Charitable Donations at Death

Prepared For: Legal Education Society of Alberta

48th Annual Refresher: Wills & Estates

Prepared by:

Ruth M. Spetz

and

Colin Poon

Borden Ladner Gervais LLP

Calgary, Alberta

For Presentation In:

Lake Louise – April 19 – 21, 2015

CHARITABLE DONATIONS AT DEATH

INTRODUCTION

By providing a mechanism to reduce tax through charitable giving, charitable donation tax credits allow taxpayers to direct their funds to purposes and causes which align with their beliefs and desires instead of merely paying into a more general "central" governmental fund. The idea of directing significant assets to such causes on death has become increasingly popular in recent years, particularly with wealthy Canadians. This is largely because it offers increased control over the portion of one's allocated wealth that otherwise would be taxed. The *Income Tax Act* (Canada)[1] contains special incentives which encourage Canadian taxpayers to make significant donations on death. For example, charitable donation credits typically may only be used to offset 75% of an individual's net income for a given year, but may be applied against up to 100% of the taxpayer's net income for both the year of death and the preceding year.[2] The Department of Finance intends to increase these incentives through legislation that has recently been passed.

Bill C-43 (the "Bill") received Royal Assent on December 17, 2014. The Bill contains a number of significant proposed changes to the Act. Amongst these changes are significant modifications to the treatment of charitable donations made on death. Generally, these changes will result in increased flexibility in allocating donation credits amongst various taxpayers and taxation years. This increased flexibility will help to ensure donation credits do not get "stranded" and will encourage estate plans which include charitable donations on death.

However, the Bill also contains a number of changes which could have an adverse effect on the use of charitable donation credits under certain estate plans involving charitable donations. It is crucial to understand these rules in order to assess whether estate plans which predate the Bill require re-working and to ensure effective planning moving forward.

The Bill also contains a number of controversial amendments which will have wide-ranging impacts on post-mortem planning in general. While many of these rules will be discussed, the focus of this paper is on the effect of the new rules in regard to charitable donations. Accordingly, this paper will briefly outline the most relevant legislative changes contained in the Bill. The benefits of these changes will then be examined and examples of planning techniques will be discussed. Additionally, traps which arise as a result of these new rules will be outlined along with mitigation strategies identified to date.

---

[1] RSC 1985, c 1 (5th Supp) (the "Act")
[2] Subparagraphs (a)(i) and (ii) of the definition of "total gifts" in subsection 118.1(1).

For a more complete discussion of the general impact of the new rules that focuses on developments outside of the charitable donations context, please see Kim Moody's paper given at this conference and Pamela Cross and Lisa Heddema's presentation "Beware: A New Era in Estate Planning; Qualified Disability Trusts, Graduated Rate Estates, Life Interest Trust Taxation.[3]

LEGISLATIVE CHANGES

As noted above, the Bill introduces a number of legislative amendments which will effect estate planning relating to charitable donations. The relevant changes include amendments to the allocation of charitable tax credits, changes to the treatment of life-interest trusts and changes to the graduated rate treatment of estates. It is important to understand both the old and the new rules relating to each of these topics in order to appreciate the impact of the Bill.

The legislative changes generally contain provisions that become effective in regard to deaths occurring after January 1, 2016.

Changes to Allocation of Charitable Donation Credits

Under the old rules a gift made "by Will" was deemed by former subsection 118.1(5) of the Act to have been made by the deceased immediately before death. This allowed the donation credits to be used to offset the tax liability arising on a taxpayer's terminal return.[4] Similarly, former subsection 118.1(5.1) and (5.3) applied to deem direct designations to qualified donees as beneficiaries of insurance proceeds or RRSPs, RRIFs and TFSAs to be charitable donations made by the deceased in the year of death. If the donation credits arising from such gifts were not fully claimed in the year of death, they could also be allocated towards the preceding year through the application of subsection 118.1(4).

In order to be considered a gift "by Will" the terms of the Will generally must have required the executor(s) to make a gift of specific property, a specific amount or a percentage of the residue of the estate, although a certain level of discretion could be given to the executors.[5] Additionally, the gift was required to actually have been made. The value of the gift of property in kind "by Will" was calculated based on the value of the gift at the time of the taxpayer's death, and not the time the property was transferred to the charity.[6] Where subsections 118.1(5), (5.1) and (5.3) did not apply,

---

[3] Society of Trust and Estate Practitioners (Canada), November 14, 2014 [*Heddema and Cross*].
[4] Special rules found in section 70 of the Act apply in calculating the tax liability of a person in their year of death, including a deemed disposition and reacquisition at fair market value of all the taxpayer's capital property pursuant to subsection 70(5) of the Act.
[5] See CRA Views, Interpretation—external, 2011-0430131E5 – "Subsection 118.1(5)—gift by will" (2011).
[6] CRA, *Registered Charities Newsletter 27*, q 7.