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CAGP 29TH National Conference on Strategic Philanthropy
April 20, 2023

CHALLENGING SITUATIONS IN GIFT RECEIPTING

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

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OVERVIEW OF TOPICS

- Fundamentals of receipting
- Unique types of gifts and gifting scenarios
- Technical receipting issues
- How to ensure compliance

Fundamentals of Receipting

- Importance of issuing accurate receipts
- Duty of charity in issuing receipts
- Basic concepts for tax receipting

A. IMPORTANCE OF ISSUING ACCURATE RECEIPTS

- Receipts must comply with *Income Tax Act* (ITA) and Regulations, and Revenue Agency's (CRA) policies
- If a receipt includes incorrect information
  - Penalty of 5% of the eligible amount on the receipt
  - Penalty of 10% for a repeat infraction within 5 years
- If a receipt includes false information
  - Penalty of 125% of eligible amount on receipt
  - If penalty is greater than $25,000, charity is liable to suspension of tax-receipting privileges
- Registered charity status may also be revoked

B. DUTY OF CHARITIES IN ISSUING RECEIPTS

- Charity has <u>no</u> obligation to:
  - **Accept a gift.** There is no gift unless the charity agrees to accept the property that is intended to be gifted
  - **Issue a receipt for a gift.** A charity is not required to receipt donations for gifts it accepts
- However, the charity takes on certain responsibilities in choosing to issue receipts for gifts

- Charities, in choosing to issue receipts, must in general:
  - Only issue receipts that are for “gifts”
  - Comply with split receipting rules, where applicable
  - Include required information on receipts
  - Ensure accuracy of information on receipts
  - Exercise due diligence in ensuring that non-cash gifts are appropriately valued and eligible for tax receipts
  - Keep control over the receipts
  - Keep adequate books and records in support of receipts issued

C. BASIC CONCEPTS FOR TAX RECEIPTING

1. General Characteristics of a "Gift"

- **Real or Personal** - Under the ITA, property that is donated means property of any kind whatsoever, whether real or personal
- **Not Contrary to Public Policy** - A gift (or its terms) cannot be against public policy: It cannot be illegal, discriminatory or violate any federal, provincial or municipal laws or regulations – for example
  - a gift that directly or indirectly "facilitates" terrorist activities
  - a gift for a scholarship restricted to only white male protestant university students

2. Legal Definition of "Gift"

- CRA adopts the common law definition of a "gift", which has <u>all</u> of the following components
  - Donor must have intention to give
  - Property is transferred by donor
  - Transfer of property must be voluntary
  - No consideration or benefit can be received by the donor

3. Fair Market Value of Gifts

- Fair Market Value (FMV) issues apply when dealing with non-cash gifts (gifts in kind)
- FMV is generally set as the highest dollar value that the gift would bring in an open unrestricted market between a buyer and seller who are knowledgeable, informed, prudent, and acting independently
- Charity has duty to ensure that the FMV is accurately stated on the receipt
- Generally, CRA suggests that
  – If FMV is <u><$1000</u> - an individual with sufficient knowledge of the property may provide the assessment
  – If FMV of the gift is <u>expected to be >$1000</u> - a professional appraisal is recommended

4. Deemed Fair Market Value

- The “Deemed Fair Market Value” (DFMV) rule was created as a result of the government’s attempt to curtail abusive tax shelter donation schemes
- The FMV of donated property is deemed to be the lesser of
  – FMV of the property, otherwise determined
  – Cost (or the adjusted cost base for capital property) of the property to the taxpayer immediately before the gift is made
- DFMV rule applies to all non-cash gifts, subject to the exceptions listed below

- In general, DFMV Rule does not apply to non-cash gifts that are
  - Made as a consequence of donor's death
  - Inventory or real property in Canada
  - Ecological gifts (unless made to a private foundation)
  - Securities listed on a designated stock exchange
  - Certified cultural property (unless the gift was part of a tax shelter and gifted after Feb 10, 2014)
  - Acquired on a tax-deferred rollover basis under certain circumstances (such as when a shareholder transferred property to a controlled corporation in exchange for shares and the shares are donated, or a rollover transaction to a corporation for the same purpose of donating shares)

- If exempt, gifts are valued using regular FMV methods
- DFMV Rule applies where donor acquired the property:
  - Under a gifting arrangement that is a tax shelter or
  - < 3 years before making the gift or
  - <10 years before making the gift, and it was reasonable to conclude that when the donor acquired the property, one of the main reasons for the acquisition was to make a gift
- Must "look-back" to see if the property had been acquired within the last 10 years by a non-arm's length person. If so, the DFMV applies back to when that non-arm's length person acquired the property
- It is the obligation of the donor to advise the charity of circumstances that may give rise to the DFMV Rule

5. Split-receipting Rules

(a) General Rule

- Under the common law, gifts cannot be receipted if the donor received any benefit or consideration
- The split-receipting rules under the ITA, were introduced in 2002 and finally became law in 2013
- Permits donor to receive a benefit provided that the value of the property donated exceeds the benefit received by the donor
- Only the “eligible amount” of a gift may be receipted

(b) Definition of “Advantage”

- The definition of “advantage” is very broad
- Generally, “advantage” is the total value, at the time the gift is made:
  - Of all property, services, compensation, use or other benefits
  - To which the donor, or a person not dealing at arm’s length with the donor
  - Has received or obtained or is entitled to receive (either immediately or in the future)
  - As partial consideration of or in gratitude of the gift or that is in any other way related to the gift

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- An advantage:
  - Must be identifiable and its value ascertainable
  - Must be related to the gift, although a direct connection is not required
  - May exist even if not received at time of the gift
  - May accrue to the donor or to a person or partnership not dealing at arm's length with the donor
  - Does not have to come directly from the charity; an advantage could be received from third parties
- Naming rights are generally not advantages if there is no potential economic benefit associated with such rights
- Donor is obligated to identify if there is an advantage

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(c) De Minimis Threshold Exemption

- De Minimis Threshold Exemption (DMTE) is an administrative CRA exemption that applies to advantages of <u>nominal value</u>
- DMTE applies where the amount of advantage is the lesser of 10% of the FMV of the gift and $75
- DMTE cannot be applied to advantages relating to cash, near-cash equivalents, or items that are the purpose of a fundraising event
- These amounts are not considered an advantage in determining eligible amount

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Unique types of gifts and gifting scenarios

- Gift of cryptocurrencies
- Ecological gifts
- Cultural gifts
- What may not be receipted?
- Foreign donors
- Crowdfunding
- True donors
- Auctions
- Non-qualifying securities
- Estate gifts

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1. Gift of Cryptocurrencies

- Cryptocurrencies are considered by the CRA to be a commodity for tax purposes, not legal tender
- Donations of cryptocurrencies are therefore subject to CRA rules for non-cash gifts (gifts-in-kind)
- Determination of FMV and DFMV for cryptocurrency donations could be subject to scrutiny by CRA
- This means that a gift of cryptocurrency acquired by a donor may result in a donation tax receipt for the ACB rather than the current FMV
- Gifts of cryptocurrency above $1,000 require an appraisal as generally recommended for non-cash donations

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- Examples of gifting issues to consider
  - What type(s) of crypto would the charity accept?
  - Does the donor have title and custody of the cryptocurrency, or is the cryptocurrency located in a digital wallet that is under the possession and control of a third party? Who has custody of the wallet? Is the custodian reputable?
  - Can the charity hold onto the crypto gift under the prudent investor rule?
  - If the charity will sell the crypto gift, what is the marketability of the cryptocurrency and ease of sale to realize cash for the charity?
  - Consider money-laundering and terrorist financing risks in both receiving a crypto gift and later in selling the cryptocurrency to realize cash

2. Ecological Gifts

- An ecological gift only involves ecologically sensitive land or a partial interest in ecologically sensitive land (including a covenant, an easement, or, in the case of land in Quebec, a real servitude or a personal servitude, the rights to which the land is subject and which has a term of not less than 100 years)
- The land must be certified as ecologically sensitive, by the Minister of Environment and Climate Change Canada (“MECCC”) or a person designated by that Minister

- Fair market value of the land or of the partial interest in land must be certified by the federal MECCC
  - The FMV as determined by the MECCC will apply for a 24-month period after the last determination
  - If the gift is made within that 24-month period, the last determined value is used to calculate the eligible amount of the gift, whether the donor claims the gift as a gift of ecologically sensitive land or as an ordinary charitable gift

- Ecological gifts can only be made to the following:
  - Government of Canada, province or territory
  - A municipality in Canada, or a municipal or public body performing a function of government in Canada, that is approved by MECCC or a person designated by MECCC in respect of the gift
  - A registered charity (but not a private foundation) approved by MECCC or a person designated by MECCC in respect of the gift
- Ecologically sensitive land must be protected and should not be used for other purposes
- If the recipient entity changed the use of the land or disposed of it without the consent of MECCC, or a person designated by MECCC, the recipient will be subject to a tax of 50% of the FMV of the land

- Donor may have a capital gain or loss for the ecologically sensitive land donated, but the donor is not required to include the capital gain realized on such gifts (zero inclusion rate)
- A gift of ecologically sensitive land is not limited to a percentage of the donor's net income (*i.e.*, the donation receipt can be used to offset the 100% of the donor's taxable income for the year)
- Any unclaimed portion of the eligible amount of the gift can be carried forward for up to 10 years if the gift is made after February 10, 2014 (instead of the normal carry forward period of 5 years)

3. Cultural Gifts

- A gift of cultural property is property that is of "outstanding significance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences"
- Gifts of cultural property made on or after March 19, 2019, are no longer required to be of "national importance" that its loss to Canada would significantly diminish the National Heritage (a change brought by the 2019 federal budget)
- Gifts of cultural property can only be accepted by a designated institution under Section 32 of the *Cultural Property Export and Import Act,* and a charity can apply to become a designated institution, either on an ongoing basis or for the purposes of receiving a one-time gift

- The Canadian Cultural Property Export Review Board decides whether to certify a property as cultural property and, if certified, it will then determine FMV of the gift for the purpose of the charitable tax receipt
  – FMV as determined by CCPERB, will apply for a 24-month period after the determination
  – If the gift is made within that 24-month period, the last determined FMV is used to calculate the eligible amount of the gift, whether the donor claims the gift as a gift of cultural property or as an ordinary charitable gift

- When a donor gifts certified cultural property to a designated institution or public authority, the donor does not realize a capital gain, but the donor can deduct capital losses within specified limits
- Gifts of certified cultural property is not limited to a percentage of the donor's net income (*i.e.*, the donation receipt can be used to offset the 100% of the donor's taxable income for the year)
- Any unclaimed portion of the eligible amount of a gift certified cultural property can be carried forward for the normal 5 year period

4. What may not be Receipted?

- Gifts that accrue an advantage to the donor (unless split-receipting rules apply, in which case only the eligible amount may be receipted)
- Gifts where the advantage exceeds 80% of the gift (unless donative intent is proven)
- Gifts that have unascertainable value
- Gifts with an advantage that has unascertainable value
- Gift pledges
- Donations of services (provision of free services)
- Purchases of an item or service by the charity
- Basic admission to an event or program (for example, fees for daycare or nursery school facilities)

- Sponsorship fees where the sponsor receives something of value in exchange for the donation made, such as advertising or business promotion
- Loans (unless forgiven)
- Free use of a property or use of a timeshare
- Court ordered donations
- Gifts from other charities or qualified donees
- Fundraising proceeds (e.g., dinner tickets, concert admission, bake sale, etc.)
- Anonymous gifts <u>unless</u> CRA's requirements are followed (e.g., through the appointment of an agent)
- Payments for a lottery ticket or chance to win a prize

- Membership fees where the value of the advantage received (e.g., the right to attend events, receive literature, receive services, or be eligible for entitlements of any material) exceeds 80% of the value of the payment
- Directed gifts by the donor to a named beneficiary, as it constitutes private benevolence
- Gift certificates that are received by the charity directly from the issuer for no consideration
  – However, gift certificates that are purchased from the issuer and donated to the charity may be receipted

5. Foreign Donors

- Donation tax receipts issued by Canadian charities to foreign donors may not be useful to them for income tax purposes in their country of residency
- Need to review application of tax relief tax treaties to cross border gifts and other applicable rules - For example - *Canada-United States Income Tax Convention*
- T3010 requires reporting of foreign donors who donated over $10,000 in line 3900 and Part 2 of Schedule 4, regardless of whether donation receipts were issued
- Consider money-laundering and terrorist financing concerns and appropriate “know your donor” due diligence

6. Crowdfunding

- Question – should donation receipts be issued?
- Various crowdfunding platforms, *e.g.*, www.gofundme.com; www.globalgiving.org; www.kickstarter.com; www.launchgood.com
- Crowdfunding involves donation-based fundraising by appealing to a "crowd" (broad group or network of small donors) over a limited period of time (typically less than 50 days) and it may or may not involve service fees
- Crowdfunding campaigns may be supporter-driven or organization-driven
- Crowdfunding platforms establish their own terms of service governing the use and storage of personal information, the use of intellectual property, liability for representations made, jurisdiction, the withdrawal of funds from an account, and the payment of a flat percentage of each donation and other service fees

- Many other issues with crowdfunding
  - Does the charity have control? - Organization-driven crowdfunding gives the charity greater control over the messages posted on its behalf
  - Are there restrictions on the use of the funds raised? - Identify and comply with donor expectations and/or restrictions – depends on the terms on the crowdfunding page what the funds raised are to be used for
  - Are they funds for charitable purposes?
  - Crowdfunding models that include donations via cryptocurrencies, or possibly even a "charitable cryptocurrency" offering raise other complicated legal issues, including the use of "smart contracts"
  - Concerns if donations are made by foreign donors

7. True Donors

- Donation receipt must reflect true donor on the receipt
  - This is a question of fact
- If the true donor is not ascertainable, then the charity cannot issue a receipt
- Evidence of the true donor is required for every receipt
- See infographic "Who is the True Donor?" https://www.canada.ca/content/dam/cra-arc/serv-info/charities/true-donor-infographic-eng.pdf

- If donation is given by cheque from a joint account (where both names appear on the cheque), the charity may issue the receipt in either or both names, regardless of how the cheque is endorsed
- If there is no obvious indication as to the true donor of a gift, the charity should request a written declaration or letter from the party providing the donation as to the identity of the true donor
- If a charity receives a gift from a company and is asked to issue the donation receipt in the name of an individual who controls the corporation (e.g., shareholder), the charity generally must issue the donation receipt to the company – unless there is evidence to show that the individual is the true donor (e.g., the company accounts for the donation from a shareholder in the shareholder's account)

- If the donated property is owned by more than one person, then the charity must issue a receipt for each person
  - The receipt must state the full value of the property and specify the donated amount in relation to the full value
  - E.g., a property that is valued at $100 and owned equally by two individuals will result in two receipts, one to each owner. Each receipt will indicate the full value of the property ($100), and specify the donation amount as 50% of the full value

8. Auctions

- Property donated for auctions
  - Generally, a receipt can be issued to the donor for the fair market value of the item at the time it is donated to the charity – if FMV of the property can be determined
  - Some donations cannot be receipted, for example
    - Use of vacation property
    - Services and gift cards or gift certificates from the issuer
    - Having dinner with a celebrity
  - Deemed Fair Market Value Rules will also apply to the gift of items for auction, such as art work or vintage wines

- Bidders at auctions
  - A successful bidder at an auction can be issued an official donation receipt for the amount in excess of the FMV paid provided that
    - It is possible to determine the FMV
    - The FMV must be made known to all before the auction
    - FMV of the property the bidder receives cannot exceed 80% of the purchase price
- Lottery and raffle tickets
  - No receipts - donors who buy lottery or raffle tickets do so primarily because they want a chance to win the prizes that are offered and not because they want to make a donation to the charity that is holding the event

9. Non-Qualifying Securities

- A gift of a non-qualifying security (“NQS”) is in general terms
  - An obligation (other than an obligation listed on a designated stock exchange) or
  - A share of a corporation (other than a share listed on a designated stock exchange)

  where the donor and the donee do not deal at arm’s length
- NQS are basically securities and other instruments which are not easily liquidated and generally not available for sale in the public markets
- Examples of NQS - Gifts of private company shares by an individual who controls the company; or if a person lends money to a related company or person and donates that debt to a charity

- A qualified donee can only issue an official donation receipt to the donor if (i) the NQS is an "excepted gift" or (ii) if one of the following is met within 60 months of acquiring the NQS:
  - The security ceases to be an NQS
  - The qualified donee disposes of the NQS and the consideration is not another NQS of any person
- An NQS is an "excepted gift" if all of the following are met:
  - It is in the form of a share
  - Donee is not a private foundation
  - Donor deals at arm's length with the donee
  - When the donee is a charitable organization or a public foundation, the donor deals at arm's length with each of the charity's directors, trustees, officers and like officials

10. Estate Gifts

- Tax rules for estate gifts and testamentary trusts of individuals were changed in 2016 and the graduated rate estate ("GRE") was created
- Estate donations (donations made by will) are deemed to be made by the individual's estate (not made by the donor during his/her lifetime) and where certain conditions are met, by the individual's graduated rate estate (GRE)
- In order to qualify as a GRE, the estate must be a testamentary trust resident in Canada, it must designate itself as such on the T3 return of its first taxation year, and there must be no other GRE for that testator. The GRE will last no more than 36 months after the person's death

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- Donations are deemed to be made at the time the property is transferred to the qualified donee
- The executor needs to transfer funds to the charity, which then issues a tax receipt, which the executor would use to claim the donation tax credits for the estate
- The estate can elect to claim the credit in the deceased's year of death or the preceding year
- The donation must be received 60 months after the date of death or it cannot be claimed as a donation tax credit

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Technical Receipting Issues

- When to issue receipts?
- Contents of receipts
- Preparation and administrative matters
- Replace lost receipts

A. WHEN TO ISSUE RECEIPTS?

- A charity may set administrative minimum threshold of gifts before issuing receipts (e.g., $10.00 minimum)
- The "date of issue" of a receipt is the date on which the receipt was prepared
- There are no requirements that receipts must be issued within a particular time frame, but CRA suggests that they be issued at least by the last day of February following the year during which the gift was made

B. CONTENTS OF RECEIPTS

1. General Requirements

- Content on receipt must not be easily altered
- Each receipt must contain <u>at least</u> the following
  - A statement that it is an official receipt for income tax purposes
  - Name and address of the charity as on file with CRA
  - Charity's registration number
  - Serial number of the receipt
  - Place or locality where the receipt was issued
  - Day or year donation was received

- Day on which the receipt was issued if it differs from the day of donation
- Full name, including middle initial of donor
- Address of the donor
- Amount of the gift
- Value and description of any advantage received by the donor
- Eligible amount of the gift
- Signature of an individual authorized by the charity to acknowledge donations
- CRA's name and website address

2. Non-Cash Gifts

- For non-cash gifts, include additional information:
  - Day on which the donation was received
  - Brief description of the property
  - Name and address of the appraiser if property was appraised
  - DFMV of the property in place of amount of gift above
  - See CRA sample receipts

  https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/sample-official-donation-receipts.html

C. PREPARATION AND ADMINISTRATIVE ISSUES

1. General Guidelines

- Prepare receipts in duplicate and keep a copy as record
- Guard against the unauthorized use of receipts (e.g., keeping pre-printed receipts in a locked office with access provided to authorized personnel)
- To correct errors on printed receipts if the charity wants to use its remaining stock of official donation receipts:
  - Use a stamp that clearly shows a change of name, address, or registration number
  - Any incorrect information is crossed out, either by stamp or by hand

2. Facsimile Signatures on Receipt

- Facsimile signatures are permissible on a receipt, provided that:
  - All copies of receipts are distinctively imprinted (usually by a commercial printer) with the name, address, and registration number of the charity
  - Receipts are serially numbered by a printing press or numbering machine
  - All unused receipt forms are kept at the charity’s Canadian address as recorded with the CRA

3. Computer-Generated Receipts

- May use computer-generated receipts, as long as:
  - All required information is provided and legible
  - Data is protected from unauthorized changes
- Charities should ensure that:
  - The computer system used to store the receipts is password protected and restricts unauthorized entry and modification
  - Donor records are stored on non-erasable media, (e.g., CD-ROMs or printouts) with copies kept off-site for recovery purposes
  - Hard copies of receipts can be printed on request

4. E-Mailing Receipts

- May email donation receipts to donors, provided that:
  - Receipts should be in a read-only or non-editable format
  - Receipts should be protected from hackers through the use of appropriate software
  - Receipts should be encrypted and signed with an electronic signature
  - Use of secure electronic signature should be kept under the control of a responsible individual authorized by the charity
  - Copies of email-issued receipt <u>must</u> be retained by the charity

5. To Replace Lost Receipts

- Replacement receipt may be issued and must:
  - Contain all required information
  - Indicate on the receipt that it cancels and replaces receipt # (insert the serial number of the lost receipt)
- The charity's copy of the lost receipt should be retained and marked "cancelled"
- To replace a lost or spoiled receipt, all copies should be retained and marked "cancelled", and another receipt may then be issued
- If receipt is lost or stolen, the charity should notify CRA immediately

6. Return of a Gift

- Gifts given to a charity become the property of the charity and cannot be returned, unless there is a legal reason to do so (e.g., reversion of ownership of a gift back to the donor if a restricted gift fails)
- If there is a legal basis to return a gift (after first seeking legal advice), then if the donor had received an official donation tax receipt, the charity will need to file an information return with CRA within 90 days of the return of the gift where the fair market value of the returned property is more than $50
- The information return is basically a letter notifying CRA of the return of the gift along with particulars of the official donation tax receipt that had been issued**.**
- See Qualified donees – Consequences of returning donated property

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HOW TO ENSURE COMPLIANCE

- Adopt policies on gift acceptance and special events
- Implement policies
- Have someone or committee in charge of process and periodic review
- Educate staff and volunteers
- Monitor new changes in CRA's policies and ITA requirements

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