
**TRADING OF CHARITABLE DONATIONS, APPEAL
REGIME, AND TRANSPARENCY AND
ACCESSIBILITY OF INFORMATION IN
SEPTEMBER 16, 2004 DRAFT AMENDMENTS TO
THE *INCOME TAX ACT***

*By Theresa L.M. Man, B.Sc., M. Mus., LL.B.
and Terrance S. Carter, B.A., LL.B.*

A. INTRODUCTION

This is the third in a series of four *Charity Law Bulletins* commenting on the draft amendments to the *Income Tax Act* (the “Act”) released by the Department of Finance (the “Department”) on September 16, 2004 (“the “September 2004 Amendments”) that, when adopted, will implement the initiative of the Federal Government in rewriting the tax rules concerning the taxation and administration of charities as set out in the Federal Budget that was announced on March 23, 2004 (the “2004 Budget”). Details regarding the 2004 Budget are summarized in *Charity Law Bulletin* No. 41.¹ Amendments to the Act regarding new proposed intermediate taxes and penalties are summarised in *Charity Law Bulletin* No. 54 dated October 29, 2004², the first *Charity Law Bulletin* in this series. *Charity Law Bulletin* No. 55 dated October 30, 2004³, the second in this series, provides comments on changes to the Act in relation to revocation and annulment of registered charities. This *Charity Law Bulletin* will provide a commentary on the amendments to the Act that would give effect to the following proposals set out in the 2004 Budget:

¹ *Charity Law Bulletin* No. 41 dated March 30, 2004 is available on our website at www.charitylaw.ca.

² *Charity Law Bulletin* No. 54 dated October 29, 2004 is available on our website at www.charitylaw.ca.

³ *Charity Law Bulletin* No. 55 dated October 30, 2004 is available on our website at www.charitylaw.ca.

- ◆ No trading in charitable donations;
- ◆ New appeal regime for registered charities, including a new internal reconsideration process and the appeal of taxes and penalties to the Tax Court of Canada; and
- ◆ Transparency and accessibility of information concerning registered charities, including release of more information to the public concerning registered charities and organizations that are denied registration, inclusion of more information on official tax receipts, and increased information on the website of Canada Revenue Agency (“CRA”).

Changes to the Act in relation to new disbursement quota rules will be commented upon in the fourth *Charity Law Bulletin* in this series.

As indicated in *Charity Law Bulletin* No. 54 dated October 29, 2004, it is important to note that the proposals that are set out in the 2004 Budget should be read in addition to the February 27, 2004 revised draft technical amendments, which were commented on in *Charity Law Bulletin* No. 40,⁴ as well as in a paper by the authors entitled “Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts (current to March 1, 2004).”⁵

B. NO TRADING CHARITABLE DONATIONS

As explained in *Charity Law Bulletin* No. 41, individuals who make charitable donations may carry forward their unused credit balances for up to five years. Similarly, corporations may also carry forward unused charitable donation deductions for up to five years. However, the Act does not permit individuals or corporations to sell or transfer these unused claims to other taxpayers.

In order to ensure that an individual who could not otherwise use surplus charitable donation tax credits also cannot do so indirectly by means of a transfer of property to a corporation, a new subsection 110.1(1.2) is proposed to be inserted into the Act. Paragraph 110.1(1.2)(a) provides that unused charitable donation deductions of a corporation are deductible only for taxation years that end before the time that control of the corporation is acquired by a person or a group of persons. This will ensure that unused charitable donation deductions cannot be traded by having unused charitable donation deductions of a corporation treated in a manner that is similar to the treatment accorded to capital losses. Paragraph 110.1(1.2)(b) goes on to deny an unused charitable donation deduction in respect of a gift made by any corporation before the control of the

⁴ *Charity Law Bulletin* No. 40 dated March 29, 2004 is available on our website at www.charitylaw.ca.

⁵ The paper “Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts (current to March 1, 2004)” was presented to the Society of Estate and Trust Practitioners on March 4, 2004 is available on our website at www.charitylaw.ca.

corporation is acquired by a person or a group of persons, if the property that is the subject of the gift was acquired by the corporation (before the making of the gift) under an arrangement under which it was expected that control of the corporation would be so acquired and a gift would be so made. This new rule does not apply where the person or group of person who acquires control of the corporation is a qualified donee that received the gift in question. These amendments will apply in respect of gifts made after March 22, 2004.

C. APPEALS REGIME

The 2004 Budget attempts to make the appeal process more accessible and affordable for registered charities and unsuccessful applicants for charitable status than has been the case in the past. As a result of this initiative, the following amendments to the Act are introduced in the September 2004 Amendments. However, the new objection and appeal process will not apply to an applicant or registered charity that is subject to a certificate under the *Charities Registration (Security Information) Act*.

1. Internal Reconsideration Process

The 2004 Budget proposes to extend the application of CRA's existing internal objection review process to notices of a decision by the Minister of National Revenue (the "Minister"). In this regard, section 168 of the Act deals with circumstances in which the Minister may revoke the registration of a charity or a registered Canadian amateur athletic association.

New subsection 168(4) of the Act is proposed to be inserted into the Act to permit an organization that wishes to avail itself of a new internal reconsideration process by filing a notice of objection within 90 days from the issuance by CRA of the notice which is being objected to. The results of the review will be communicated in writing and no appeal can be made to a court unless the objection process has been availed of. In particular, subsection 168(4) provides that a person may file a notice of objection if the person objects to a notice of intention to revoke the registration of a charity (subsection 168(1)), revocation of a charity's registration (subsections 149.1(2), (3), (4), or (4.1)), designation of a charity as a private or public foundation or charitable organization (subsection 149.1(6.3)), denial of applications for charitable status (new subsection 149.1(22)), or annulment of a charity's registration (new subsection 149.1(23)). The filing of a notice of objection is a required step before the person may appeal to the Federal Court of Appeal under subsection 172(3). New subsection 168(4) applies in

respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

Subsection 168(3) of the Act currently provides that, notwithstanding (a) the issuance of a notice of intention from the Minister to revoke the registration of a charity pursuant to subsection 168(1) of the Act or (b) an application from a person to the Federal Court of Appeal for a stay of publication of such a notice under subsection 168(2) of the Act, the registration of the charity is revoked as of the time that a certificate issued under the *Charities Registration (Security Information) Act* is determined to be reasonable. As a result of the introduction of new subsection 168(4), subsection 168(3) is expanded to include a third scenario (in addition to scenarios (a) and (b) above) in respect of notices of objection filed under 168(4). This means that the registration is also revoked as of the time that a certificate issued under the *Charities Registration (Security Information) Act* is determined to be reasonable notwithstanding that the person may have filed a notice of objection under subsection 168(4).

It is also important to note that subsection 168(2) remains unchanged. This means that the Minister retains the option to publish in the *Canada Gazette* a copy of a notice of intention to revoke the registration of a charity, if at least 30 days have elapsed since the notice was issued. The Explanatory Notes to the September 2004 Amendments clarify that after the time of publication, the registration of a charity is revoked, notwithstanding that an objection may have been filed. The charity may apply to the Federal Court of Appeal for an extension of the 30-day period.

2. External Appeals Process

Appeals from decisions concerning refusal to grant registered charitable status or revocation of registered charitable status will need to continue to be made to the Federal Court of Appeal. This is unfortunate, as an appeal in this regard is a very costly process that few charities are in a financial position to pursue.

In this regard, subsection 172(3) of the Act currently provides a person with a right to appeal to the Federal Court of Appeal against a decision of the Minister to, *inter alia*, refuse the person's registration as a charity or a notice of intention by the Minister to revoke the registration of a charity or a refusal to designate a charity as a charitable organization, public foundation or private foundation, etc.

As a result of the introduction of the filing of notice of objection under new subsection 168(4), paragraphs 172(3)(a) and (a.1) are amended so that the right to appeal to the Federal Court of Appeal against a decision of the Minister in respect of a notice issued under any of subsections 149.1(2) to (4.1), (6.3), (22) or (23) or 168(1), will then apply in respect of the confirmation of the Minister of such a decision in response to a notice of objection filed under subsection 168(4). In addition, a person who has filed a notice of objection under subsection 168(4) will have the option to appeal the decision after 90 days have elapsed from the filing of the said notice of objection because, under that circumstance, the Minister would be deemed to have refused the objection.

As a result of the introduction of subsection 168(4) and the amendment of subsection 172(3), subsection 172(4) has to be amended to remove the right of registered charities to appeal to the Federal Court of Appeal within a 180-day appeal period because it is no longer applicable under the new appeal regime. Furthermore, the appeal period of 30 days set out in subsection 180(1) for the institution of an appeal to the Federal Court of Appeal is also amended to provide that for decisions of the Minister in respect of charities and applicants for status as a registered charity, this 30-day period begins from the day on which the Minister responds to a notice of objection filed under the new subsection 168(4).

However, appeals of taxes and penalties will be directed to the Tax Court of Canada. Specifically, subsection 189(8.1) clarifies that a taxpayer may not appeal to the Tax Court of Canada in respect of an issue that could be the subject of a notice of objection filed under new subsection 168(4) of the Act.

The amended subsections 172(3), 172(4) and 180(1) apply in respect of notices issued by the Minister after the later of December 31, 2004 and 30 days after Royal Assent.

D. TRANSPARENCY AND ACCESSIBILITY OF INFORMATION

1. Information pertaining to registered charities

Prior to the 2004 Budget, the public could only obtain copies of annual information returns, governing documents with the names of directors, registration letters, and notices of revocation in relation to registered charities. The 2004 Budget proposes to authorize the Minister to release to the public additional information where such information has been submitted to the Minister after 2004. The Explanatory Notes explain that the proposal is intended to “further enhance transparency and

accessibility by making new information available on registered charities, the registration process, regulatory decisions, and compliance activities.”

In this regard, subsection 241(3.2) currently permits a government official to release certain information relating to a registered charity, including the charity’s governing documents, the application for charitable status, names of directors of the charity, notification of registration, and letter of revocation of registration. The September 2004 Amendments propose to amend subsection 241(3.2) by amending paragraph (e) and inserting new paragraphs (f) to (h) to include the disclosure of the following information:

- ◆ Letters to a charity relating to grounds for revocation or annulment (paragraph 241(3.2)(e));
- ◆ Financial statements that are filed with the annual information return (paragraph 241(3.2)(f));
- ◆ The decision of CRA regarding a notice of objection filed by a registered charity (paragraph 241(3.2)(g));
- ◆ The identification of the registered charity which is subject to a sanction, the type of sanction imposed, as well as the letter sent to the registered charity relating to the grounds for the sanction (paragraph 241(3.2)(g)); and
- ◆ Information to support an application by a registered charity for special status or an exemption under the Act (e.g. request for permission to accumulate assets) (paragraph 241(3.2)(h)).

This amendment applies to documents sent by the Minister or that are filed or required to be filed with the Minister after the later of December 31, 2004 and Royal Assent.

2. Information concerning organizations that are denied registration

Paragraph 241(4)(g) currently permits a government official to use information to compile information in a form that does not directly or indirectly reveal the identity of the person to whom the information relates. The Explanatory Notes indicate that “in order to assist the charitable sector and the public in understanding how CRA determines whether an organization meets the criteria for registration as a registered charity,” it “may make available its reasons for denying the registration of organizations, in such a manner as to withhold the identity of an applicant.” Such information could include the governing documents of the applicant, information disclosed by the applicant in the course of making the application, a “copy of the notice of denial, and a copy of the decision, if any, of the Appeals Branch of CRA regarding a notice of objection, if any, filed by the organization.”

3. Additional information on official tax receipts

For official donation receipts issued after 2004, it is proposed that sections 3501 and 3502 of the *Income Tax Act Regulations* be amended to require that official donation receipts would need to include the current internet address of CRA.

E. CONCLUSION

The above is a summary of the new appeal regime introduced by the September 2004 Amendments, including the implementation of an internal reconsideration process. Under the new regime, appeals from decisions concerning refusal to grant registered charitable status or revocation of registered charitable status will need to continue to be made to the Federal Court of Appeal, while appeals of taxes and penalties will be directed to the Tax Court of Canada. We welcome the implementation of changes to the Act so that information will become more readily available and accessible by the public, including information concerning applications for charitable status that have been denied.