



Gift Planning in the “New Age”

New Tax Provisions generally
effective January 1, 2016

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Overview

- Miscellaneous Updates
- Flat Taxation of Testamentary Trusts
- New Graduated Rate Estate (“GRE”)
- Gifts Arising as a Consequence of Death
- Gifts Made by a GRE
- Life Interest / Charitable Remainder Trusts
- Examples for illustration

Miscellaneous Updates

- First-Time Donor's Super Credit (2013)
 - Super Credit for first time donors
 - Temporary, non-refundable federal tax credit
 - Can only be claimed once
 - Effectively adds 25% to the rates used in calculating the credit for monetary donations up to \$1,000
 - 2017 is the sunset year

Miscellaneous Updates

- Top Marginal Tax Rate – (applicable to gifts made after January 1, 2016)
 - 33% federal rate (17.4% in Manitoba) for income over \$200,000
 - Corresponding increase to tax credit rate for donations above \$200 to 33% to the extent that income is subject to the new top federal rate

Miscellaneous Updates

- Donations of Certified Cultural Property made after February 10, 2014
 - FMV deemed to be lesser of FMV and cost
 - Only applies to property acquired through a tax shelter gifting arrangements
- Donations of Ecologically Sensitive Land made after February 10, 2014
 - Carryforward extended from 5 to 10 years

Miscellaneous Updates

- Donation of Gifts of Proceeds from sale of Private Company Shares or Real Estate
 - Proposed in Budget 2015 that where proceeds donated within 30 days, disposition would be exempt from capital gains tax (i.e. like publicly-traded shares)
 - Budget 2016 announced Government would NOT proceed with this measure

Miscellaneous Updates

- Investments by Charities/RCAAs in Limited Partnerships
 - Previously prohibited for carrying on an unrelated business
 - After April 20, 2015, generally permitted if:
 - liability of the charity is limited under governing law
 - the charity (and related parties) hold 20% or less
 - the charity deals at arm's length with the general partners

Flat Tax on Testamentary Trusts

- Previously, testamentary trusts created under Wills used to split income because each had access to marginal tax rates
- Effective for 2016 and subsequent tax years, subject to tax at the highest marginal rate (like *inter vivos* trusts), except for:
 - Graduated Rate Estate (“GRE”)
 - Qualified Disability Trust (“QDT”)

New Graduated Rate Estate

- GRE definition:
 - Estate arising as a consequence of death
 - Must qualify as a “testamentary trust”
 - Must be designated the GRE in first T3 return
 - Must include the deceased’s social insurance number on each T3 return
 - Must only be one GRE for an individual
 - Ceases to be a GRE 36 months after death

Testamentary Trust

- Trust arising on and as a consequence of the death of an individual
- No property has been contributed to the trust otherwise than by an individual on or after the individual's death and as a consequence thereof

New Qualified Disability Trust

- QDT definition:
 - Estate arising as a consequence of death
 - Must jointly elect in its T3 with one or more beneficiaries (“EB(s)”) of the Estate to be a QDT
 - Each EB must be eligible for the DTC
 - Must include each EB’s social insurance number on the T3 return
 - Each EB may elect with only one QDT
 - QDT must be factually resident in Canada
 - QDT must not be liable for new “recovery tax”

QDT – “recovery tax”

- QDT will be subject to recovery tax in the year if:
 - Trust ceases during the year to have any EBs (including year of death of the EB)
 - Year is the taxation year deemed to have ended because the trust ceased to be resident in Canada
 - Trust distributes capital to a beneficiary which is not an EB in the year or in an earlier year

Flat Tax – Deemed Year Ends

- GREs may have non-calendar year ends
- Non-GREs must have calendar year ends
- Testamentary trusts with non-calendar year ends had a deemed year end on Dec 31, 2015, UNLESS trust is an estate on Dec 31, 2015 and will be a GRE for its 2016 year
- GREs will have a deemed year end on the day the trust ceases to be a GRE

Gifts as a Consequence of Death

- For deaths BEFORE 2016, a gift made as a consequence of death:
 - i.e. by Will or by designation of RRIF/insurance
 - Deemed to be made immediately before death
 - Charitable donation tax credit (“CDC”) available:
 - to offset 100% of tax in individual’s terminal return
 - may be carried back to offset 100% of tax in year prior to death
- Estate gifts generate a CDC for the Estate only
- Eligible amount of gift is FMV on date of death

Gifts as a Consequence of Death

- For deaths AFTER 2015, a gift made as a consequence of death:
 - By Will of property “acquired by estate” on death
 - By designation of RRSP/RRIF or life insurance
 - Deemed to be made by the deceased’s Estate
 - Will be deemed to be made by the GRE if donation is made by a transfer from the GRE
- Eligible amount of gift is FMV on date gifted property is transferred

Donation Receipt Amount

- Old rules: Receipt = eligible amount of gift on date of death (same value used for capital gains and CTC calculation)
- New rules: Receipt = eligible amount of gift on date gifted property is transferred
- *Effect of new rules is that an GRE may have a capital gain or loss arising on the transfer of property to the charity*

Gifts made by a GRE

- Increased FLEXIBILITY: executor may allocate a GRE gift among any of:
 - the year of death and the prior year of deceased
 - tax year of GRE in which gift is made, or
 - up to two prior tax years of the GRE
- CRA's administrative policy to allow spouses to share donation tax credits no longer applies

PROBLEM: 36-Month Period

- GRE exists only 36 months following death
- Estate may not be completed and gifts made within that period
- Existing law provides:
 - flexibility on allocation of donations only for a GRE
 - exemption from capital gains on gifts of publicly-traded securities only for a GRE

Proposal for 60-Month Period

- Legislative proposals (to be effective for gifts made after 2016)
 - GRE will exist only 36 months following death, but:
 - Donations from 36 - 60 months following death may be allocated back to year of death and the prior year
 - Exemption from capital gains on gifts of publicly-traded securities extended for up to 60 months following death
- Provides additional but not unlimited time

Timing of Making of Gift

- Two reasons why Executor may want to make gift soon following death:
 - Tax will be payable on the terminal return if the gift is not completed at the time it must be filed
 - Estate may need to pre-fund tax until the donation can be made (*Remember rules for testamentary trust because Estate must continue to be a GRE.)
 - Property which fluctuates in value (public company shares) may give rise to a gain or loss in the estate

Life Interest Trust (“LIT”)

- Life interest trusts are generally trusts which exist for the lifetime of an individual
- Life interest trusts can be *inter vivos* – spousal trust, joint partner trust, *alter ego* trust, self benefit trust – or on death
- On the death of the life interest, the balance left in the trust is distributed to the “residual beneficiary(ies)”

Charitable Remainder Trust (“CRT”)

- Charitable Remainder trusts are generally trusts where the balance left in the trust on wind-up is to be distributed to one or more charities (which are the “residual beneficiaries”) pursuant to the terms of the trust

Example

- Testator's Will leaves his estate to a trust for his spouse, for life
- Trust provides:
 - All income payable to spouse for life
 - Any capital encroachments only for spouse
 - On death of spouse, trust is wound up, and trust property will be distributed to charities
- Trust is both a LIT and a CRT

Testator dies BEFORE 2016

- On the death of the first spouse:
 - no deemed disposition of the assets, because there is a rollover to a spousal trust
 - gift to charity of the residual interest for which a charitable donation receipt may be issued
 - If there is no power (or a fixed power) to encroach on capital, present value can be determined with an actuary
 - If there is a discretionary power to encroach on capital, the present value is nil

Testator dies BEFORE 2016

- On the death of the surviving spouse:
 - deemed disposition of the property held by the trust
 - any income or capital gains subject to tax in the trust
 - after-tax amount remaining is then paid to the charity
 - if pursuant to the terms of the trust, no donation receipt
 - if discretionary as to whether the gift to charity is made or not, donation receipt may be issued to the trust

Testator dies AFTER 2015

- On the death of the first spouse:
 - no deemed disposition of the assets, because there is a rollover to a spousal trust
 - if estate is a GRE, should be a gift to charity of the residual interest for which a charitable donation receipt may be issued (value as per earlier slide)
 - **PROBLEM FOR CRT?:** Donation must be “property that was acquired by the estate on and as a consequence of the death” (or property substituted therefor). *Residual interest is never acquired by the estate.*

Testator dies AFTER 2015

- For deaths AFTER 2015, on the death of the surviving spouse:
 - deemed disposition of property held by the trust
 - any income or capital gains deemed to be paid to the deceased beneficiary (taxed on their terminal return)
 - property held by the trust is transferred to the charity (possibly donation receipt as per earlier slide)
- **PROBLEM FOR LIT:** Mismatch of tax and any tax credit

Proposed Amendments

- 2016 legislative proposals provide that AFTER 2015:
 - on the death of a life interest, any income or capital gains are subject to tax in the trust
 - trust can allocate a donation made within 90 days of end of calendar in which beneficiary dies:
 - To short tax year of the trust which ends on death
 - To the year of the gift or the following 5 years

Proposed Amendments

- This solves the problem of the mismatch, as the tax is payable by the LIT, and the donation receipt (if any) is received by the LIT, and can be allocated to the previous year in which the tax arose

Caution - Private Company Shares

- Private company shares transferred from a GRE or charitable remainder trust may be a “non-qualifying security” – no receipt can be issued until liquidated or sold to third party
- Additionally, for a private foundation, private company shares may:
 - be a “non-qualified investment” (tax imposed), or
 - trigger the “Excess Business Holdings Regime”

Conclusion

- The recent rules have a significant impact on estate and gift planning
- Other than the loss of testamentary trusts, most of the rules are intended to be relieving
- Encourage donors to get the proper advice to achieve the results you both intend.