



THE PRICE OF FORGIVENESS ... ESTATE ADMINISTRATION TAX & FORGIVING DEBTS

By Suzana Popovic-Montag - July 2023

Loan forgiveness may be an estate planning strategy of interest for clients who have made intrafamily loans. Often discussions on this topic are motivated by plans to equalize bequests amongst family members,¹ or the tax implications for borrowers, also known as “debt forgiveness rules.”² This Solicitor’s Tip addresses a point that should not be overlooked during estate administrations: the financial implications for an estate when the testator chooses to forgive a debt in their will, where the will must be admitted to probate.

Probate Fees May Be Payable on Forgiven Debts

An unpaid loan owing to the deceased at the time of death is typically considered an estate asset, even if that loan is forgiven under the deceased’s will, and is therefore subject to Estate Administration Taxes (also known as probate fees) exigible under the *Estate Administration Tax Act, 1998* (the “**Act**”).³

While loans are not expressly addressed in the Act, its regulations confirm that “a loan receivable” is an estate asset that must be listed on the Estate Information Return filed pursuant to the Act.⁴ Probate fees will be payable on any such loan, insofar that the list of assets included in the Estate Information Return is used to determine the value of the estate and calculate the probate fees that must be paid.⁵ The definition of “value of the estate” in section 1(1) of the Act expressly confirms that an estate includes “all property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is

¹ See, for example, Darien Murray, “Hotchpot: An Uncommon Clause for an Executor to be Aware of” (27 Sept. 2022) Hull & Hull LLP (blog), online: <<https://hullandhull.com/Knowledge/2022/09/hotchpot-an-uncommon-clause-for-an-executor-to-be-aware-of/>>. See also Margaret O’Sullivan, “Why family gifts and loans require planning” (30 June 2017) Advisor’s Edge, online: <https://www.advisor.ca/columnists_/margaret-osullivan/why-family-gifts-and-loans-require-planning/>.

² See, for example, Jamie Golombek and Debbie Pearl-Weinberg, “Loans to Family Members – The debt forgiveness rules” (Jan. 2023) CIBC, online: <https://www.cibc.com/content/dam/personal_banking/advice_centre/tax-savings/debt-forgiveness-en.pdf>. Also see Tim Cestnick, “Forgiving loans in your will can be effective” (27 June 2019) The Globe and Mail, online: <<https://www.theglobeandmail.com/investing/personal-finance/taxes/article-forgiving-loans-in-your-will-can-be-effective/>>.

³ *Estate Administration Tax Act, 1998*, S.O. 1998, c 34, Sch. [EATA].

⁴ *Information Required Under Section 4.1 of the Act*, O. Reg. 310/14, s. 3(2)5.iii.

⁵ EATA, *supra* note 3, s. 2.

included in the property of the deceased person.”⁶ Loans, even if forgiven under a will that operates after death, are not excluded.

The notion that a forgiven loan is an estate asset is also supported, albeit indirectly, by case law. The Superior Court of Justice has confirmed that a loan is transformed into a gift if it is forgiven under the creditor’s will upon their death.⁷ Since a forgiven loan is a bequest, it follows that it would be included in the estate inventory, as all property gifted by the testator under a will that is admitted to probate must be included in the estate inventory.

The same principle also ought to apply if the testator’s will gives the estate trustee the power to forgive a loan.⁸ Even if the estate trustee chooses to exercise that power of forgiveness, the debt ought to be included in the estate inventory as a date-of-death asset.

Estate Planning and Loans Owing to the Testator

In light of the fact that debts receivable are considered estate assets under the Act, clients ought to be asked to disclose all outstanding loans receivable when engaging in estate planning. More specifically, information about debts that a solicitor ought to obtain include all loan recipients, all loan amounts, the terms of each loan, interest terms, and the balances owing. It is also advisable to include instructions regarding how each loan should be handled under the client’s will, including whether a loan is to be forgiven when the client passes away.

Estate Administration and Forgiven Loans

If a loan has been forgiven by the deceased, it will be necessary to determine how much, if any, of the loan has been repaid prior to death in order to properly determine the value of the deceased’s estate. To obtain this information, a solicitor or estate trustee may need to review the deceased’s financial records and also reach out to the debtor to confirm whether payments were made on the loan prior to the deceased’s death.

If the testator’s will indicates that a debt has been forgiven, but the debt is not included in the estate inventory, issues may arise if the estate is audited.⁹ Not only may an audit add to the administrative expense of an estate administration, but it could also result in the estate trustee or counsel for the estate being charged with an offence under the Act for making or assisting in making a false statement.¹⁰ Since the penalty for this offence is between \$1,000 and double the probate fees owing if found guilty,¹¹ it is advisable to ensure that all debts owing to the estate are included in the estate inventory.

Conclusion

⁶ Emphasis added.

⁷ *Nutzenberger v. Pryde*, 2019 ONSC 5030 at para. 18.

⁸ See, for example, *McClintock, Re*, 1976 CarswellOnt 882 (Ont. Div. Ct.).

⁹ *EATA*, *supra* note 3, s. 4.7. Also see the Estate Information Return Guide, which can be found online: <[https://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~8/\\$File/9955E_Guide.pdf](https://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~8/$File/9955E_Guide.pdf)> at 3.

¹⁰ *EATA*, *ibid.*, s. 5.1.

¹¹ *Ibid.*

To sum it up, if a will admitted to probate forgives an outstanding loan owing to the testator at the time of their death, including where the will gives an estate trustee the power to forgive a loan, the date-of-death value of the loan should still be included in the testator's estate for the purpose of calculating probate fees. The estate trustee and/or their solicitor may otherwise be subject to scrutiny on an audit. Next month's Solicitor's Tip will focus on strategies clients can utilize to avoid paying probate fees on forgiven loans.