Making a very large donation

Giving a large sum of money, by which I mean a really large sum of money away, ought to be as easy as falling off a log, but once you start to unpack the issues, it is not quite as simple as that.

Unless before the gift is made, a number of quite varied issues are properly resolved, the gift can have some unintended consequences. To maximise the benefits for both giver and recipient means looking at some key issues:

- Who the gift is to;
- The nature of the gift and benefit given;
- Conditions or arrangements associated with the gift;
- Impact on the family of the donation; And
- Perhaps most importantly of all, the multiple potential tax ramifications.

Who is the gift to?

The most straightforward gift is one by an English domicile tax payer to a registered charity. For tax purposes it may be possible to give just as effectively to a charity dual registered in England and Scotland, registered in Northern Ireland or Scotland alone, or which is not registered with the Charity Commission at all.

Many large institutions, the British Museum, the universities and many schools and church organisations are either exempt or excepted from registration with the Commission and don't have a charity number but are just as charitable as a registered charity.

More recently, Community Amateur Sports Clubs (CASCs) have gained some but not all of the tax benefits available to giving to charity.

At a higher level of complexity, it is possible to make a charitable gift that ends up in the hands of a social enterprise, commercial business or private individual to achieve some charitable purpose still count as a proper charitable gift. A small example of this would be where a donation is made to a charity that supports young people in education by providing scholarships. The end recipient is a non-charity but the donation is charitable.

Not uncommonly now, charities themselves have trading entities or social enterprises, some registered as community interest companies carrying out charitable activities within a non-charitable shell. If the gift is properly routed through a charitable intermediary, it may still be possible to have the outcomes delivered by a non-charity and still have the benefit of tax relief on the gift.

What are you actually giving?

A straight cash gift is simplest but there are significant advantages for some in giving shares or securities or an interest in land.

A social investment

Increasingly, major donors are looking beyond a simple gift and often applying lessons they had learned from their business experiences. A small but growing proportion of the support for charitable and similar enterprises is now coming from social investment. A donor may want to look at making not a gift but a loan or perhaps a loan which turns into a gift on the meeting of certain conditions.

Types of donors

Inland Revenue research showed that those making large gifts tended to be divided into two groups, “committed givers” and “ad hoc givers”. Giving by committed givers was planned and often associated with a long term and sometimes quite in depth relationship with the charity, whether as a trustee, involvement in administration or in other ways. Ad hoc givers tend to respond to external stimuli and make one off gifts without seeking the degree of involvement of committed givers.

The degree of commitment of the giver to the process is likely to show up in a range of ways.

The pre-gift work

All but the most spontaneous ad hoc givers will want to do some form of due diligence on the charity that they are giving to. If the charity gets wind of the size of the donation, it is likely to have a major donor team who are going to want to woo the potential donor. For smaller charities, trustees or the chief executive often undertake much of this function. There may be a period of visits, introductions and presentations or the donor may commission a more hard edged due diligence in relation to accounts, effectiveness and outcomes.

Conditions on the gift?

Attaching conditions to gifts has a long and honourable history. Many large gifts to charities, particularly of land or large capital sums, have been given what is known as “permanent endowment”. Permanent endowment means that the charity is able to make use of the land or the income it produced but is not able use the capital for revenue purposes. In some cases, the gift is on conditions which will lead to the return of the land or other asset to the donor if it is no longer used for charitable purposes.

A famous example was the sale by the Westminster family of the land on which a hospital was built in central London. The NHS discovered to its considerable surprise when it sought to sell the land as a luxury hotel, that the original Duke who had sold the building to the state had inserted a clause in the deal allowing his estate to buy it back at the same price, so the current Duke of Westminster duly paid the 19th century price to buy back a piece of £60m prime central London real estate. It cost him £6,000.

Permanent endowment these days is often associated with the capital funding of projects when a major donor might want to protect themselves in case unexpected turn of events lend to their donation not continuing in the use that they had expected.

More common than making a donation as permanent endowment is attaching conditions to the use of the donation which mean that it is “restricted funds” ie it can only be used for the specified purpose. This contrasts with an unrestricted donation which the charity may use the money for any purposes within its objects.

Grant agreement

Those providing large amounts of funds often want detailed agreements as to the use of the donation which may include;

- Restriction on use
- Reports on the impact achieved
- Rights to visit
- Phasing of the payments on achievement of agreed targets
- Break rights where targets are not achieved or deadlines met
- Claw-back arrangements if a project ends or assets purchased with the donation are disposed of

Benefits for the donor

It is not uncommon for a donor to envisage that there will be practical or other benefits for themselves. This is particularly true of corporate donors who may be seeking exposure to branding logos and other forms of marketing advantage. This immediately starts to raise issues as whether this is a pure gift or perhaps a gift mixed with the purchase of marketing services. Here issues like VAT start to raise their ugly head. All these issues can be managed if they are spotted and proper provision is made.

What raises more difficulty and which has created considerable scandal recently is where the donor is seeking financial advantages for themselves or people connected with them. Most people will have been aware of the controversy surrounding the Cup Trust which enabled its donors to avoid £46 million pound's worth of tax through gift aid incentives. Although it raised £176 million from donations in its first two years, it only distributed £55,000 to charity.

The storm of protest that occurred when the story emerged means that there is a particularly sharp focus on ensuring that charitable status is not abused at present. However, save within a very limited range of circumstances, donors have always faced substantial issues if they are gaining any benefits from their gift other than the straightforward ones of normal tax recovery. The Revenue's attempts to crack down were covered first in a set of rules about substantial donors. These are being replaced by rules on tainted gifts. These need to be very carefully looked at if the donor is to receive a benefit of any sort.

The family of the donor

While in most circumstances, as long as one has full capacity, the law allows you to make your own decisions about gifts. However, where a donor dies leaving heirs who feel that they have been deprived of their inheritance by the gift, there may be litigation but this is not that common in England.

The situation is very different if any cross border issues affect the donor. A number of European jurisdictions allow heirs to claim back all or part of gifts that reduce their inheritance and in some cases, they can even recover land or other property that has been given away. Any donor with involvement in multiple jurisdictions is going to need to talk to private client lawyers who understand how these sorts of issues play out in different jurisdictions and Russell-Cooke's private client department would be happy to assist.

Gifts for work overseas

The English tax system has a number of major incentives for those giving to charities. It is important to remember however that in the main these only apply to UK tax payers, whether individual or corporations, and where the gift is to a charity recognised by English law. Given the cross border nature of much wealth creation, this is causing major problems as a UK tax payer may well be wanting to make a donation to benefit their country of origin. The European Commission has been trying to do something to help here by bringing forward proposals for a European Foundation to enable donations from one country to gain tax relief even if they benefit charitable work in another country. However, proposals have stalled on dealing with the tax complexities.

There can be routes to dealing with this issue including creating a UK based charitable entity to funnel the money on to a charitable activity off shore but as one might expect, both the Revenue and the Charity Commission look carefully at the funding of off shore activities.

Inheritance tax

The last budget introduced a reduced rate of inheritance tax where 10% or more of the net value of the deceased's estate is left to a charity but it has been the case for many years that gifts to charity in a will, if properly set up, will not attract inheritance tax and help reduce the tax burden on the rest of the estate.

Income tax

Gift aid allows the charity to recover the basic rate of tax and higher rate tax payers who have paid sufficient tax to cover the donation to recover at the higher rate. Attempts to attack this higher rate tax relief were hurriedly withdrawn by the Government after an outcry at such proposals in the last budget. The issues here about personal benefit above apply and as with any tax situation, the donor's personal tax situation needs to be looked at carefully to ensure that the gift is made in the most tax effective way.

Corporation tax

Companies have rights to set donations against corporation tax.

Capital gains tax

Tax reliefs also exist to cover the gift or sale as an under value of assets which may be subject to capital gains tax but again the rules are complex.

Should giving be simpler?

It would be nice to think that giving could be facilitated by simplifying some of the complexities outlined above. The research doesn't seem to indicate that people are put off by the legal and tax issues raised and those who are giving millions of pounds away are likely to have access or know how to find the sort of specialist charity sector solicitors who will be able to guide them through this process. Where there are large sums of money and the tax system interacts with tax relieved entities, it is likely that the rules are going to be less than completely straightforward. This shouldn't discourage anyone from supporting something they believe in.

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