to gift or not to gift

update on the law on gifting

February 2012

On 1 October 2011 one of New Zealand's oldest taxes, gift duty, was abolished. Gift duty originally operated in conjunction with the estate duty regime to discourage people from avoiding tax by giving away their assets before they died. Estate duty was repealed in 1992, however gift duty remained as a means of controlling the transfer of assets into trusts.

Yet it became clear that gift duty was not an effective means of collecting revenue for the Government, nor did it prevent people from moving their assets into trust (even with the ongoing gifting related costs). It is viewed as positive then that it has now been abolished.

Despite the abolition of gift duty, there remain some important considerations to take into account before embarking on a major programme of gifting to a trust.

Reasons to gift

- **Creditor protection**
  Subject to certain statutory claw back periods, and assuming there is not an intention to prejudice creditors at the time the gift is made, gifting an asset into a trust may put that asset out of the reach of creditors.

- **Safeguard against relationship property claims**
  Previously, although transferring an asset into a trust may have safeguarded that asset from a future relationship property claim, the resulting debt back from the trust could still be attacked as relationship property. Now it is easier for an individual to safeguard his or her assets from possible future property relationship claims by being able to easily and quickly put those assets into a trust.

- **Safeguard against possible estate claims**
  Another possible benefit, in the eye of a will maker, in gifting an asset to a trust without a resulting debt back is that it makes it more difficult for disappointed beneficiaries under a will to establish a claim for the asset. The claim would need to be against the trustees of a trust rather than the executors of the estate.

- **Introduction of capital gains tax or other duty**
  The introduction of capital gains tax or re-introduction of gift duty, estate duty or another similar type of duty are further reasons for getting appreciating assets across to a trust.

- **Manage the transfer of wealth between generations of family**
  A trust survives you. Therefore the assets of a trust can continue to be held by that trust, managed and dealt with by the trustees in accordance with the terms of the trust, despite your death.

- **Tax benefits**
  Trustee income is taxed at a rate of 33% and beneficiary income is subject to tax as income in the hands of the beneficiary. Accordingly it is

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possible to take advantage of the marginal tax rates of beneficiaries by distributions.

Reasons not to gift

- **Loss of control**
  Depending on the makeup and governance of the trust, gifting an asset to the trust without any resulting debt back, may mean that you lose absolute control over that asset. That is, with a resulting debt back, you can retain certain rights and powers over the asset as a lender to the trust.

- **Residential care subsidy implications**
  The Ministry of Social Development will continue to look at gifts made in the last five years and beyond when assessing residential care subsidies. The rules currently only allow for gifts to be made of $6,000 per annum for the five years preceding the application, and gifts of $27,000 per annum for the years beyond the five years. If there is a one off gift, all but the allowable amounts mentioned above will be included in the entitlement calculation. There may also be benefits in the applicant maintaining joint ownership of the family home for the entitlement calculation, and so advice should be sought before any major gifts, especially the family home, to a trust, if a residential care subsidy may be required in the future.

- **Tax and other implications involving gifting of shares**
  Where the gift involves shares in a company, that company may lose the ability to carry losses and imputation credits forward. The transfer may also trigger a change of control under that company's contractual arrangements (for which consent is required).

Forgiveness of debt

If you have already put an asset in a trust and are undertaking a gifting programme, you may now wish to forgive by way of a gift, the resulting debt. However remember that this will constitute income in the hands of the creditor, unless the forgiveness is for the benefit of people that the creditor has "natural love and affection" for. Therefore if you are forgiving the debt of a trust you will need to ensure that you have natural love and affection for all the beneficiaries, or alternatively that the trustees of the trust do not make any distribution to a non-natural love and affection beneficiary, to prevent the forgiveness of debt being treated as income of the trust.

Summary

So the question remains, to gift or not to gift? The answer to this will depend on the close evaluation of the above considerations and on the gift makers personal circumstances.

Legal advice should therefore be obtained before making significant gifts in order to ensure that there are not any adverse consequences, and that the gift meets the objectives of the gift maker. Our team would be happy to assist with this if required.

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This paper gives a general overview of the topics covered and is not intended to be relied upon as legal advice

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