ABOLITION OF GIFT DUTY

1. Gift duty is not payable on a gift made on or after 1 October 2011. Gift statements will not need to be filed for dispositions of property made on or after 1 October 2011.

2. Section 245 of the Taxation (Tax Administration and Remedial Matters) Act 2011, enacted on 29 August 2011, has abolished gift duty in relation to a gift made on or after 1 October 2011. In the definition of "gift" in section 2(2) of the Estate and Gift Duties Act 1968, the phrase "disposition of property" has been replaced by "disposition of property before 1 October 2011". In section 61 of the Estate and Gift Duties Act 1968, the phrase "made after the commencement of this Act" is replaced by "made after the commencement of this Act and before 1 October 2011".

3. Gift duty will continue to apply to any gifts made before 1 October 2011. Gift statements will remain due for dispositions of property made prior to 1 October 2011.

Income tax implications

4. The abolition of gift duty does not have any impact on income tax anti-avoidance rules. A gift may be deemed to be part of a wider arrangement of tax avoidance under section BG 1 of the Income Tax Act 2007.

5. In addition to the general anti-avoidance provisions the following provisions in the Income Tax Act 2007 apply to ensure integrity around arrangements involving gifts:

- Section HC 35 which sets out the minor beneficiary income rules.
- Section EW 38 which sets out rules for the disposal of financial arrangements for less than fully adequate consideration. Section EW 44 provides an exception to this rule where the creditor forgives the debtor's debt because of the natural love and affection the creditor has for the debtor.
- Section HD 15 which provides for joint and several liability of company directors and controlling or interested shareholders, where a company enters into an arrangement that results in an inability to meet its tax liability.
- Section CD 6 which concerns deemed dividends for transfers of value from a company to an individual.
- Section CX which sets out the fringe benefit tax rules for gifts to employees.

- Sections FC 1 and FC 2 under which distributions from companies and trusts, gifts, and transfers of assets and liabilities upon death, are treated as disposals and acquisitions at market value.

- Section GC 1 which sets out the rules for disposal of trading stock for less than fully adequate consideration.

6. Section 10(3) of the Goods and Services Tax Act 1985 treats the supply of goods and services between persons who are associated as if they were for market value where there is no fully adequate consideration.

Remedies available to creditors and others when assets have been gifted away

7. Three existing statutes contain provisions to allow the clawback of dispositions for the benefit of creditors:

- Sections 204 and 205 of the Insolvency Act 2006 allowed the Official Assignee to automatically cancel gifts made within 2 years before adjudication, or within 5 years if the bankrupt cannot demonstrate solvency at the time the gift was made.

- Section 292 of the Companies Act 1993 gives the Official Assignee similar powers but over shorter time frames (6 months and 2 years).

- Subpart 6 of the Property Law Act 2007 empowers the Courts to set aside property dispositions where there was an intention to prejudice the interests of a creditor. This provision is not time-limited.

8. There are other legislative provisions that may apply in the case of relationships disputes to remedy gifts made:

- The Property (Relationships) Act allows the Courts to restrain or to set aside transfers of property to trust where there was an intention to defeat a spouse's or partners claim at the time the disposition was made;

- If the disposition was not intended to defeat a claim, but had that effect, the Courts are able to grant compensation (although in this circumstance the Courts cannot set aside the trust). Compensation can include other non-trust assets or the income of the trust, but does not include the capital of the trust (the power to unwind the trust could disadvantage other beneficiaries, including children of the relationship).

- Section 182 of the Family Proceedings Act allows the Courts to vary the terms of an agreement or settlement (made before or after a marriage or civil union) if, at the end of the marriage or civil union, an applicant no longer derives the benefit he or she reasonably expected to receive from the agreement or settlement. This includes the ability for the Courts to vest part of a trust in an affected partner, for their benefit.

9. The Ministry of Justice will monitor any impacts of gift duty abolition to inform the government-wide post-implementation review.

[*The material in this document was obtained from a Special Report published by the Policy Advice Division of Inland Revenue on 1 September 2011*]