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BILL C-33 - PROPOSED AMENDMENTS TO THE *INCOME TAX ACT* AFFECTING CHARITIES

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A. BILL C-33 INTRODUCED

The long-awaited action by the Department of Finance (the "Department") to move forward with proposed amendments to the *Income Tax Act* (the "Act") containing significant changes affecting charities were released by the Department of Finance on November 9, 2006, by way of a Notice of Ways and Means of Motion. The motion was introduced as Bill C-33, and received its first reading in the House of Commons on November 22, 2006, as the *Income Tax Amendments Act, 2006*.[1]

The proposed changes were last released by the Department on July 18, 2005, which amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003, and February 27, 2004. The amendments proposed in July 2005 have been summarized in *Charity Law Bulletin* Nos. 76 and 77, available on our website www.charitylaw.ca.

A number of the proposed changes contained in Bill C-33 will substantially impact registered charities in Canada. Some of the most significant proposed changes involve the introduction of split-receipting rules and rules to curtail abusive donation tax shelter schemes. These changes are contained in subsections 248(30) to (41) of the Act. Other proposed amendments include new definitions of charitable organizations and public foundations, rules affecting the revocation of charitable registrations, municipal or public bodies performing a

[1] The text of the Bill C-33 is available at http://www.parl.gc.ca/legisinfo/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4876&List=toc-1.

function of government in Canada as new qualified donees, and new expanded disclosure of information concerning registered charities to the public.

The provisions contained in Bill C-33 are for the most part the same as the amendments released in July 2005, with a few exceptions reviewed below.

B. WITHDRAWAL OF REASONABLE INQUIRY REQUIREMENT

One of the main differences between Bill C-33 and the July 2005 proposed amendments is that the previously proposed requirement in subsection 248(40) imposing a heavy onus on a charity to make inquiries of a donor who made a gift with an eligible amount in excess of $5,000 on or after January 1, 2006. The charitable sector and its advisors were very concerned with the proposed statutory onus placed on charities when issuing receipts. In response to a submission made by the Government Relations Committee of the Canadian Association of Gift Planners, Len Farber of the Department of Finance in a letter dated November 22, 2005, advised that the Department "recognize[d] the difficulties that have been brought to light by this proposal" placing an administrative burden on charities. Mr. Farber indicated that the Department was "prepared to recommend to the Minister of Finance that proposed subsection 248(40) be withdrawn." As a result, the proposed reasonable inquiry requirement has been withdrawn from Bill C-33. Notwithstanding the withdrawal of this proposed onerous rule, charities are still required to exercise due diligence when issuing charitable donation receipts to ensure that the information on the receipts is accurate.

C. INTER-CHARITY GIFTS

In place of the withdrawn reasonable inquiry requirement, the Department inserted a new provision in subsection 248(40) of the Act to provide that subsection 248(30), which deals with the intention to give where there is an advantage to the donor, does not apply in respect of a gift received by a qualified donee from a registered charity. This proposed rule does not apply in respect of gifts made before November 9, 2006.

At common law, in order to qualify as a gift, property must be transferred voluntarily with an intention to make a gift. Where the transferor has received any form of consideration or benefit, it is generally *presumed* that such an intention is not present. Subsection 248(30) provides the transferor with an opportunity to rebut

this presumption. Specifically, subsection 248(30) provides that the existence of an advantage in respect of a property transferred to a qualified donee (e.g. a registered charity) does not "in and by itself" disqualify the transfer from being a gift under two situations, namely (a) where the amount of the advantage does not exceed 80% of the fair market value of the transferred property, and (b) where the transferor establishes to the satisfaction of the Minister of National Revenue (the "Minister") that the transfer was made with the intention to make a gift. Under the latter scenario, the Explanatory Notes indicate that the taxpayer would need to apply to the Minister for a determination of whether the transfer was made with the intention to make a gift.

By stating that subsection 248(30) does not apply to inter-charity gifts, this means that the common law rule would apply. The explanatory notes to Bill C-33 indicate that the application of the presumption rebuttal rule "is unnecessary in the context of inter-charity transfers and could lead to complications of the 'disbursement quota' calculation of a charity." By providing that the presumption rebuttal rule does not apply to inter-charity gifts, the explanatory notes further indicate that "the eligible amount of a gift under new subsection 248(31) should always equal its fair market value."

However, the practical implication and application of this provision is unclear. For example, it is not clear how this rule would apply in situations where the transferor charity of an inter-charity gift receives a benefit from the transferee charity, such as a gift of a property that is subject to a debt. In such a situation, it is not clear what would be the amount to be included in the disbursement quota calculation, i.e. the fair market value of the property gifted, or the net value of the property after deducting the debt.

D. NON-APPLICATION OF DEEMED FAIR MARKET VALUE

The proposed subsection 248(35) of the Act introduces a new deeming provision to require the fair market value of the property that is the subject of a gift, for purposes of determining the eligible amount of the gift under subsection 248(31), be *deemed* to be the lesser of (i) the "fair market value of the property otherwise determined," and (ii) the cost (or the adjusted cost base in the case of capital property) of the property to the donor immediately before the gift is made.

The proposed subsection 248(37) sets out a list of circumstances in which the deeming provision would not apply, including inventory, real property or an immovable situated in Canada, certified cultural property,

publicly traded shares or ecological gifts. The deeming provision also does not apply to circumstances involving a shareholder transferring property to a controlled corporation in exchange for shares issued by the corporation, and then donating the shares to a charity, or having the corporation donate the shares to a charity. If subsections 85(1) or 85(2) of the Act[2] applied to the transfer of such an exempt property to the corporation, then subsection 248(37) would preclude the application of subsection 248(35) to that property if it were then donated by the corporation.

In addition to the above, a new exception is introduced in Bill C-33. In this regard, the proposed paragraph 248(37)(g) provides that "a property that was acquired in circumstances where subsection 70(6) or (9) or 73(1), (3) or (4) applied" would be exempt from the application of the deeming provision. The explanatory notes to Bill C-33 indicate that under those situations, the donor has acquired the property from a transferor (such as a spouse) on a tax-deferred rollover basis. Pursuant to paragraph 248(37)(g), unless the transferor acquired the property within the three-year period referred to in subsection 248(35) (or the 10-year period, where applicable), subsection 248(35) will not apply in these circumstances to deem the value of the gift to the donor's rollover cost or adjusted cost base.

E. CONCLUSION

Notwithstanding the fact that these amendments have not been enacted, Canada Revenue Agency already requires charities to comply with the proposed split-receipting rules, and its administrative positions have been upheld by courts.[3] However, other proposed changes have not been applied by Canada Revenue Agency, e.g. the new definition for charitable organizations and public foundations. Therefore, the long-awaited introduction of Bill C-33 is a welcomed move by the Department to finally bring closure to the proposed amendments that were first introduced four years ago.

These amendments, once enacted, will bring sweeping changes that affect charities in many ways. It is important that charities and their advisors become familiar with these proposed changes in order to ensure compliance. In addition, since the effective date for each of the new rules set out in subsections 248(30) to (41) is different, it is important for charities to be aware of them in order to comply appropriately.

[2] The "section 85 rollover" allows the transfer of assets to a corporation at cost in exchange for shares of the corporation. It can be used whenever the opening words of subsection 85(1) are satisfied and the property being transferred to a corporation is "eligible property" under 85(1.1). Subsection 85(2) deals with rollovers from a Canadian partnership to a corporation.
[3] *Richert v. Stewards' Charitable Foundation* [2005] B.C.J. No. 279, affirmed 2006 BCCA 9.

There are still many areas where the meaning and application of the proposed amendments are not clear. It is hoped that these grey areas will be clarified either by future remedial amendments to the Act or by Canada Revenue Agency providing the charitable sector with administrative guidelines on how these statutory provisions will be interpreted by Canada Revenue Agency.

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