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2013 FEDERAL BUDGET: NEW DONOR TAX CREDIT, GST/HST AND ANTI-TAX SHELTER PROVISIONS AFFECTING CHARITIES

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A. INTRODUCTION

On March 21, 2013, the federal government introduced the 2013 Federal Budget ("Budget 2013").[1] While Budget 2013 includes a so called "First-Time Donor's Super Credit" ("New Donor Tax Credit") that is intended to encourage new donors, the budget document includes little else from the various recommendations that were contained in the House of Commons Standing Committee on Finance Report ("SCOF Report") entitled *Tax Incentives for Charitable Giving in Canada*[2] that was released on February 11, 2013, presumably so that it could be taken into consideration when drafting Budget 2013.[3] While the charitable sector was undoubtedly expecting more in the way of charitable donation incentives Budget 2013 arising from the SCOF Report, in the present economic circumstances it is remarkable that there was any new charitable donation tax incentives included in Budget 2013 at all. Hopefully, some of the other recommendations from the SCOF Report will eventually make their way into future federal budgets.

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[1] The full text of the Budget 2013 document can be viewed at http://www.budget.gc.ca.

[2] Report of the Standing Committee on Finance. James Rajotte, MP, Chair. 41st Parliament, 1st Session. Available online at: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5972482&Language=E&Mode=1&Parl=41&Ses=1.

[3] For a commentary on the House of Commons Standing Committee on Finance Report, see *Charity law Bulletin* No. 301 available at www.carters.ca/pub/bulletin/charity/2013/chylb301.htm.

In addition to the New Donor Tax Credit, Budget 2013 includes changes with regards to the application of HST/GST to paid parking operated by charities, extending the normal reassessment period with regards to tax shelters and reportable transactions, providing for the early collection of 50% of disputed tax, interest and penalties arising from charitable tax shelters, as well as repeating a call for increased transparency and accountability in the charitable sector and support for the need for social finance, amongst other initiatives.

This *Charity Law Bulletin* provides a brief summary of these and some of the other more significant provisions from Budget 2013 that affect charities.

B. OVERVIEW OF SIGNIFICANT PROVISIONS OF BUDGET 2013 CONCERNING CHARITIES

1. Introduction of Temporary Donation Tax Credit for "First-Time Donors"

As mentioned above, Budget 2013 introduces a New Donor Tax Credit which "is designed to encourage new donors to give to charity." Donors claiming the New Donor Tax Credit will receive an additional 25% tax credit for "first-time" donations on up to $1,000 of a gift, provided that the gift is made in cash. However, the New Donor Tax Credit does not go nearly as far as the Stretch Tax Credit proposed by Imagine Canada and had been recommended for adoption by the SCOF Report.

The New Donor Tax Credit is only available where neither a donor nor his or her spouse has claimed a charitable donation tax credit since 2007. In this regard, while the New Donor Tax Credit is ostensibly targeted at young first-time donors, it will also apply to those who have not claimed a donation tax credit since 2007. The New Donor Tax Credit can be claimed only once. As well, it will be available only on a temporary basis between the 2013 and 2017 taxation years.

As a result of the New Donor Tax Credit, new donors or those individuals who have not donated since 2007, will receive an enhanced federal tax credit of 40% for donations of $200 or less, and a 54% federal tax credit for the portion of their donation in excess of $200, up to a maximum of $1,000. Those donors who are married or in a common-law partnership will also be permitted to share the New Donor Tax Credit in any given taxation year, provided that the New Donor Tax Credit claimed does not exceed the amount that either spouse would be entitled to on an individual basis. Interestingly, if the couple cannot agree concerning what portion of the New Donor Tax Credit each can deduct from their income, proposed amendments to the *Income Tax Act* (Canada) ("ITA") in Budget 2013 will allow the Minister to "fix the portions".

The New Donor Tax Credit can be applied to eligible donations after March 21, 2013 but may be claimed only once prior to 2018.

2. Extension of Reassessment Period for Donors to Registered Tax Shelters

While much of Budget 2013 focuses on the creation of new jobs in Canada and economic growth, a significant portion of Budget 2013 is focused on increasing the means for balancing the budget. In order to do so, the federal government has taken a hard line on various tax loop-holes, particularly those involving tax shelters. In this regard, Budget 2013 proposes to extend the reassessment period for reportable tax avoidance transactions and tax shelters where information returns required to be filed under the ITA relating to the tax shelter have not been filed on time.

In this regard, while Canada Revenue Agency ("CRA") is permitted to reassess a taxpayer's return outside of the normal reassessment period of three years in cases of misrepresentation attributable to neglect, carelessness, wilful default or fraud, the ITA currently does not provide a similar extension in cases where an information return by a tax shelter has not been filed or has been filed late. As a result, CRA's ability to audit the tax shelter is prejudiced by the application of the shorter reassessment period.

In response, Budget 2013 proposes to extend the normal reassessment period with respect to participants in a tax shelter or "reportable transactions" where the information return required to be filed by the tax shelter or reportable transaction is not filed on time, or at all, by a period of a further 3 years after the date that the information return has been filed (for a total of 6 years). This extended reassessment period will apply to all future taxation years that end after March 21, 2013.

3. Early Collection of Amounts Owing from Donation Tax Shelters

Generally, CRA has been successful in the Tax Court of Canada and the Federal Court of Appeal in recent years in relation to challenging disputed charitable donation tax credits or deductions claimed by donors involved in donation tax shelters. However, Budget 2013 notes that this success often comes only after years of litigation. As a result, CRA has experienced significant delays in collecting any taxes owed, together with fines and penalties assessed against the donor.

In response, Budget 2013 states that it hopes to "discourage participation in questionable charitable donation tax shelters" by permitting CRA to proceed with collection actions on 50% of the disputed tax, interest or penalties, which result from the disallowance of a donation claimed with respect to a tax shelter, even before the ultimate liability of the donor has been determined through the objection and appeal process.

While there are many donors who have turned a blind eye and become involved in donation tax shelters schemes that were obviously too good to be true to their detriment, there is an arguable unfairness whereby CRA is permitted to collect taxes, fines, and penalties with regard to disputed donation tax credits or deductions before all routes of appeal have been exhausted. There are no similar provisions under the ITA for other potentially disputed taxes by CRA, and given the recent decision of *Guindon v. The Queen*[4] stating that monetary penalties against third-parties under the ITA can be equated with criminal sanctions, the constitutionality of the proposed amendments to the ITA in this regard is questionable.

Budget 2013 states that these measures will apply to amounts assessed for the 2013 taxation year and all subsequent taxation years.

4. <u>New Rules Concerning Collection of GST/HST on Paid Parking Affecting Charities</u>

Budget 2013 states that it is unclear whether many public sector bodies, i.e., municipalities, universities, public colleges, school authorities, hospital authorities, charities, non-profit organizations or government entities ("PSB") are exempt from GST/HST in relation to the provision of paid parking. In this regard, Budget 2013 states that, "[I]t was never intended that this provision would exempt a commercial activity, such as paid parking provided on a regular basis by a PSB that may compete with others providing paid parking services."

[4] (2012) TCC 287.

As such, Budget 2013 states that the *Excise Tax Act* will be amended to clarify that PSBs are not exempt from collecting and remitted HST/GST on supplies of paid parking made by way of lease, license or similar arrangement in the course of a business carried on by the PSB. Budget 2013 specifically identifies parking facilities operated by municipalities or hospitals in this regard. In an effort to be consistent, Budget 2013 also specifically states that supplies of paid parking made by other charities will also not be exempt. As a practical result, many charities, including hospitals and universities, will now need to ensure that they are registered for GST/HST purposes and are collecting and remitting all taxes owed with respect to any parking facilities that they operate in the course of a business. This proposed change will impose an additional administrative burden many charities and smaller PSBs which are not at present registered and will now need to take steps to determine if their paid parking services will require that they register for GST/HST purposes. It should be noted, however, that the proposed amendments to the *Excise Tax Act* will apply where the supply is made “in the course of a business”, and whether the provision of paid parking is made in the course of a business is a question of fact which would need to be determined on a case by case basis.

These proposed measures apply to all supplies of paid parking made after March 21, 2013.

5. <u>Repeated Focus on Transparency and Accountability in the Charitable Sector</u>

In addition to the proposed amendments described above, Budget 2013 also announces that the federal government will encourage more donations and further enhance public awareness, reduce red tape, and increase transparency and accountability in the charitable sector, by working with organizations in the sector, including Imagine Canada. This announcement has been repeated in previous budgets with respect to the federal government’s intentions with regard to the charitable sector.

6. <u>Federal Government Recommits to Supporting Social Finance</u>

Budget 2013 continues to reinforce the importance of supporting the facilitation of social finance as outlined in previous budgets. Specifically, Budget 2013 states that the federal government will continue to “bring together key players in the non-profit and private sectors to develop investment-worthy ideas and tap the potential of the social finance marketplace to promote economic growth and prosperity.”

7. Amalgamation of the Department of Foreign Affairs and International Trade with CIDA

Budget 2013 announces that the Department of Foreign Affairs and International Trade and the Canadian International Development Agency will be amalgamated into the new Department of Foreign Affairs, Trade, and Development (DFATD). As well, there will continue to be two ministerial positions for the trade and development functions, whose responsibilities and roles will now be prescribed in forthcoming legislation.

While the stated reasoning for the amalgamation is to increase the ability of the new DFATD to "leverage the synergies resulting from the amalgamation to maximize the effectiveness of the resources available to deliver development and humanitarian assistance", it is questionable why it is necessary or even advisable to tie commercial trade policy with the objectives of international aid.

8. Additional Funding Announced for Nature Conservancy of Canada and Other Charities

Finally, Budget 2013 proposes funding for a number of charitable organizations, including a grant of $20 million for the Nature Conservancy of Canada, a charitable private land conservation organization, in order to allow it to continue to conserve ecologically sensitive land under the Natural Areas Conservation Program. This funding will also be matched by $2 million in new funding from other unnamed sources. Budget 2013 emphasises the federal government's commitment to preserving the natural environment. This might be considered indirect response to the SCOF Report's recommendation to eliminate taxable capital gains on donations of real property, since doing so would substantially decrease the effectiveness of this Program. As well, this grant is in keeping with previous budgets, whereby the Federal Government provided $225 million to the NCC and other charities for this Program in 2007.

C. CONCLUSION

While Budget 2013 could have gone further in encouraging charitable donations by adopting the Stretch Credit as proposed by Imagine Canada, the fact that there has been the inclusion of the New Donor Tax Credit, limited as it is, as well as the inclusion of a number of specific subsector grants, is obviously a step in the right direction and evidences a willingness by the federal government to recognise the importance of the charitable sector in Canada even during a period of fiscal restraint. Other than the provisions extending the reassessment period with regards to tax shelters and reportable transactions, as well as allowing an early 50%

collection of disputed tax, interest and penalties involving tax shelters (both of which few would dispute as a matter of policy), the other provisions of Budget 2013 generally reflect a statement by the federal government that they intend to support the charitable sector in Canada. However, as is often said, "the proof is in the pudding" and as such the charitable sector will want to carefully monitor and continue to pressure the federal government to ensure that it follows through with its stated intentions over the coming year.

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