Perspective

R. A. Green*

This paper by Richard Green, who lectures in income tax and estate planning in the Faculty of Law at Victoria University, provides an introduction to the essays on estate planning that make up this volume.

It is appropriate to introduce this collection of papers by pausing to consider the prognosis for the Estate and Gift Duties Act 1968. In other countries extensive changes have been taking place in the field of taxation with particular emphasis on the taxation of wealth. In New Zealand the changes which have taken place have been more limited yet there are indications of possible future developments.

What has happened elsewhere in the wealth transfer tax area? In the United Kingdom the coverage and impact of the wealth transfer tax was increased with the introduction of the Capital Transfer Tax in Part III of the Finance Act 1975.[1] That tax was significant in the United Kingdom context because of its application to gifts (which had largely been excluded under the previous estate tax), the way in which trusts are singled out for special treatment, and the fact that all transfers are aggregated for the purpose of determining the tax rate. In a parallel development in the United States, the Tax Reform Act 1976 was aimed at broadening the scope of wealth transfer taxation in that country.[2] The Tax Reform Act introduced a uniform rate schedule for estate and gift taxes and, as under the United Kingdom Capital Transfer Tax provisions, all transfers whether occurring during a person's lifetime or on his death are aggregated for the purpose

* Senior Lecturer in Law, Victoria University of Wellington.

1 A wealth tax has also been under consideration in the United Kingdom. A Select Committee appointed to consider the Green Paper on proposals for a *Wealth Tax* (London, 1974, Cmnd. 5704) could not agree on a report and consequently the Minutes of Evidence were published in four volumes on 11 November 1975. It was announced to the House of Commons late in 1976 that the introduction of a wealth tax was being deferred.

2 For a general summary see J. R. Price "Major Transfer Tax Changes made by the United States Tax Reform Act of 1976" [1977] B.T.R. 5.

of determining the tax rate applicable to the particular transfer. The Tax Reform Act also imposed a tax on generation skipping trusts.[3]

During the same period in which the United Kingdom and the United States have been engaged in strengthening their wealth transfer tax provisions certain other countries have been dismantling their equivalent tax structures. Part of the 1971 Canadian tax reform package was the vacation of the gift and estate tax field by the Federal Government. This vacation was a quid pro quo for the inclusion in the income tax base of a portion of capital gains which are deemed to arise on death.[4] Since that time several of the Canadian Provinces have also vacated the the wealth transfer tax field.[5] Closer to New Zealand the Australian Federal Government has announced its intention to abolish the Commonwealth estate and gift taxes in the near future. As a preliminary move intra-family transfers are now totally exempt.[6] Prior to the Australian government's announcement the State of Queensland abolished its State wealth transfer taxes, and thus has become a wealth transfer tax haven in Australia. It is to be anticipated that that move will put pressure on the other Australian States to reduce the level of their wealth transfer taxes in the same way that the Province of Alberta's wealth transfer tax haven status in Canada after 1971 led to several other Canadian Provinces vacating the field.

Meanwhile, in New Zealand there have been some signs that certain policy changes are under way. The Matrimonial Property Act 1976 has raised some interesting questions concerning its impact on the Estate and Gift Duties Act 1968. The former Act does not apply to the "law relating to the imposition, assessment, and collection of estate duty".[7] Presumably, as no mention is made of the law relating to gift duty the Matrimonial Property Act does have some effect on that. An evaluation of the precise implications of the Matrimonial Property Act on the Estate and Gift Duties Act will be more timely when the government introduces its legislation governing the division of matrimonial property on death.[8]

An indication of what might happen in New Zealand in the future is possibly to be found in the introduction of the matrimonial home allowance in 1976.[9] In the 1976 Budget Speech the allowance was justified as being a measure introduced " . . . to overcome the present inequity arising out of the fact that the relief from (sic)

3 See R. B. Stephens and D. Calfee "Skip to M'Loo" (1977) 32 Tax Law Rev. 447, and J. M. Dodge "Generation Skipping Transfers after the Tax Reform Act of 1976" (1977) 125 U. Penn. Law Rev. 1265.

4 See E. J. Benson, Minister of Finance *Summary of 1971 Tax Reform Legislation* (the "Raspberry Book") 33.

5 The most recent being Saskatchewan as from 1 January 1977 and British Columbia as from 24 January 1977.

6 Statement by the Australian Treasurer in January 1978 in which he said that legislation would be introduced late in 1978 to provide that as from 21 November 1977 no duty would be payable on property passing by inter vivos or testamentary disposition to a spouse, child or parent. The legislation will also provide for the total abolition of Commonwealth Estate and Gift Duty as from 1 July 1979.

7 Section 4(5)(b).

8 The importance of the implications of such division on the estate duty was acknowledged by the Minister of Justice in *Matrimonial Property — Comparable Sharing. An Explanation of the Matrimonial Property Bill 1975* (Wellington, 1975) 13.

9 Estate and Gift Duties Act 1968, s. 17A.

registered joint family homes is not always available in respect of farm homesteads, and certain other matrimonial dwellings . . . ."[10] The fact that an equivalent allowance can be obtained for assets other than a matrimonial home, if there is such a home and it has not been left to a spouse, has been seized upon by tax planners as a useful planning technique.[11] In practical terms it is now possible to leave a reasonably large estate to a spouse without paying much estate duty. The increase in the value of gifts and estates which are zero-rated and the amendment of the rate structure, announced in the same budget, also assisted in lessening the impact of estate and gift duties. In the 1978 Budget it was announced that the full value of personal chattels left to a spouse would be exempt from estate duty.[12]

What then are the likely developments in New Zealand? One writer has suggested that the time is ripe for the introduction of an integrated capital transfer tax.[13] The same writer, after a detailed historical and statistical analysis of the evoluation of the estate tax in New Zealand, while noting the decline in the proportion of government revenue provided by wealth taxes concluded that " . . . in real as well as relative terms a commitment to continuing severe taxation of the wealthy is apparent".[14] It may well be that an integrated capital transfer tax would be an appropriate replacement for the Estate and Gift Duties Act 1968. Another possible replacement would be to include gifts and inheritance in the income tax base of the recipients.[15] There are other options too. However, it is suggested that the indications are that there will be a move to severely restrict the level of transfer taxes eligible on inter-spousal transfers.[16] In policy terms this would be the sensible thing to do. Such a move would give explicit sanction to a state of affairs which can be achieved already through judicious estate planning. The result achieved would appear to be in accord with the underlying philosophy of the Matrimonial Property Act 1976.

Notwithstanding the international developments, the domestic portents and the general resurgence of "tax reform fever",[17] the Estate and Gift Duties Act 1968 has now been in force almost a decade and is still the New Zealand model wealth transfer tax. Almost the same period has elapsed since the publication of the

10 *Financial Statement to the House of Representatives* (Wellington, 29 July 1976) 39.
11 See e.g. J. Prebble "The Matrimonial Home Allowance" [1977] N.Z.L.J. 48.
12 *Financial Statement to the House of Representatives* (Wellington, 1 June 1978) 41. It is not made clear in the statement whether the exemption is to be limited to "personal chattels" as presently defined in s. 2(2) of the Estate and Gift Duties Act 1968.
13 L. McKay "The Estate and Gift Duties Act 1968 — Time for a Change of Concept" [1977] N.Z.L.J. 97.
14 L. McKay "Historical Aspects of the evolution of Estate Tax in N.Z." (1978) 8 N.Z.U.L.R. 1, 27.
15 See the Carter Report *Report of the Royal Commission on Taxation* (Ottawa, 1966) Vol. 3 Ch. 17.
16 As has been done in Ontario and under the United States Tax Reform Act of 1976. As to the latter see Price, op. cit., at p. 8 n. 3.
17 As well as the calls from the various political parties and the income tax rate changes announced in the 1978 Budget (supra n. 12) the New Zealand Planning Council (NZPC) has become heavily involved in advocating major tax reform. See *Planning Perspectives 1978-1983* NZPC No. 4 (Wellington 1978) 71-74; *Taxation Reform* NZPC No. 5 (Wellington 1978) and *Income Maintenance and Taxation: Some Options for Reform* NZPC No. 6 (Wellington 1978).

collection of essays on certain aspects of the then new Act.[18] It was therefore thought fitting that the following collection of papers — edited versions of research papers prepared under my supervision by postgraduate students in the Law Faculty — should be published, in order to add a little more to the store of published material on the Estate and Gift Duties Act. The papers focus in particular on recent jurisprudence both from New Zealand and from other jurisdictions. They do not purport to provide a comprehensive coverage of all the recent developments[19] but an attempt has been made to undertake a fuller analysis of the issues than is possible in a textbook.[20] Paradoxically, the labyrinths that the various analyses reveal, highlight the need for reform and for useful planning techniques. It is hoped that both reformers and planners will find the papers worthy of perusal.[21]

18 Richardson (ed) *Essays on the Estate and Gift Duties Act 1968* (Wellington 1969).

19 Cases of particular significance which are not covered include *C.S.D.* v. *Bone* (1976) 6 A.T.R. 66 (see the note on that case by the present writer in [1977] N.Z.L.J. 220), and *Edgar and Fay* v. *C.I.R.* (1977) 2 T.R.N.Z. 275.

20 The leading textbook is undoubtedly *Adams and Richardson's Law of Estate and Gift Duty*. The fifth edition of that work was published early in 1978. Unfortunately it was not available to all of the writers of the following papers and therefore in some cases the analyses do not reflect the views expressed in the fifth edition.

21 The Estate and Gift Duties Amendment Bill 1978 was introduced just before the final printing of these papers. The effect of cl. 5 of the Bill is indeed to limit the exemption for personal chattels left to a spouse to "personal chattels" as defined in s. 2(2) of the 1968 Act — see n. 12 supra. There are also some previously unannounced changes outlined in the Bill. Of particular significance for the papers which follow are the amendment to s. 23(2) proposed in cl. 4 of the Bill and the amendment to s. 22 proposed in cl. 3. The latter amendment could have some effect on the implications in New Zealand of some of the cases discussed by Willis in his paper on preference shares. The clause permits the Commissioner not only to disregard restrictions on the alienation and transfer of shares contained in the articles and memorandum but also any such restrictions contained " . . . in any agreement, deed, or other writing, or in any other manner whatever . . . ."