

Charitable Giving

Update on New Donation Tax Credit Rules

Presented by: Josh Harnett
September 15, 2016



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Overview

- Pre-2016 rules provided limited flexibility for claiming donation tax credits (“DTCs”) for donations made on death
- Legislation released in 2014 to overhaul taxation of testamentary trusts (mostly negative changes)
- 2014 legislation included greater flexibility for claiming DTCs for donations made on death
- Further amendments have responded to feedback from professional community and provided even more flexibility

Pre-2016 Rules

- Gift made in year of death deemed to be made in the preceding taxation year
- DTC could therefore be claimed in year of death or preceding year
- Gift made by will deemed to have been made immediately before death
- Narrow interpretation by CRA of “gift made by will”

Pre-2016 Rules

- If gift not (deemed) made by deceased prior to death, then gift made by estate
- DTCs for gifts by estate could only be used by the estate under general rules
 - Year of gift or 5 year carry-forward
- No carry-back available to deceased's final 2 years

New Post-2015 Rules

Introduction

- Rules described above significantly changed
- No longer depend on deeming rules for use of DTCs in year of death or preceding year
- Focus now on when gift is made and what the subject matter is
- Came into effect on January 1, 2016 for deaths occurring after 2015

New Post-2015 Rules

New Deeming Rules

- New set of rules to determine who made the gift and when it was made
- If certain conditions met, gift deemed to be made:
 - by the estate (and not by any other taxpayer)
 - at the time the subject matter of the gift is transferred to the qualified donee (“QD”)
- Special treatment applies to gifts made by an individual’s “graduated rate estate” (“GRE”)

New Post-2015 Rules

Meaning of “Graduated Rate Estate”

- A GRE of an individual at any time is an estate that arose as a consequence of the individual’s death if:
 - The time is no more than 36 months after the death;
 - Estate is a “testamentary trust”;
 - Deceased’s SIN provided in estate’s first tax return;
 - Estate designates itself as the deceased’s GRE in first tax return; and
 - No other estate designates itself as the deceased’s GRE

New Post-2015 Rules

Who can claim DTC?

- Definitions in s. 118.1(1) amended to allow for expanded use of DTCs
- If gift is made by GRE and subsection 118.1(5.1) applies to the gift, then DTC can be claimed:
 - By the deceased individual in year of death or preceding year;
 - By the GRE in the year that gift is made or a preceding year of the estate; or
 - By the estate in any of the 5 years following the year in which the gift was made

New Post-2015 Rules

Gift by GRE

- In order for gift made by GRE to qualify for special treatment, subsection 118.1(5.1) must apply to the gift
- Subsection 118.1(5.1) applies where:
 - Gift made by GRE;
 - Death occurs after 2015; and
 - Subsection 118.1(5.2) applies (discussed below); or
 - The subject matter of the gift was property acquired by the estate as a consequence of death or is property substituted for such property
- Amendment proposed to subsection 118.1(5.1)



New Post-2015 Rules

Life Insurance and Registered Plans

- Subsection 118.1(5.2) applies to certain transfers to QDs
- Applies to life insurance, RRSPs, RRIFs and TFSAs
- Deems the transfer to be a gift made to the QD in respect of the individual's death

New Post-2015 Rules

Life Insurance and Registered Plans

- Deeming rule under subsection 118.1(5.2) is relevant to both:
 - Determining if gift deemed made by estate; and
 - Determining if subsection 118.1(5.1) applies to the gift
- Transfer from policy/plan to QD is treated as gift by estate for purposes of claiming DTCs

New Post-2015 Rules

Marketable Securities

- Taxable capital gain arising from deemed disposition on death deemed nil where gain arises from marketable securities that are the subject of a gift to QD to which subsection 118.1(5.1) applies

January 2016 Amendments

- Amendments released in January 2016 provide even further relief
- Subsection 118.1(5.1) will now apply to gifts made in the first 60 months of an estate
 - No longer limited to 36 month GRE period
 - Estate must otherwise qualify as GRE
- If gift made after first 36 months, cannot be carried back to prior estate years

January 2016 Amendments

- Relief provided for spousal trusts on death of life tenant spouse/common-law partner
- DTCs from gifts made after death of life tenant can be used to shelter tax arising from deemed disposition on death of life tenant if:
 - Gift made before filing-due date for year of life tenant's death; and
 - Subject matter of gift was held by trust at time of life tenant's death or property substituted therefor

Planning Opportunities

- Spousal trusts are still useful and trustees can have discretion to make gifts after death of spouse
- Clients can provide executors with flexibility for making charitable gifts
- Consider making gifts in 3rd year after death for maximum flexibility

Potential Pitfalls

- Gifts must be made in first 5 years after death or carry-back of DTCs will be lost
- Assets that are gifted must have been owned by the deceased
 - Flexible rules do not apply to assets acquired by estate, e.g., using income generated in the estate
- Don't forget to make GRE designation in first tax return of estate

THANK YOU

The next presentation will begin shortly

Charities and Charitable Giving as Part of Estate and Succession Planning

Presented by: James M. Parks
September 15, 2016



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Types of Charitable Entities

- a) Public foundations and private foundations
- b) Donor advised funds in public foundations
- c) Considerations in choosing
 - i. start-up costs
 - ii. compliance costs
 - iii. administration
 - iv. investments
 - v. succession
 - vi. flexibility

Types of Charitable Entities

...cont'd

- d) Charitable organizations
- e) Registration process



Forming Private Foundation

- a) Jurisdiction of incorporation
- b) Ontario PGT
- c) Choice of directors
- d) Corporate law issues with respect to financial disclosure, number of directors, etc., no payments to directors permitted
- e) Eligible individuals
- f) Record keeping
- g) CRA audits and compliance
- h) Source of funds and receipting issues

Donor Advised Funds

- a) Gift made absolutely, charity has discretion, subject to recommendations from advisor
- b) Some provide more flexibility than others
- c) Annual fee in DAF for funds retained and/or funds distributed, compared to annual maintenance costs and start-up costs for private foundation
- d) Succession through advisor
- e) Anonymity available - recipient charity does not issue a receipt to donor but rather receives gift from DAF



Distinction Between Charity and Not-For-Profit Organization

- a) No tax relief for donations to unregistered NPO
- b) Requirements for tax to status
- c) Department of Finance consultation and forthcoming amendments
- d) CRA restrictive view on purposes/activities

Donations to Charities

- a) Three categories; charitable organization, private foundation and public foundation
- b) Different levels of compliance such as carrying on business, acquiring control of and investing in shares of companies, etc.
- c) Due diligence with respect to recipient (including T3010 return)

Donations to Charities

...cont'd

- d) Administrative costs and funds actually employed in charitable activities or in making grants to other qualified donees
- e) Disbursement quota issues and requirement to spend minimum amount on charitable activities or making grants
- f) Intermediary, such as Canada Helps

Donations to Charities

...cont'd

- h) Valuation of property for receipting purposes, probate tax and income tax
- i) Tax relief based on "eligible amount" of donation
- j) Official receipt must state eligible amount, if any advantage received by donor
- k) Issues relating to measurement of advantage
- l) Retention of naming rights, use of property on loan, property received in exchange (split receipting such as dinners and other events)

Donations to Charities

...cont'd

- m) Aggressive arrangements involving buy-low and donate high and loose links e.g. school program
- n) Conditional gifts – condition precedent or condition subsequent
- o) Reversing gifts
- p) Gifts by holding companies

Types of Donations

- a) Cash
- b) Marketable securities
- c) Art and other exotic property
- d) Real estate
- e) Shares of private companies (issues re control, excess business holdings)
- f) Ecological property

Types of Donations

...cont'd

- g) Cultural property
- h) Inventory
- i) Special benefits for non-recognition

Methods of Giving

- a) Inter vivos
- b) Testamentary
- c) Trusts

Donations to Foreign Organizations

- a) Foreign organizations that Canada recognizes as qualified donees
- b) U.S. organizations are not necessarily qualified donees to which deductible donations can be made
- c) Problem with grants by registered charities to U.S. organizations that are not qualified donees

Probate Tax Issues

- a) Gifts made outside will not subject to probate tax
- b) Designation of life insurance proceeds, RRIFs, RRSPs and TSFAs
- c) Need to coordinate overall plan with tax consequences and tax savings
- d) Tax tail should not wag dog

Life Insurance a Useful Tool

- a) Death benefit can pay tax on deemed disposition at death or other income or be donated
- b) Insurance policy can be donated to charity with credit for value of policy and premiums paid or cash donated to charity to pay premiums
- c) Corporate owned insurance increases capital dividend account (subject to new rules)
- d) Access to refundable tax in private corporations

Life Insurance a Useful Tool

...cont'd

- e) Split ownership of policies dividing cash value and death benefit
- f) Changes in tax rules
- g) Other life insurance issues



Non-Qualifying Securities

- a) Loan-back rules response to planning involving private companies, payment of salaries, funds lent back to company and charity without funds
- b) Use of life insurance to monetize value of loans
- c) Five year waiting period for non-qualifying securities
- d) Exceptions for arm's length public foundations and charitable organizations (Remai case on "arm's length")
- e) Other issues in planning for "closely held" charitable organizations such as private foundations or shares or debt of family entities



Questionable Arrangements

- a) "Buy/low – donate high" arrangements
- b) Triple dip or double dip no longer available for flow-through shares
- c) Anti-avoidance rules and general anti-avoidance rules
- d) Cases on scope of advantage that taints a gift, even if cash paid
 - i. Marechaux
 - ii. Coleman
- e) Dichotomy between provincial law and tax law with respect to "gift"

Planning Involving Charities and Charitable Donations

- a) Testamentary gifts are made by estate not by deceased
- b) Need to coordinate tax relief in year of death
- c) Five year carry forward for gifts not utilized while alive
- d) Carry over rules for gifts by will
- e) Charitable remainder trusts
- f) Charitable annuities

Planning Involving Charities and Charitable Donations

...cont'd

- g) Valuation issues for real estate, art, shares of private companies, etc.
- h) 2015 budget proposals dropped for donations of proceeds of sale of real estate or private company shares

Conclusion

- a) Motivation for giving is important
- b) Ongoing involvement of donor may be important
- c) Private foundation offers most control, combined with succession issues, involving next generation, etc. but more administrative effort and cost
- d) DAF a useful alternative
- e) Homework required to investigate recipients
- f) Other issues if charity is expected to carry out its own activities either off shore or domestically through intermediaries

Conclusion

...cont'd

- g) Political activity often a concern
- h) Reputation issues
- i) Life insurance often a useful tool
- j) Many donors want to be more involved than writing a cheque, by donating time, volunteering on boards or as workers
- k) Provincial law, e.g. Ontario PGT

THANK YOU

The next presentation will begin shortly

Hot Button Topic – Charities Carrying on Activities Through an Agent or Intermediary

Presented by: Clifford S. Goldfarb, Counsel
September 15, 2016



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Charity Must Devote All Activities and Assets to Charitable Purposes

Can accomplish this by:

- Carrying on Own Charitable Activity
- By Giving its Assets to a Qualified Donee



What is a Qualified Donee?

Qualified Donees are defined in ITA ss.149.1(1): all registered charities and certain other Canadian entities

AND

The following foreign entities:

- The United Nations and its agencies
- Prescribed universities outside Canada whose student body ordinarily includes students from Canada
- Foreign charitable organizations outside Canada to which the federal government has made a gift during the current and preceding taxation year

Foreign Organizations May Apply to Become Qualified Donee (“QD”)

Qualified donee: Foreign charities that have received a gift from Her Majesty in right of Canada

Guidance CG-023, June 16, 2016:

Effective for 24 month period

At least one of

- carries on relief activities in response to a disaster
- provides urgent humanitarian aid
- carries on activities in the national interest of Canada

As of September 6, 2016, the only currently registered foreign charities are Aga Khan Foundation (Switzerland) and Woodrow Wilson International Center for Scholars (USA)



Carrying on Own Activity Through Intermediary

- Difference Between Canadian Charities and other Common Law Countries
 - Most other countries allow direct gifts to organizations which would qualify as charities – e.g. US 501(c)(3)
 - Must Maintain “Direction and Control”
 - Must be “own activity” – not a “conduit”

Cases

- *Public Television Association of Quebec v. Canada (National Revenue)*, 2015 FCA 170 [acting as “conduit”]
- *Opportunities for the Disabled Foundation v. MNR*, 2016 FCA 94 [gifting funds to non-QD foreign hospital, not following terms of existing agency agreement]
- *Isna Development Foundation* – [Muslim – not exerting direction and control – possible funding of terrorist organization]
- *ASL Charity Foundation* – [Jewish – direction and control – inadequate books and records]
- *Bethesda Missionary Temple (Canada) Inc.* – [Christian – direction and control – acting as a conduit]

CRA Policy Statements

- Canadian Registered Charities Carrying Out Activities Outside Canada CG002

www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html

- Using an Intermediary to Carry out a Charity's Activities within Canada CG004

www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html



Types of Intermediaries

- Agents
- Partners
- Joint Ventures

Important Steps

- Agency or other agreement
- Separate accounts
- Proper and complete records
- In English or French
- On-site supervision
- Ownership of capital property

Political Activities (1)

- Under the ITA, a charity cannot have a political “purpose”
- A charity is permitted to engage in political “activities” under certain circumstances (ITA, s.149.1(6),(6.1) & (6.2)):
 - Not partisan
 - Not more than allowed percentage of “resources”
 - Additional Elections Canada spending restrictions during federal election campaigns

Political Activities (2)

- Charity audits – 60 focused on political activities
- 38 completed as of August, 2016
- New Liberal government – No new audits, 24 ongoing audits to continue (16 currently)
- Education first – then revocation
- Results – charities mostly compliant with requirements – six charities given notice of proposed revocation – only one for political activities – most will appeal

Political Activities (3)

Policy Statement CPS-022

September 2, 2003 (updated to 2012)

The courts have determined political purposes to be those that seek to:

- retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.
- further the interests of a particular political party; or support a political party or candidate for public office; or

Political Activities (4)

CRA presumes an activity to be political if a charity:

- explicitly communicates a call to political action (that is, encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);
- explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained (if the retention of the law, policy or decision is being reconsidered by a government), opposed, or changed; or

Political Activities (4)

...cont'd

- explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

Political Activities (5)

Expenditure Limits on Political Activities

“Substantially all” resources devoted to charitable activities = 90% or more (the “10% rule”)

Charity may devote not more than 10% of its total resources, but:

- Revenues less than \$50,000 = 20%
- Revenues \$50-\$100,000 = 15%
- Revenues \$100-\$200,000 = 12%

Political Activities (6)

Expenditure Limits on Political Activities

- “Resources” not defined in the ITA
- CRA considers “it to include the total of a charity's financial assets, as well as everything the charity can use to further its purposes, such as its staff, volunteers, directors, and its premises and equipment.”

Political Activities (7)

Expenditure Limits on Political Activities

Since 2012, a gift to a “qualified donee” is presumed to be used by the donating charity in its own political activities if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee.

Political Activities (8)

Mandate Letter

Allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors, working with the Minister of Finance. This will include clarifying the rules governing “political activity,” with an understanding that charities make an important contribution to public debate and public policy. A new legislative framework to strengthen the sector will emerge from this process.

One of three “top priorities”: The Honourable Diane Lebouthillier, Minister of National Revenue



Political Activities (9)

Resources for Charities about Political Activities

The Future:

- New legislation? Rumours abound
- Charter Challenge: August 25, 2016. Canada Without Poverty commenced action alleging that the ITA ban on political activities violates s.2 of the Charter of Rights and Freedoms, which guarantees freedom of expression and freedom of association.

Political Activities (10)

Resources for Charities about Political Activities

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/menu-eng.html>



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