
**THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar**

Ottawa – February 7, 2013

Update on NPO Issues

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2

OVERVIEW

- Maintaining NPO Status
- Audit Issues
- Recent CRA Interpretations
- NPO Risk Identification Project

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3

MAINTAINING NPO STATUS

- The terms “non-profit” and “not-for-profit” (“NPOs”) are used interchangeably and generally refer to organizations whose profits are not passed on to their members
- This section provides an update on recent CRA views on the tax exempt status of NPOs, including
 - Capacity of NPOs to earn profits
 - Carrying on a trade or business through an NPO
 - Tax consequences of losing NPO tax exemption
- Recent CRA views create much uncertainty for NPOs and substantially limit their revenue-generating capacity

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4

FOUR BASIC REQUIREMENTS FOR NPOs

- To qualify as an NPO, organization must meet all 4 criteria under paragraph 149(1)(l) of the ITA throughout any taxation year in order to maintain tax-exempt status
 1. Not be a charity
 2. Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 3. Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 4. Not distribute or otherwise make available for the personal benefit of a member any of its income

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5

- It is a question of fact that can only be determined after a review of the purposes and activities of the NPO
- NPO status must generally be reviewed on a year by year basis
- Document 2010-038058117 – It is possible for an organization to qualify for exemption as an NPO for a period shorter than its fiscal year
- Being incorporated as a not-for-profit under corporate legislation does not mean that the organization is an NPO for tax purposes
- See CRA *IT-496R, Non-Profit Organizations*
<http://www.cra-arc.gc.ca/E/pub/tp/it496r/README.html>

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6

1. Must not be a charity
 - If CRA considers an organization to be a "charity" as defined in subsection 149.1(1), then it cannot qualify in that period as a tax-exempt NPO
 - No explicit opinion from CRA is required and no ruling would be issued because it is always a question of fact (Document 2009-03299)
 - If an NPO is denied charitable registration, this does not automatically mean that it is not a charity
 - Document 2010-038058117 - an organization with exclusively charitable purposes does not qualify as an NPO, even if it is not a registered charity

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7

- 2. Must be *organized* for non-profit purposes
 - NPOs must be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 - Document 2010-038058117 - NPOs may be established to further any purpose other than for a profit purpose, no requirement that an NPO must have a "benevolent" or "social" purpose
 - When determining the purpose for which an association was organized, the instruments creating the association will normally be reviewed, including letters patent, articles of incorporation, memoranda of agreement, by-laws, etc
 - Rarely an issue

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8

- 3. Must be operated for non-profit purposes
 - NPOs must in fact be *operated* exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 - This is the criteria that is the subject of the most uncertainty for NPOs
 - CRA is generally of the view that an NPO can engage in commercial activities and earn an unintentional profit, but if it would be unable to undertake its not-for-profit activities but for its profitable activities, the organization cannot be an NPO because it has a profit purpose (Document 2009-033731)

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- Issues
 - Carrying on a trade or business
 - Accumulating excess income
 - Earning investment income
 - Carrying on a trade or business through a wholly owned subsidiary

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- Document 2010-038058117 – summary of CRA's view
 - NPOs must operate "exclusively" for purposes other than profit (incidental profits do not amount to a profit purpose)
 - May receive incidental profits through basic fundraising (lotteries, bake sales, chocolate bar sales, etc.) and soliciting gifts and grants
 - Can earn profits, but the profits should be incidental and arise from activities that are undertaken to meet the organization's not-for-profit objectives ("incidental profits")

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11

- Earning profits to fund not-for-profit objectives is not considered to be itself a not-for-profit objective (i.e., no destination test)
- Should fund capital projects and establish (reasonable) operating reserves from capital contributed by members, from gifts and grants, or from accumulated, incidental profits
- Capital contributions, gifts and grants, and incidental profits should generally be accumulated solely for use in the operations of the organization (including funding capital projects or setting up operating reserves) and should not be used to establish long-term reserves designed primarily to generate investment income

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12

- Maintaining reasonable operating reserves or bank accounts required for ordinary operations will generally be considered to be an activity undertaken to meet the not-for-profit objectives of an organization - incidental income arising from these reserves or accounts will not affect the status of an organization
- May engage in limited fundraising activities involving games of chance (e.g., lotteries, draws), or sales of donated or inexpensive goods (e.g., bake sales or plant sales, chocolate bar sales)

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13

- In determining whether an organization has any profit purpose, the activities of the organization must be reviewed both independently and in the context of the organization as a whole
- CRA gave the following examples of acceptable activities that result in incidental profit
 - Operation of a canteen at a hockey arena
 - Charging admission above direct cost for a children's concert (where the not-for-profit purpose of the organization was to organize and promote youth participation in music)

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14

4. Must not distribute income to members

- An NPO must not distribute or otherwise make available for the personal benefit of a member any of its income unless the member is a RCAA
- No part of the income of an NPO, whether current or accumulated, can be paid to a member, nor may it declare and pay dividends out of income
- An NPO may fail to comply with this requirement on a winding-up, dissolution, or amalgamation resulting in tax liability
- Certain types of payments will not, in and by themselves, disqualify an NPO, such as reasonable salaries, wages, fees or honorariums for services rendered to the NPO

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15

CONSEQUENCES OF LOSING NPO STATUS

- Automatically becomes a taxable entity
- A deemed year end for the corporation is created and corporation deemed to have disposed of and reacquired all of the corporation's assets for fair market value [paragraph 149(10) if the ITA]
- It also affects the corporation's ability to carry forward losses and other balances or reserves
- Members of an unincorporated NPO would become responsible for any taxable income in the organization (CRA Document 2010-036970)
- Document 2010-035583 provides a recent discussion

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16

RECENT CRA ACTIONS

- CRA View 2011-0392841E5 addressed whether an NPO can maintain its 149(1)(l) status while trying to recover its losses and continue to meet its objectives
- NPOs may:
 - Require higher member contributions to cover a previous years losses would not be a for-profit purpose
 - Is for improving a loss position, not generating investment income
 - Have members provide loans to NPO without loan repayments being considered income from the NPO being payable to the members
 - Question of fact whether member receiving payment in capacity of a lender or member

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17

- Generating income to cover interest on loan will not indicate that NPO has a profit purpose
 - An expense to be taken into account
- Principal portion of loan should be paid from member contributions and incidental profits (or gifts and grants from other sources)
- Generating material profits from a particular activity in order to offset prior years' losses related to that activity would not be considered a profit purpose
- Cannot use profits from one activity to cover the expenses of another activity
 - "destination of funds" test has been rejected multiple times by the courts

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18

- Carry on a business for profit and may remain non-taxable if its meets the requirements of paragraph 149(1)(l)
 - Leasing activities may be acceptable if they are connected to the objectives of the NPO
 - Question of fact
 - Incidental profits from the activities could be used to offset losses or expenses from other activities or to repay loans
 - Operation of a canteen at a hockey arena that results in incidental profit would be acceptable
 - But an NPO's business activities cannot be designed to be a driving force of the entity's existence and cannot be the NPO's principle objective

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19

- Fundraise to help cover operating expenses or deficit or purchase of equipment
 - Usually NPOs that are organized for social welfare, civic improvement, or pleasure or recreation may do this
 - Need to use volunteers
 - Involve activities involving the sale of donated goods or services or games of chance
 - Need to ensure that the scope of the fundraising is not so significant that it can be considered to be a purpose of the NPO

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20

NPO RISK IDENTIFICATION PROJECT

- The NPO Risk Identification Project is in its final year of a 3-year research project on tax compliance in the non-profit sector
- NPOs have been under the microscope of CRA, particularly with respect to the revenue they earn in addition to membership fees
- CRA randomly selected NPOs to review from the 39,000 NPOs that file T2, T3 and/or T1044 returns
 - Over the three years of the project, 1440 NPOs will have been reviewed

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21

- The key question for an NPO that has generated a surplus in a particular year is can it be considered to have been operated exclusively for, and in accordance with, its non-profit purposes
 - This determination is usually made by CRA in respect of a particular taxation year of an NPO on the basis of a review of its yearly activities during the course of an audit

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22

- For example:
 - ABC Professional Association consists of 100 dues paying members and earns significant profits from an annual conference and sale of trade-related publications
 - Assume that 50% of its revenue is from the annual conference and sales (the remainder is from membership dues), and that each of these activities generates a profit of 10% over expenses
 - ABC realizes a surplus each year of 5%
 - In 2011, the organization was audited by CRA in respect of the 2009 taxation year

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23

- Although CRA agreed with ABC that its purposes were non-profit, CRA indicated in an “education letter” that the activities of the conference and the sale of publications were not
- Specifically, the sale of the trade-related publications and conference fees for non-members at higher price was for the purpose of making a profit and aided in keeping these costs low for ABC members
- Although facts above are hypothetical, many existing NPOs, including professional associations and related corporations, have received these “education letters”

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- Education letters have caused great concern among NPO sector and prompted many discussions with CRA
- Perrin Beatty, President and CEO of the Canadian Chamber of Commerce wrote a letter on March 13, 2012 to the Minister of National Revenue expressing the concerns of the NPO sector
 - Stated CRA appeared to be unaware of impact of letters on members of NPOs

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25

- Mr. Beatty stated:
 - “Our concern is not with the examination, but with the lack of communications about its purpose and with the Agency’s practice of issuing “education letters” to organizations which have been audited under this process. Although the Agency has often stated that “no conclusions have been reached”, these letters inform the organizations that they are in breach of the Act, and urge them to make adjustments in their activities to comply”
- As of April 23, 2012 CRA was directed by the Minister to stop issuing the education letters

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26

- CRA now has an informative question and answer section for NPOs to consult <http://www.cra-arc.gc.ca/tx/nnprft/qa-eng.html>
- CRA states that education letters were meant to “raise awareness of the rules governing the benefits available” to NPOs under the ITA and that reassessments are only occurring in the most “egregious cases”
- CRA maintains its position that it is possible for an NPO to generate a profit but
 - the profit must be incidental; and
 - arise from activities that support the organization’s not-for-profit objectives

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27

SOME PRACTICAL ISSUES/COMMENTS

- Questions to ask:
 - Does the organization continue to meet the definition of a non-profit organization under the ITA?
 - Are the organization’s objects sufficient to ensure that it is not a charity, e.g., by including in its objects a disqualifying clause such as lobbying for legislative change?

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28

- Does the organization earn a profit from a particular activity? If so, is the earning of the profit incidental or intentional, how much profit is earned from each activity and what is the profit used for?
- Does the organization maintain reserves in excess of a reasonable level acceptable to CRA?
- Be careful about how capital projects are funded, CRA suggests this may only occur through increased member fees
- Does the organization carry out revenue activity within a taxable entity? If so, governance issues will need to be carefully considered
- Is the organization filing all required income tax forms?


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29

CONCLUSION

- Recent CRA views create much uncertainty for NPOs and substantially limit their revenue-generating capacity
- While these views are open to challenge on the basis that they contradict existing jurisprudence, NPOs seeking to comply will have to look closely at their revenue-generating activities and take proactive measures to ensure that they are not caught offside the CRA's recent administrative positions
- Still remains to be seen though what the outcome of the Risk Identification Project will be and whether activities such as ABCs will continue to be off-side of CRA requirements

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