GIFT DUTY BILL 1971

EXPLANATORY MEMORANDUM.

Clause 1 provides for citation as the *Gift Duty Act* 1971.

Clause 2 provides for the legislation to come into operation on a day to be proclaimed.

Clause 3 sets out the arrangement of the Act.

Clause 4 deals with definitions and interpretations.

There is a special definition of a " Controlled Company " for the purpose of subsequent provisions designed to protect the revenue against avoidance through arrangements made by means of private or controlled companies. What comprises a " disposition of property " for purposes of determining whether a gift has been made is set out. This extends to the issue of shares, creation of trusts, grants of leases, licences and rights, release of rights, and interests, exercise of power of appointment, and the doing or omission to do anything that may diminish the property of one person and increase that of another.

Sub-clause (2) of the clause sets out when a " controlled company " is deemed to exist. For that purpose, it is stated when a company is a subsidiary company. It is also stated when the public is considered to be substantially interested in a company ; for the public to be substantially interested in a company, the requirements are that at least 25 per cent. of the ordinary shares shall be owned by the public, that the rights to transfer those shares are not restricted, and that they are generally available to be acquired by the public. It is also stated when a company is deemed to be under the control of not more than five persons.

In determining whether a company is controlled by no more than five persons, the Bill provides that where a person is related to, or is a nominee or partner of, another person, the two concerned are for these purposes to be considered as one. Sub-clauses (3) and (4) set out what constitutes being related as between one person and another, and this extends to lineal issue and ancestors, collaterally and their lineal issue, as well as the spouses of any of these people and their lineal issue.

Sub-clause (5) sets out the circumstances in which one person is the nominee of another and this, too, is relevant to the clauses relating to gifts made by way of controlled companies.

Sub-clauses (6) and (7) provide that a gift is considered to have been made if the owner of the debt or comparable right should permit the right to lapse in favour of someone else. However, if subsequently the person who gained as a result of the lapse makes payment to the original debtor or owner, that subsequent payment is not to be considered a gift in the other direction. It is subsequently provided in clause 24 (3) that if duty has been paid on the gift deemed to arise in this case, it shall be refunded if payment of the debt occurs later.

Sub-clauses (8) and (9) provide that, even though a contract may be void, any payments made thereunder will not be treated as gifts if the Commissioner is satisfied that the contract was bona fide and not entered into to avoid gift duty.

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Sub-clause (10) deals with the time when a disposition takes effect and how the value of the disposition is determined. It provides that in determining the value no allowance shall be made for any contingency which may affect either donor or donee but which in fact has not taken place and may not take place.

Sub-clauses (11) and (12) provide that any action or omission of a controlled company that diminishes the property of a person who is a director, shareholder or creditor of the company, shall be regarded as a disposition of property by that person or, if a person acting through his rights and powers in a controlled company diverts property that could have been his to another person, that diversion shall be regarded as a disposition of property.

Sub-clauses (13) and (14) are complementary to sub-clause (12) and deal with the case where there may be some consideration for the benefit conferred and where certain dispositions are deemed to be made for full consideration.

Sub-clause (15) ensures that the provisions of sub-clause (12) are not to be read as limiting dispositions by controlled companies to those coming within the operation of that sub-clause.

Sub-clauses (16) and (17) deal with the circumstances where a gift is made by a controlled company but, because the company is not incorporated in this State, it cannot be levied directly for duty. In such case, the members of the company are deemed to be the donors rather than the company, and in appropriate proportion.

Sub-clause (18) provides that where a person, without losing the right to recover a debt, does not take steps to recover it when due, this is to be taken as a gift to the extent of interest on the debt calculated at 7 per cent. per annum or such other rate as is determined from time to time.

Sub-clause (19) relates to gifts made by two or more persons jointly and apportions such gifts between them.

Sub-clauses (20) and (21) provide that a series of actions that may constitute the making of a gift shall not be permitted to result in the same gift being dutiable more than once.

Sub-clause (22) provides that gifts referred to in sub-clauses (11) to (18) made prior to the passing of the Act shall not be liable for gift duty and may not be taken into account in relation to any other gift or in determining the amount of gift duty payable.

Clause 5 defines " all relevant gifts " for the purpose of determing their total value to arrive at the rate of gift duty payable on gifts for a period of 18 months before and after the gift being assessed are aggregated to ascertain whether the $4,000 minimum is exceeded and to indicate the rate of duty.

Part II. deals with the administration of the Act.

Clause 6 provides for the administration of the legislation by the Commissioner of Probate Duties.

Clause 7 (1) makes the appropriate provisions for secrecy. Sub-clause (2) releases the secrecy provisions to the extent necessary for any court proceedings, and sub-clause (3) relates to the administration of an oath of secrecy.

Sub-clauses (4) and (5) make the usual provision in taxation legislation for the exchange of information between the Commissioner and the taxation authorities in the Commonwealth and in the other States.

Part III. deals with liability to duty.

Clause 8 provides the relevant criteria respecting location of the property concerned and domicile of the parties involved. Generally a gift is dutiable if the property is situated in the State, whether it be real or personal property. Personal property situated outside the State may be liable if either the donor or donee is domiciled in the State, or in the case of a corporation, if it is incorporated or resident in the State. Special provisions are made in the case of a non-resident controlled company that also carries on business outside the State in order to determine the extent of any gift liable for duty in this State.

Clause 9 refers to the Schedule to the Act setting out rates and prescribes how they shall be applied.

Clause 10 prescribes that any assessment of gift duty of less than $5 shall not be in fact be payable.

Clause 11 makes provision for determining when, in fact, a disposition of property involving a gift is deemed to have taken place, and makes it clear that if a gift actually takes place after the commencement of the Act, even though the agreement or relevant document may have been completed earlier, it is nevertheless subject to duty.

Clause 12 provides for the situation in which a person liable for the payment of gift duty dies before the assessment of the duty and gives the Commissioner the same powers against the trustees of an estate as he would have against the donor or donee.

Clause 13 provides that shares in a corporation incorporated in Victoria and those of a corporation incorporated outside Victoria, but recorded in a local share registry are regarded as property situated in this State. Similarly, where the diminution of the property of a local resident is determined to be a gift, the property involved is considered to be personal property situated in Victoria. The clause also deems property at sea in the course of transit to Victoria to be property situated in Victoria.

Clause 14 provides for exemptions. Exemptions (*a*), (*b*), (*c*) and (*d*) in sub-clause (1) relate to payments of a variety of benefits from an employer to an employee. They cover contributions towards pensions, retiring allowances and other reasonable bonuses and gratuities. Exemption (*e*) relates to gifts which are charitable within the legal meaning of the term and to any gift that would be exempt from probate duty under section 21 of the *Probate Duty Act* 1962. Exemption (*f*) applies to gifts to or by the Commonwealth or a State. Special provision is made in (*g*) for exemption of minor gifts or gratuities not exceeding $200 which the Commissioner is satisfied are part of the donor's normal expenditure and for gifts to a spouse or dependant children towards their support and education, provided such gifts are not excessive. Exemption (*h*) makes it clear that insurance premiums paid by a person insuring his own life for the benefit of his wife and children shall be exempt to the extent of $500 a year. Supplementary contributions by employers to the pay of their employees serving in the armed forces are also exempted in clause 14 (*i*).

Sub-clause 14 (2) provides a definition of the term " bona fide scheme of superannuation retirement benefit or pension " for the purpose of exemption (*a*).

Sub-clause 14 (3) ensures that in respect of exemptions (*a*), (*b*), (*c*) or (*d*) gift duty is payable only on such portion as may be considered excessive.

Clause 15 makes it clear that exempt gifts as well as not being dutiable are not to be taken into account in determining whether and at what rates duties shall be levied on other gifts.

Clause 16 provides that where some consideration is paid for a disposition of property but that consideration is inadequate, the value of the gift is the extent of the inadequacy.

Clause 17 provides for the valuing of gifts. (*a*) that any contingency that might possibly affect the interests of the donee shall not be allowed for. (*b*) the value shall be the value at the time of the gift, and (*c*) if the property that is the subject of the gift is the subject of an encumbrance, but the donee is not responsible for discharging the encumbrance, this encumbrance is not to be deducted from the value of the gift.

Clause 18 covers the case of a gift with reservations. This particular provision is to guard against avoidance of duty, or avoidance of the full rate of duty, by dividing a disposition of property into two or more parts, one or more of the parts being withheld by some reservation and later released. It provides that such a later release shall when it occurs, be counted back to the time of the original disposition so as to determine the rate of duty though, of course not earlier than the commencement of the Act.

Part IV. deals with returns and assessments.

Clause 19 deals with returns. Sub-clause (1) indicates that returns must relate to gifts over a period of 18 months prior to the time of the making of the latest gift, and this applies whether that period of 18 months may have been partly before the commencement of the Act. Sub-clause (2) requires returns to be made by both donor and donee if the aggregate of gifts given by the donor exceeds $3,000 or if the aggregate of gifts received by the donee from one donor exceeds $3,000. If the gift is made in Australia, the return must be made within one month and, if made elsewhere, within 2 months. Sub-clause (3) requires copies of relevant documents to be furnished with the return and sub-clause (4) exempts a donee from making a return if the donor has made one.

Sub-clause (5) makes it clear that returns are not required for exempt gifts.

Clause 20 provides a power to require a valuation of the property comprised in a gift.

Clause 21 authorises the Commissioner to adopt a valuation as assessed for the purpose of Commonwealth gift or estate duty.

Clause 22 gives the Commissioner the right to call for returns from any person to determine whether gift duty is payable.

Clauses 23 and 24 authorise the making and amendment of assessments and the repayment of duty consequent upon the amendment of an assessment.

Clauses 25, 26 and 27 give the Commissioner the right to issue default assessments where inadequate returns are made and provide that notices of assessment must be given to the donor and may be given to the donee, and for the manner in which the notices may be given.

Part V. deals with the collection and recovery of duty.

Clause 28 makes duty due and payable upon the making of the gift or in certain cases upon the dates on which the Act comes into operation. It makes the duty a charge upon the gift property and permits a donee to be called on for the duty or his trustee if recovery is not made from the donor.

Clause 29 permits the Commissioner to extend the time for payment or to allow payment by instalments.

Clauses 30 and 31 provide for interest at 10 per cent. per annum where there is delay in payment of duty. The Commissioner is authorized to remit such interest where appropriate.

Clause 32 authorizes the Commissioner to register a charge on land which is the subject of a gift.

Clause 33 provides for the sale of the gift property where gift duty remains unpaid for 6 months.

Clause 34 ensures that there shall be no limitation of action for the recovery of duty.

Part VI. deals with objections and appeals. The provisions are similar to objections and appeals against the assessment of probate duty.

Clause 35 provides for the lodgement of an objection against an assessment of gift duty with the Commissioner, where the objector is not satisfied with the Commissioner's decision, he has a further right to have the matter determined by the Supreme Court or, where the objection relates to the valuation of land he may in certain circumstances elect to have the matter heard by the Land Valuation Board of Review. Sub-clause 11 provides that a pending objection or appeal shall not interfere with the normal recovery.

Clauses 36 and 37 prescribes the circumstances in which appeals may be heard by the Land Valuation Board of Review, and the powers which it has.

Part VII. is a set of miscellaneous provisions.

Clause 38 deals with ordinary recovery procedures.

Clause 39 deals with measures to avoid the imposition of double duty where another State also levies duty upon a gift.

Clause 40 allows a deduction from the gift duty payable upon a gift, where stamp duty has been paid upon the instrument effecting the gift.

Clause 41 makes normal provisions for the Commissioner to obtain information.

Clause 42 provides for a deduction from the probate duty payable in the estate of a donor, which includes gift property upon which gift duty has been paid.

Clauses 43, 44 and 45 make provision for additional duties and other penalties and prosecutions for failure to make returns or supply information relating to a gift.

Clause 46 deals with the offences of making false returns or giving false evidence.

Clause 47 is an evidentiary provision.

Clause 48 deals with the liability for offences arising out of false declarations and oaths.

Clause 49 gives authority for inspection of appropriate books and records.

Clause 50 deals with the procedure relating to proceedings for offences.

Clause 51 provides that the incurring of a penalty does not exonerate a person from liability for gift duty.

Clause 52 makes special provision for the valuation of shares in private or family companies. These provisions are necessary to enable reasonable valuations to be placed on such shares.

Clause 53 gives the Commissioner power to determine the gift duty payable, where the normal procedures would be inappropriate.

Clause 54 enables the revocation or variation of notices published by the Governor in Council.

Clause 55 provides for the service of notices by post.

Clause 56 is a normal regulation-making power.

Clause 57 makes consequential amendments to the *Stamps Act* 1958.

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