

EFFECTIVE WAIVER OF DEBTS

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Introduction

One of the elementary guidelines of estate-planning is to utilise all the available statutory exemptions and reliefs before turning to consider more sophisticated strategies. In seeking to apply this principle many advisers quite rightly emphasise to their clients the importance of using the inheritance tax exemption in respect of transfers of value not exceeding £3,000 in any one year (Inheritance Tax Act ("IHTA") 1984 s.19). One common way of attempting to take advantage of the annual exemption is for an individual to lend, interest-free, a sum of money repayable on demand to, for example, a child and then write off £3,000 worth of debt each year.

It has been suggested that the Inland Revenue could if it wished contend that the debt waivers are associated operations under IHTA 1984 s.268. The result of this would be that a gift of the entire amount of the loan could be said to occur on the date of the final waiver. However, the official approach appears to be not to apply s.268 in this way; that does not mean to say that such a strategy is inevitably successful. The Inland Revenue is properly concerned to see that the alleged waivers are indeed effective. It is sometimes suggested that the kind of arrangements outlined above can rarely succeed if there is no deed of waiver and no grounds upon which an effective defence of estoppel can be raised. However, this is not necessarily the case.

Waivers and Variations

It is helpful in the first place to contrast a waiver with a variation. Variation of a contract for a loan requires an alteration in the contractual relationship between the parties. To be binding, therefore, it must be supported by consideration or be by way of deed. A waiver on the other hand is simply a voluntary concession that contractual rights are not to be enforced and that payment in relation to, say, £3,000 is not required. The voluntary element is vital, of course, since if the waiver were made binding by virtue of the provision of consideration the size of the transfer of value would be diminished and the utilisation of the annual exemption consequently ineffective.

It should be emphasised that if arrangements of the kind outlined above are established there must not be an initial understanding that the borrower's liabilities

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pursuant to the loan are to be waived annually. The existence of the understanding may well make the application of the rules concerning associated operations more likely as well as giving rise to other problems.

"Waivers" by Deed

Clearly, in order for successive waivers of debt to be covered by the annual exemption it must be demonstrated that the waiver can be relied upon by the debtor and cannot be withdrawn by the creditor at some time in the future. The Inland Revenue often seem to require the production of a deed giving effect to the waiver (probably more accurately regarded as a deed of variation). Whilst it cannot be denied that a deed is often desirable if the binding nature of the waiver is to be established, it is not always legally necessary. Neither is it to be supposed that in the absence of a deed promissory estoppel is all that there is to be relied upon. In certain circumstances waivers in writing are acceptable as a matter of law.

Waivers in Writing

In determining whether or not a written "waiver" may in certain circumstances be adequate the provisions of the Bills of Exchange Act 1882 must be consulted. Section 62 provides as follows:

"(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation"

Section 89 (1) which appears in part IV of the Act dealing with promissory notes provides that:

"(1) Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes"

The effects of these provisions is to permit written "waivers" where the original loan has been based upon a promissory note. They do not, of course, assist if the original loan is simply created by means of an oral arrangement. As to the meaning of "promissory note", section 83 (1) of the 1882 Act states:

"A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of, a specified person or to bearer."

Conclusion

There is insufficient space in a note of this length to consider in detail all the applicable law relating to waivers and promissory notes which must be borne in mind if one is dealing with a case in which effective debt waivers are in issue. It is, though, hoped that enough has been said to indicate that the absence of a deed in such a case is not necessarily fatal. So far as the establishment of new arrangements is concerned, maybe the provisions of the 1882 Act should be borne in mind from the outset.