

The family home: GWR exceptions (Lecture P1274 – 11.47 minutes)

The GWR rules: outline

The inheritance tax (IHT) 'gifts with reservation' (GWR) provisions (FA 1986, ss 102-102C, Sch 20) are anti-avoidance rules. They deal with situations where someone gives away an asset in the hope of surviving at least seven years in order for the gift to become exempt from IHT but continue to use or enjoy that asset during all or part of the period.

If 'caught' by the GWR rules, the gifted asset is treated as forming part of the deceased's death estate for IHT purposes. However, the GWR charge is subject to various exclusions and exceptions.

The basic GWR rule (FA 1986, s 102(1)) states:

'(1) Subject to subsections (5) and (6) below, this section applies where, on or after 18th March 1986, an individual disposes of any property by way of gift and either—

(a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of the relevant period; or

(b) at any time in the relevant period the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise;

and in this section "the relevant period" means a period ending on the date of the donor's death and beginning seven years before that date or, if it is later, on the date of the gift' (emphasis added).

The GWR rules (which originally applied to gifts from 18 March 1986) were extended to include rules relating to gifts of land from 9 March 1999 (FA 1986, ss 102A-102C), which were introduced to deal with certain IHT avoidance schemes at the time. The gifts of land rules broadly provide that a reservation of benefit will arise where the donor enjoys a significant right or interest, or is party to a significant arrangement, in relation to the land, and the donor occupies the gifted land or enjoys some right in relation to it.

Is there a 'gift' of the family home?

It is important to remember that the GWR rules apply to gifts. Hence if an individual receives full consideration for the property there should be no GWR, as there is no 'gift' element on which the rules can bite.

HMRC's view is that a sale for less than full value arising from a 'bad bargain' is not necessarily a gift with reservation. However, HMRC also considers that the GWR provisions apply to sales at undervalue, although they only apply in respect of the undervalue proportion (see IHTM14316).

The 'de minimis' rule

The term 'virtually the entire exclusion' in FA 1986, s 102(1)(b) potentially provides some scope for the donor to continue benefiting from the gifted property to a limited extent.

Examples of situations where HMRC considers that 'de minimis' benefits to the donor may be permitted without bringing the GWR provisions into play are set out in HMRC's Revenue Interpretation 55, and in IHTM14333. These include:

- a house which becomes the donee's residence but the donor subsequently stays with the donee for less than one month each year, or in the absence of the donee for not more than two weeks each year;
- social visits (excluding overnight stays by the donor as a guest of the donee) to a house the donor has given away. According to HMRC, the extent of the social visits should be no greater than visits the donor might be expected to make to the donee's house in the absence of any gift by the donor; and
- a temporary stay for some short term-purpose in a house the donor had previously given away; for example, while the donor convalesces after medical treatment, or looks after a donee convalescing after medical treatment, or while the donor's own home is being redecorated, or for visits to a house for domestic reasons, such as babysitting for the donee's children.

However, if these de minimis benefits escalate into something more significant, the GWR provisions may apply (e.g., a house in which the donor begins staying longer and rent-free, such as for most weekends or for one month or more per year).

Full consideration

If the donor gives full consideration in money or money's worth for continued occupation or enjoyment of the property, there should be no GWR.

For example, if a family member gives their home to another family member but carries on occupying the property, the occupation is disregarded for GWR purposes if the donor pays full consideration (and continues to do so during the period of occupation).

HMRC accepts that 'full' consideration falling within 'normal' valuation tolerances will be acceptable. However, it is not altogether clear what is regarded as 'normal' in this context; so both parties should obtain regular independent professional advice to determine full consideration (i.e., in this case a commercial amount of rent).

A turn for the worse

There is also a specific relieving provision to prevent unexpected and unfortunate changes in circumstances involving family members. The donor's occupation of gifted property is disregarded if the following conditions are all satisfied (FA 1986, s 102C(3); Sch 20, para 6(1)(b)):

- a) the occupation results from an unforeseen change in the donor's circumstances; and
- b) the donor has become unable to maintain himself through old age, infirmity or otherwise; and
- c) the occupation represents reasonable provision by the donee for the donor's care and maintenance; and
- d) the donee is a relative of the donor (or his spouse or civil partner).

These conditions are cumulative, and therefore potentially onerous. Nevertheless, the above provision can provide a potentially useful 'let-out' from a GWR charge.

Example: Gift of house followed by serious illness

Jane gifted her house to her daughter Karen in December 2012. Jane moved into a small bungalow, while Karen and her husband moved into the gifted property as their home.

Unfortunately, in February 2021, Jane (who did not previously have any major health problems) suffered a serious stroke, which left her needing constant care. Following her release from hospital, Jane moved back to her old house, where Karen looked after her. However, Jane sadly died in May 2021.

Jane's gift of the property was made more than seven years before her death. Nevertheless, the house would otherwise have been treated as forming part of her estate for IHT purposes under the GWR rules but for this exception for an unforeseen change of circumstances.

In cases of serious illness where donors cannot maintain themselves, HMRC would probably accept that the occupation of gifted land represents reasonable provision for the donor's care and maintenance (see IHTM14342). However, this exclusion from a GWR charge would only be available until the donor sufficiently recovered.

Contributed by Mark McLaughlin