

## **EXEMPTION FOR CHARITIES UNDER NEW REGULATION TO THE *LAND TRANSFER TAX ACT (ONTARIO)***

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*By Theresa L.M. Man\**

### **A. INTRODUCTION**

On October 1, 2010 the Ontario Ministry of Finance filed Ontario Regulation 386/10 (the “Regulation”) made under the *Land Transfer Tax Act* (Ontario) (“Act”), which permits the exemption from land transfer tax for certain transfers of property between charities, implementing the proposal announced as part of the March 2010 Ontario Budget. The Regulation is deemed to have come into force as of March 26, 2010 and therefore all qualifying transfers of land since that date may claim an exemption from the tax payable under the Act. The new rules are explained in *Tax Bulletin* LTT 2-2010, October 2010.<sup>1</sup>

### **B. THE CONTEXT**

In Ontario, land transfer tax is generally payable upon the registration of a conveyance or a disposition of a beneficial interest in land regardless of whether the disposition is registered. The amount of the land transfer tax is normally calculated based on the amount paid for the land, in addition to the amount remaining on any mortgage or debt assumed as part of the arrangement to acquire the land. As such, where the consideration is nil, with no mortgage or debt assumed, no tax will be payable. In some cases the amount of the tax is based on the fair market value of the land, for example where land is transferred between a corporation and one of

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\* Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M., is a partner of Carters Professional Corporation and practices charity and not-for-profit law. The author would like to thank student-at-law Colin Thurston, J.D. for his assistance in the preparation of this Bulletin.

<sup>1</sup> [http://www.rev.gov.on.ca/en/bulletins/ltt/pdf/2\\_2010.pdf](http://www.rev.gov.on.ca/en/bulletins/ltt/pdf/2_2010.pdf). More information can be found on the Ministry’s website at <http://www.rev.gov.on.ca/en/> or by calling the Ministry at 1-866-ONT-TAXS (1-866-668-8297).

its shareholders. This is to ensure that an appropriate tax is paid for the transaction even when the amount paid for the property (if any) is below fair market value.

There are certain circumstances where the payment of the tax is exempt, such as certain transfers from an individual to their family business corporation, certain transfers between spouses, and certain transfers from trustee to beneficial owner and *vice versa*. In particular, transfers between trustees where there is no change in beneficiary, and transfers from trustee to beneficiary where there is no change in beneficiary, are also exempt from land transfer tax, even if liabilities are assumed by the transferee.

In situations where land is transferred from the trustees of an unincorporated charity to the corporate successor of the charity upon incorporation, with the successor charitable corporation assuming all of the liabilities of the unincorporated charity in relation to the property (e.g. the assumption of a mortgage or a building contract), the beneficial owner, being the charitable purpose, remains unchanged. As such, conceptually, the transfer from the trustees for the charitable purpose to the corporate successor of the same charitable purpose should qualify for an exemption from land transfer tax, since the beneficial owner has not changed. The exemption should apply regardless of whether there is any liability assumed by the transferee.

Such transfers are not uncommon, since religious organizations (such as churches) are often initially established as unincorporated associations or trusts and acquire land in the course of their operations, but subsequently decided to incorporate for asset protection purposes as their operations grow over time. However, difficulty nevertheless arises in these situations, since the Ministry of Finance takes the position that land transfer tax is exigible on such a transfer, based on the amount of liabilities assumed by the corporate successor even if there is no other consideration between the unincorporated transferor charity and the charitable successor corporation. Obviously, if the property is free and clear of encumbrances and no liabilities are assumed by the corporate successor, there would be no tax payable notwithstanding the position of the Minister. However, more often than not, the property transferred is subject to a mortgage to be assumed by the corporate successor.

Other difficulties may also arise where a charity transfers property to a parallel charity (such as a foundation) that has been established for the purpose of asset protection. In those situations, if the transferee foundation and the transferor charity are both established for the same charitable purpose, then conceptually, the transfer should qualify as an exempt transfer from a trustee to a trustee, for the benefit of the same beneficial owner.

### C. WHAT IS REQUIRED TO QUALIFY FOR THE EXEMPTION

Recognizing this difficulty, it is encouraging that the Ontario Government now permits transfers of land from trustees to a non-share capital corporation, or from one non-share capital corporation to another, to be exempt from land transfer tax, provided that the transferee will be continuing the same charitable purpose and no consideration is paid, other than the assumption of any existing liabilities registered on the land. These changes are implemented by the Regulation.

In this regard, the exemption applies to transfers of land from a “qualifying trust” to a “qualifying corporation” and to transfers between two “qualifying corporations.” A “qualifying trust” is defined as a trust that is a registered charity, and a “qualifying corporation” is defined as a non-profit non-share capital corporation that is a registered charity. A “registered charity” is a registered charity as defined under the *Income Tax Act* but does not include an organization whose registration has been suspended or revoked. In other words, transfers of property from an unincorporated charity to its corporate successor and transfers between two charitable corporations would qualify for exemption, provided that the following additional requirements for the transferor, transferee, and the nature of the transfer are met.

Firstly, the transferor must meet the following requirements:

- if a qualifying trust, it must have been the owner of the land immediately prior to the transfer;
- if a qualifying corporation, it must have been the beneficial owner of the land immediately prior to the transfer;
- it must have paid the land transfer tax when it previously acquired the land; and
- it must have held the land for a charitable purpose.

Secondly, the transferee qualifying corporation must continue to hold the land for the same charitable purpose as the transferor for at least one year after the date of the transfer.

Lastly, the transfer must be made on or after March 26, 2010 and the value of the consideration for the conveyance or disposition must be nil, other than the assumption or undertaking of any encumbrance registered against the land at the time of the transfer.

#### **D. HOW TO CLAIM THE EXEMPTION FOR PENDING TRANSFERS OF LAND**

Where the transfer is to be registered electronically, it is possible to claim the exemption electronically prior to the registration by requesting the Ministry of Revenue to pre-approve the exemption. Ministry pre-approval can be obtained by submitting the following documents to the Land and Resources Tax Section of the Ministry of Revenue in Oshawa, Ontario:

- Two copies of the transfer that is to be registered;
- copy of the agreement of purchase and sale and any other agreements related to the transfer;
- copy of the statement of adjustments; and
- properly completed affidavit regarding the transfer between registered charities.

According to the Ministry, the affidavit must be sworn by an officer of the transferee corporation and must set out that the following requirements of the Regulation have been met:

- at the time of the transfer, the transferor is either a qualifying corporation or a qualifying trust as defined in the Regulation;
- the transferor has been granted a registered charity number by the Minister of National Revenue (with the number to be listed);
- land transfer tax was paid under the Act upon the prior transfer of the land to the transferor;
- immediately before the conveyance, the transferor held the land for a charitable purpose (with the purpose to be stated);
- the transferee is a qualifying corporation as defined in the Regulation and will, for at least one year after the date of the conveyance, hold the land for the same charitable purpose for which it was held by the transferor;
- the transferee has been granted a registered charity number by the Minister of National Revenue (with the number to be listed); and
- the value of the consideration for the transfer is nil, other than the assumption or undertaking by the transferee of any encumbrance registered against the land at the time of the conveyance.

Once the Ministry has approved the exemption, the submitted transfers will be endorsed with a direction to the Land Registrar that no land transfer tax is payable on registration, and returned to the taxpayer or their representative for registration. After registration, a copy of the registered instrument must be submitted to the Ministry.

Where paper registration is available, the exemption may be claimed upon registration without Ministry pre-approval by attaching to the Transfer/Deed the above-noted affidavit regarding the transfer between registered charities, and the Land Transfer Tax Affidavit containing a statement in paragraph 5 that the transfer is exempt from tax pursuant to the Regulation.

Where the pre-approved transfer is not registered within 30 days, a Return on the Acquisition of a Beneficial Interest in Land must be filed with the Ministry.

#### **E. HOW TO CLAIM A TAX REFUND FOR COMPLETED TRANSFERS**

Alternatively, instead of seeking pre-approval and thereby avoiding the payment of the tax upon registration of the transfer, the transferee can pay the land transfer tax on registration and subsequently apply to the Ministry for a refund. In this regard, to apply for a refund, charities must send the following documents to the Ministry:

- A copy of the registered instrument on which the land transfer tax was paid;
- Proof of payment of land transfer tax;
- Copy of the agreement of purchase and sale, and any other documents related to the transfer;
- Copy of the statement of adjustments; and
- Affidavit regarding the transfer between registered charities

## F. CONCLUDING OBSERVATIONS

These new exemptions from land transfer tax are welcomed changes for charities and remove unnecessary administrative deterrence for unincorporated charities that hold real property to pursue incorporation for various reasons (including asset protection and limited liability protection for members).

However, there are still uncertainties that need to be clarified. For example, the Regulation provides that the exemption applies to a transferor that is either a qualifying trust or a qualifying corporation. The Regulation defines a “qualifying trust” to be a trust that is a registered charity. It is not clear whether this is intended to include unincorporated charities that are organized as unincorporated associations, rather than as trusts. Under the *Income Tax Act*, there are three options to establish a registered charity. In the case of a charitable organization, it can be established as a trust (by way of a trust deed), an unincorporated association (by way of a constitution), or a corporation. In the case of a charitable foundation (including both public and private foundations), it can be established either as a trust or a corporation, but not an unincorporated association. It is therefore not clear whether the requirement that a qualifying trust must be a “trust” is intended to refer to only a charity that is established using the legal form of a trust, but not an unincorporated association; or whether it is intended to also include an unincorporated association in recognition of the fact that its charitable purpose would constitute an implied charitable purpose trust at trust law. From a policy perspective, it does not appear that there is any reason to exclude an unincorporated transferor charity that is organized as an unincorporated association, rather than a trust.

In relation to the information required to be provided to the Ministry regarding the transfer, the charitable registration number of both the transferor charity and the transferee charity must be provided in the affidavit regarding the transfer. From a practical perspective, this may lead to a timing issue in relation to when to register the transfer in situations involving the incorporation of an unincorporated charity. When an unincorporated charity is to be incorporated, it will involve (1) the incorporation of a successor corporation; (2) followed by the transfer of the assets and liabilities from the unincorporated charity to the corporate successor, together with a request to Canada Revenue Agency to assign the charitable registration from the unincorporated charity to the corporate successor; and (3) the eventual winding up of the unincorporated charity. The current processing time of the Charities Directorate of Canada Revenue Agency for a request to assign the charitable registration to a corporate successor is approximately six months (although it is possible to request the process be expedited where special circumstances are involved) and the charitable registration

number for the corporate successor will not be available until Canada Revenue Agency has completed the assignment. As such, charities will need to factor in the time required for Canada Revenue Agency to assign charitable registration when planning for the transfer of property from the unincorporated charity to its corporate successor.

In situations involving the transfer of property between two charitable corporations for asset protection purposes (such as transfer from a charity to a property holding foundation), care will need to be taken in drafting the objects of the transferee corporation to ensure that the charitable purpose of both corporations remain the same in order to be eligible to benefit from the exemption.