

ABOLITION OF GIFT DUTY

Introduction

Gift duty has been abolished effective 1 October 2011. Gift duty was a tax, which was previously applied to gifts made by individuals of more than \$27,000 in any one year.

People who have existing Trusts and gifting programmes will need to consider the implications of the abolition of gift duty. Others who may have previously considered transferring assets to others within their family or to a Family Trust may also wish to consider whether the abolition of gift duty provides an opportunity to put those plans into action.

Many people who have existing gifting programmes have assumed that they should simply gift off the whole remaining balance owing to them by their Family Trust on or soon after 1 October 2011. However, there are a number of reasons why the forgiveness of the entire debt or the gift of a valuable asset to an existing or new Trust or family recipient may not be desirable. Gifting valuable property or forgiving a loan may have unintended consequences. Some of those consequences are set out in this article.

Other Taxes

Although gift duty has been abolished, no other legislation has at this time been amended. The various provisions of the Income Tax legislation and Goods and Services Tax legislation remain in place. The Income Tax Rules mean that you will need to have natural love and affection (which is a term defined in the Act) for the recipient of a gift otherwise income tax is payable by the recipient. Gifts to family members and Family Trusts are not likely to cause problems. However gifts to a company may create an issue. There are also other potential taxation consequences if the company is a "look through" company or a limited partnership is involved.

Gifting of assets which are in the tax base such as farms or commercial properties may trigger liabilities such as tax on depreciation recovered, income tax, and GST.

Solvency

There are rules to protect current and future creditors in circumstances where a gift is made.

Creditors include current creditors and contingent future creditors (such as creditors under a personal guarantee that you have given, or spouses or partners who may make a claim in the future). If you make a gift when you are insolvent, or you become insolvent as a result of making a gift, the gift could be set aside by your creditors. There are provisions under the Insolvency Act 2006 which provide that gifts made by a bankrupt person within 2 years immediately before the bankruptcy are presumed to be void against the Official Assignee and can be clawed back. A gift made between 2 and 5 years prior to bankruptcy is potentially void. The recipient of the gift has to prove that the bankrupt person was solvent at the time of the making of the gift. Because of these rules, it may be desirable for the person making the gift to complete a solvency certificate at the time of making the gift so any future issue can be dealt with.

Under the Property Law Act 2007 dispositions of property (including gifts) can be set aside if those dispositions were made with the intention to defeat creditors. The Supreme Court has recently held that intention to defraud creditors includes a situation where the person disposing of the property consciously put some of his or her property beyond the reach of creditors, including contingent creditors such as those under personal guarantees, even though they did not intend any prejudice to those creditors.

In either situation, if the gift is set aside, the recipient of the gift will have to return the gift to the Official Assignee or other creditor. If the recipient themselves has disposed of the property comprised in the gift (for example, sold the property and spent the money) then they may have a personal liability to the Official Assignee or other creditor to account for the amount of the gift.

Eligibility for Benefits

As earlier indicated, other legislation has not been changed. The rules around eligibility for asset tested state benefits remain the same. If you have made a single large gift to a Trust or other family member during your lifetime, you will almost certainly be in breach of the rules around eligibility for asset tested benefits such as rest home subsidies. In those circumstances it may be better to continue with a gradual gifting process although even then there can be no certainty that you will remain eligible for those asset tested benefits.

Relationship Property Issues

Gifts can be challenged if they are made with the intention or effect of defeating a claim by a relationship partner. If you are in a relationship and are considering making a gift to a Family Trust which is not controlled by both partners, it may be desirable to consider entering into a Contracting Out Agreement under the Property (Relationships) Act 1976 to ensure that if your relationship ends at some future point, there is no risk of your partner attempting to claw back the gift made to the Trust.

Gifts made by one partner to the other are generally the recipient partner's separate property so are not able to be clawed back in the event that the relationship ends. It may be more desirable to make a loan to your partner rather than an outright gift, particularly if a significant sum or asset is involved.

Access to Assets/Estate Planning

When assets are gifted, they are no longer your property. Should your circumstances change and you need access to those assets, there is no way of forcing the recipient to give you that access in circumstances where you have gifted the whole asset rather than leaving a loan outstanding in relation to the asset.

Leaving a loan outstanding may also be useful from the point of view of wider estate planning where for example you might want one of your children to have the benefit of the asset during your lifetime (in a farming situation for example) but there is an expectation that some of the value of the asset (the outstanding loan) will be available for your other children upon your death.

Other Issues

Considering whether or not to gift remaining loan balances or other assets into a Trust or other entity is a good opportunity to consider whether other aspects of your personal affairs are in order such as your Wills, Enduring Powers of Attorney, any Statement of Wishes in relation to your Trust, and whether the current Trustees remain appropriate.

We would suggest that it might be an opportune time to consider various issues around your personal affairs. Nominated are senior staff members in each of our offices to co-ordinate a review process. If you would like to schedule a review, please contact:

In Dunedin:



Stephanie Pettigrew

Phone: 03 477 3973

Email: stephanie.pettigrew@andersonlloyd.co.nz

In Christchurch:



Josie Simpson

Phone: 03 379 0037

Email: josie.simpson@andersonlloyd.co.nz

In Queenstown:



Stephen Brent

Phone: 03 450 0700

Email: stephen.brent@andersonlloyd.co.nz

Alternatively, you can contact the Anderson Lloyd partner who normally carries out your work for further advice and assistance.