

## LEGAL UPDATE:

# ESTATE PLANNING AND INTER VIVOS GIFTS

*By Erica Paine, Partner and Zia Lewis-Adams, Associate*

In July 2019, the Government introduced important tax reforms allowing for the exemption from the payment of transfer taxes on certain real property inter vivos gifts to family members. These provisions are of particular significance to estate planning by property owners.

### **Background**

Real property transactions in The Bahamas have historically been subject to the payment of stamp duty under the Stamp Act. The amendments to the Stamp Act and Value Added Tax ("VAT") Act which came into effect on 1st July, 2019 brought realty transactions under the ambit of the VAT Act with the transfer tax thus being classified in the nature of a payment of VAT rather than a payment of stamp duty, albeit that the applicable tax / duty rates largely remained the same.

As such, every deed of conveyance, long-term lease, assignment or transfer of real property that is not zero-rated is now subject to VAT at 2.5% where the value is \$100,000.00 and under and 10% where the value exceeds \$100,000.00.

### **Inter-vivos gifts**

The Value Added Tax (Amendment) Act, 2019 and VAT Rule 2019-0004 have introduced a new category of zero-rated land transactions being inter vivos gifts to certain family members. Inter vivos gifts are defined as voluntary dispositions of real property by one living person to another for nominal or no consideration. Thus, the transactions which are now classified as free from the payment of transfer tax are the following:

|    | <b>THE TRANSFEROR</b> | <b>QUALIFYING TRANSFEREE</b>  |
|----|-----------------------|---|
| 1. | An individual         | A Company, all of whose shares of every class are beneficially owned by the transferor, the transferor's spouse, the transferor's adult children or adult remoter issue, and in relation to which no other person owns or has agreed to acquire any right, power, title, option or other interest in, over or concerning the shares, any of the property of the company, or any of the property of the transferor, the transferor's spouse, the transferor's adult children or adult remoter issue. |
| 2. | An individual         | A trustee where the express and unalterable terms of the trust instrument permanently excludes every person, except for the transferor, the transferor's spouse, parent, children or remoter issue, from taking or receiving any title to the trust property or income, or any power, right or benefit pertaining to the trust  |
| 3. | An individual         | Another individual who is:<br>A. The transferor's spouse,<br>B. one or both of the transferor's parents;<br>C. One or more of the transferor's adult children;<br>D. The transferor's adult grandchild as remoter issue   |
| 4. | An individual         | A foundation where the only beneficiaries are<br>i. the transferor, and/or<br>ii. the transferor's spouse and/or<br>iii. the transferor's children or remoter issue   |
| 5. | A company             | A trust or foundation where the only beneficiaries are<br>i. the beneficial owner of all of the equity in such company, and/or<br>ii. spouse of the beneficial owner of such company and/or<br>iii. the children or remoter issue of the beneficial owner of such company   |
| 6. | A trustee             | Another trustee where<br>i. the terms of the trust or trust deed, the beneficiaries and the trust assets remains the same.<br>ii. The change in trustee is purely for administrative purposes and there is no variation in the rights and obligations of the trustees or beneficiaries.   |

It is clear that the intent of Parliament when implementing this tax reform for inter vivos family gifts was to encourage legitimate estate planning and for this reason the transferee of a zero-rated inter vivos gift must hold the real property for at least seven years from the date of the original transfer, except that the transferee is permitted to transfer the real property within that seven year period to his spouse, parent, child or remoter issue and is further permitted to mortgage the property to a financial institution regulated under the Banks and Trust Companies Act. If the transferee transfers, sells or mortgages the gifted property within the seven year period other than in the permitted manner, then VAT is assessed on the initial transfer using the fair market value of the real property at the date of the original inter vivos transfer and applying the applicable VAT rate at the date of the original inter vivos transfer. Further, interest and a late fine will also apply.

There is a detailed process which must be followed to ensure that an inter vivos gift is zero-rated for VAT purposes, involving the online submission of the Department of Inland Revenue's applicable form and stipulated documents. If you require advice generally on estate planning, or wish to ensure that inter vivos gifts are free from the payment of VAT, we strongly recommend that legal advice is sought from a professional advisor to ensure that all options are considered and evaluated, and that appropriate steps are taken to ensure that transfer taxes and other expenses are minimized.

*This Article is for general information purposes and is not intended as legal advice. Further it is only intended to cover the VAT Reform as it relates to inter vivos gifts. The attorneys in the Real Property Group at Graham Thompson remain available to provide further advice.*

## About the Authors



**Erica Paine** is a Partner in the law firm of Graham Thompson since 2004, Erica Paine heads the firm's Grand Bahama office. She is a member of GrahamThompson's Property and Development Practice Group and chairs the firm's Value Added Tax (Tax) group.

Erica specializes in real estate transactions and conveyancing, sales and structuring for both high-end and private client matters and large commercial transactions. Her practice covers condominium agreements and declarations, resorts, hotels, marinas, mixed use and residential projects, fractional ownership arrangements, private and commercial leases, subdivision planning, easements, title insurance, service charges and rights of way, mortgage-backed financing and loans, property title due diligence and opinions, commercial and residential leases and related tax matters and issues, and in advising on

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She was called to the Bar of England and Wales – Middle Temple in 1980 and holds a Master of Jurisprudence degree from Oxford University. Before moving to The Bahamas, Erica practiced in London, where she specialised in Landlord and Tenant and Real Property Law.

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Zia holds a Master of Law (LLM) Degree, Commercial and Maritime Law, from the University of London, and a Bachelor of Law (LLB) Degree (Hons), from the University of Manchester, England. She completed the Bar Professional Training Course at The College of Law, London, England; and studies in Foundation in Law, at Holburn College, London, England.

In 2013, she was admitted to the Bar of England and Wales, and to The Bahamas Bar. Zia is the 2018 – 2020 President of the Grand Bahama Chapter of the International Federation of Women Lawyers (FIDA).

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