Gift duty repeal

Arguably the most significant law change this month is the repeal of gift duty. As many readers will have interests in family trusts it is essential that the changes are understood.

Previously you were able to make a gift of $27,000.00 each year. You were taxed on any money gifted over that figure. Those with family trusts will have been involved in 'gifting programmes' – each settlor (usually husband and wife) gifting $27,000.00 to the trust each year by forgiving debt. This was a slow process and took years to complete.

Now you can immediately forgive the entire balance of an outstanding debt to a trust and will not be taxed.

There are numerous reasons to forgive debts owed by a trust: creditor protection, government subsidies, relationship property protection, avoiding estate litigation, child support etc. I expect you have heard of all of these and more so I won't go into the details.

My concern however is that many people are failing to consider the problems that can occur. The following are examples:

- You will no longer be owed money! This means that if you suddenly need access to funds for personal reasons, you won't be able to call up the debt.

- You need to be solvent when you gift the debt. If you forgive the gift and have creditors (or potential creditors) the gifting can be unwound.

- If there are potential relationship property issues, it may be worth your time resolving these prior to forgiving the debt. Debts can be relationship property, meaning the debt can belong to both you and your spouse or partner. The Courts have the power to unwind the transaction if you separate, then split the proceeds between both parties. If this scares you consider getting a contracting out agreement (a 'pre-nup').

- If you are forgiving a significant debt to obtain a government subsidy (for example, a rest home subsidy) you may be deemed to have 'deprived' yourself of that asset. The gift you have forgiven will be included as an asset. These persons will be worse off than those without family trusts, because they will be unable to even obtain an interest free residential care loan (because the trust will own 'their' home).

- If the trust administration is not up to date when the gift is made the trust assets, and the trustees themselves, can be vulnerable to attack.

So what should you do? I can't answer that question for you. You will need to think seriously about whether to gift or not. If you have concerns it would be worth discussing your options with either your lawyer or your accountant – the cost of taking that advice will be a fraction of the cost if something goes wrong.

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