law Practice Tips: Issues 4, 5, 5A and 6, which attempt to promote an understanding of the concept of "Marginal Rates".

Admittedly, there will be many situations, such as those of a young couple, in which the prediction of likely Marginal Rates is far too speculative to be reliable. There, the Rule of Thumb should apply and 35% is not far from reality in many cases.

There are other rare situations, however, when the task is less daunting; such as when the RRSP owner faces a predictable income at liquidation date, often in the not too distant future.

In fact, it can even be possible that the discount for the spouses' **respective** RRSP's should be different because they respectively face reliably predictable Marginal rates that are different. That approach is rarely used and, except when the evidence is overwhelmingly and reliably supportive of a predictable liquidation date income of one or both of the spouses, I support the Devenney approach which is a "Rule of Thumb" discount for taxable assets, such as RRSP's.

Given the Marginal Rate Chart and the current standard of incomes of most Canadians, 35% equates roughly to the Marginal Rate that would apply to many retiring citizens.

Looking at the Marginal Rate Chart, it can be seen that 35% is a rate that is just a bit high for a taxpayer who liquidates an RRSP against other income at or above \$29,590 such that the then total Income will be below \$59,180. Thus 35% can be a reasonable "Rule of Thumb" rate.

However, consider the low income litigant (such as a Legal Aid qualifier) who owns a modest RRSP and who can reliably expect to "retire" on a minimal income such as CPP and/or Old Age Security. That person will face a Marginal Rate at the lowest level of 25%. It would be a substantial injustice to the opposite spouse to discount that person's RRSP's at 35% unless the RRSP withdrawal is so substantial that it would raise that basic income to the bracket that attracts that 35% level of tax. This merely makes the point that the "Rule of Thumb" rate of 35% should not be automatic.

Dare I say it again: An understanding of "Marginal Tax Rates" is important to the practice of Family Law. Resort to those very good internet sites is only as good as one's understanding of the concept. The "Click" is no substitute for the knowledge.

The 2015 Combined Federal/Provincial Marginal Tax rates Chart is reproduced below for quick reference. Note that it may change as a result of the Federal or Provincial Budgets in the spring of 2015.

Nova Scotia 2015 Combined Federal / Provincial Marginal Tax Rates

Prepared November 28, 2014

by Doug Campbell

(Using 2015 Estimates of brackets and rates)

Taxable Income Above	Basic Tax	Tax on Next	Marginal Rate
11,327	0	18,263	25.00%
29,590	4,066	29,590	33.50%
59,180	13,979	30,221	38.67%
89,401	25,665	49,185	43.10%
138,586	46,864	11,414	46.50%
150,000	52,172	remainder	50.00%