GIFT WITH RESERVATION OF BENEFIT? *NIL DESPERANDUM!*

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When I was a pupil tax barrister, possibly the only thing I knew more about than some of my pupil masters was Latin. This led to my being cited in oral submissions to the Supreme Court as an authority as to whether certain words in the traditional (Latin) definition of interest were in the accusative or ablative. Rather less publicly, one pupil master asked me to translate his personal credo into a snappy classical aphorism. That was "never give up". I was happily able to respond that no less a poet than Horace had already done the job – "nil desperandum". (As an aside to linguists who are considering the Bar, I was also called upon to give Sanskrit lessons to an existing tenant. *Sic itur ad astra*.)

Horace, of course, had somehow transferred from being on the losing side of a brutal civil war to a lovely villa outside Rome given to him by a grateful emperor, so perhaps had good cause never to give up. But not only is it generally very good advice, it is also particularly good advice on tax matters, where there is usually some argument to deal with even the greatest pickles. Gifts with reservation of benefit can fall into that camp. Take the following situation. A client's parents decided long ago that they would transfer his house to him and indeed did so. Naturally, they did not actually wish to leave the house and did not do so. The parents having died, the client is unpleasantly surprised that not only is there an inheritance tax bill, but the capital gains tax uplift on death does not apply when he comes to sell it.

The gift with reservation of benefit case law in the

Inheritance Tax Act contains a number of quirks and exceptions. The first port of call is, of course, to study those. But there are two options of last resort that may not occur to all. Before throwing in the towel, they are worth looking at.

First, setting aside the gift for mistake, such that the law operates as if no gift had ever been given. This option relies either on an order from the High Court, or, potentially, simply on arguing before the Tax Tribunal that Equity treats as done that which ought to be done (see *Lobler v HMRC* [2015] UKUT 0152 (TCC) and *AC v DC* [2012] EWHC 2032 (Fam) at [31]). HMRC are known to disagree with the proposition that no recourse to the High Court is necessary however, so unless there are severe financial pressures going straight to the Tax Tribunal is usually the less desirable option. The principles that the High Court applies are set out in *Van der Merwe v Goldman* [2016] EWHC 790 (Ch). Broadly a donor (or his estate) can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift. It does not matter if that mistake was due to carelessness nor that a mistake was about the tax consequences of a transaction. So, on our facts, if it can be established that the parents believed there were no adverse IHT consequences of giving away their house, then the transaction could be rescinded and the CGT uplift obtained.

Second, a resulting bare trust. Recall that bare trusts are (broadly) ignored for IHT and CGT purposes, such that if there is a bare trust then the tax statutes operate as if the property had always belonged to the donor. When a property is transferred gratuitously to another, there is a general legal presumption that the equitable interest is not transferred but merely the legal interest (*Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669). On our facts, there is a complication by another presumption, i.e. the so-called presumption of advancement which assumes a parent does indeed wish to give his child an equitable interest (*Chettiar v Chettiar* [1962] A.C. 294, PC). However, evidence as to intention can overrule the presumption of advancement. Parents who continue to live in the property, do not pay rent, pay for bills, insurance, mortgage, repairs, renovations and so forth very arguably did not intend to benefit their children. Naturally, if the parents are still alive, they can give evidence of what their intention was.

While the title of this article referred to gifts with reservations of benefits, the two options outlined above apply more broadly whenever a transfer of property has potentially adverse tax consequences. *Nil desperandum* indeed!