

## MEMO ABOUT GIFTING

Current as at October 2011

Gift duty has been abolished with effect from 1 October 2011. Before then the Estate and Gift Duties Act only allowed gifts of up to \$27,000 to be made in any 12 month period without duty being payable on that gift.

This means that after 1 October 2011 a person may gift any amount in reduction of debt or transfer of an asset without New Zealand gift duty being applied to that gift.

However, before making any such gift, you need to consider whether or not you should make such a gift. You need to understand why we had gift duty in the first place, and how the previous gifting regime worked.

### *Former estate (or death) duty*

Prior to 17 December 1992, individuals who had over \$450,000 in assets at their death were taxed 40% of the value of estate assets over that threshold. This provided a real incentive to reduce one's personal estate below that threshold during one's life.

### *Gift duty*

As noted above, before 1 October 2011 gifts of up to \$27,000 could be made in any 12 month period without duty being payable on that gift. With potential death duty savings of \$10,800 on each gift of \$27,000, that provided an incentive to establish a gifting programme of \$27,000 a year. For a husband and wife that enabled a combined asset reduction of \$54,000 each 12 month period.

When death duties were abolished in 1992, there were residual concerns first, that a future government might re-introduce a similar duty or an inheritance tax, and secondly, about reducing a person's estate for rest home subsidy purposes. Faced with these concerns, and because the amount gifted each year was relatively small, many people carried on with their established gift reduction programmes.

### *Time for a re-think*

A gift is final. Once you, as donor, have given an asset or forgiven a debt you can't later seek to retrieve the asset or money gifted. Having made a gift to a trust, your status changes from being a creditor, to being one of a number of discretionary beneficiaries all of whom are owed duties by the trustees.

So long as a person is a creditor of a trust on which they have settled assets, they have rights against the trust as a creditor. As a creditor, they can require the trustees to repay all or part of the debt whether or not the trustees (and/or competing beneficiaries) think they should receive funds from the trust.

As a beneficiary of the trust, the trustees must consider any request for payment or distribution to any beneficiary, and must decide whether or not it is not appropriate to make the payment or distribution within the terms of the trust and trust law.

Now that gift duty has been abolished, before gifting the balance of any debt owed by the trustees of the family trusts they have established, it is sensible for people to review their particular situation, and to revisit their original reasons for establishing their respective gifting programmes.

Leaving part or all of the debt owing gives trustees further choices as to how they pay money to a creditor/beneficiary of a trust. For example, there may be tax advantages for payments to be made in reduction of debt owed instead of distributing from the income or capital of the trust.

There are still some good reasons why people may decide to make significant gifts including:

- To protect against perceived possible medium to long term risk of creditor attack. This needs careful consideration, we recommend that the person proposing to make the gift (the donor) first discuss the proposal with their lawyer and accountant before such action is taken particularly concerning any possible or potential claims by creditors.
- Where the donor is not in a relationship and caught by the Property (Relationships) Act, but may in the future enter into a relationship, it may be appropriate to establish a gifting programme to a trust.
- If a donor has concerns that, on their death, there could be a squabble over their estate, or there are circumstances where there might be a claim against their estate, the removal of gift duty offers an opportunity for making gifts of the donor's assets, including all debts owed to them by their trust so they die personally penniless. As the law presently stands, this is intended to avoid potential claims against personal assets under the Family Protection Act, the Testamentary Promises Act and the Property Relationships Act. In such circumstances the property gifted will be distributed by the trustees of the trust to the trust beneficiaries in accordance with any wishes contained in the donor's letter of guidance. Alternatively it may be appropriate for the donor to make the intended gift directly to the recipient they wish to benefit.
- Continuing gifting at up to \$27,000 per year by a single person or between spouses reduces their personal estate for the purposes of Government means testing for rest home care subsidy (with some exceptions).

The message to take from this change is **not** that "Gift duty has gone so I should gift whatever is still owing to me by the trust". **Rather**, there is an opportunity for people to carefully consider whether or not it is in their best interest to carry on, or commence reducing any debt owed to them personally to minimise their personal estate.

The information in this memo is of a general nature only and should not be acted on or relied on without first seeking professional advice.

We welcome any queries, our trust team's contact details are:

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