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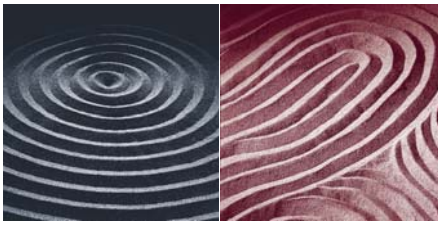

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Father's transfer of funds through charity found to be valid gift to family

Amanda J. Stacey

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Father's transfer of funds through charity found to be valid gift to family

By Amanda J. Stacey

In March of this year, the Tax Court of Canada in *Benquesus v. Canada* [2006] T.C.J. No. 149, ruled on an interesting case involving a gift by a father to his adult children by way of a transfer of funds to a Canadian charity, which funds constituted loans by the children to the charity. At issue before the court was whether the father had in fact made a valid gift to his children.

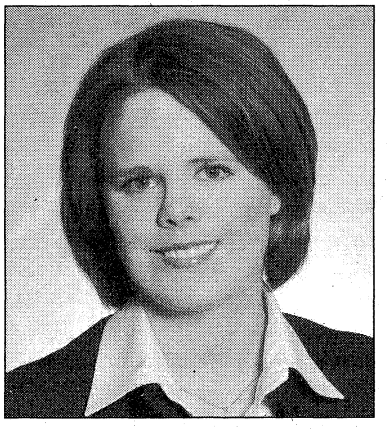
Jacques Benquesus was a resident of Israel. In 1997 he transferred $1.5 million to the Sephardic Educational Foundation (a Canadian charity) on behalf of his four adult children and his son-in-law (the appellants in this case), all of whom were Canadian residents and all of whom were members of the Sephardic Jewish community. He indicated in a letter to the charity that the funds were being loaned to it on an interest-free basis by his children. The letter stated that should any of the children require any of the funds for their own use, the charity was to repay any amounts requested by them. The letter also stated that the children were entitled to forgive any part of the loans and in such a case the charity was to treat any such amounts as a donation. Benquesus made a similar transfer to the charity on behalf of his children later that same year. They were aware of these transfers to the charity by their father. Benquesus had made other significant gifts to his children over the years.

In 1999, the appellants notified the charity that they intended to gift part of the transfers absolutely (i.e. forgive part of the loans). Collectively, the appellants gifted approximately $750,000 to the charity. The appellants received charitable receipts for these amounts, which they claimed as charitable donations in the year in question. The amount of the gifts was shown as a donation in the financial statements of the charity and the amount of the loans reflected on these statements were reduced accordingly. In years prior and subsequent to the year at issue, the appellants made further gifts to the charity from the amount of the transfers. The appellants eventually took back the balance of the transfers that remained for their own personal use.

The minister argued that Benquesus had not made a gift to his children but rather had made a donation to the charity personally. If this were the case, Benquesus, as a resident of Israel, would have had no use for the charitable receipt issued by the charity.

The Tax Court of Canada held in favour of the appellants and concluded that Benquesus had in fact made a valid gift to his children and thus the children were entitled to claim donation tax credits in the year in question. The court found that the following three requirements for a valid *inter vivos* gift were met in this case: (1) an intention to give; (2) an acceptance by the donee; and (3) a sufficient act of delivery.

In concluding that Benquesus intended to gift the funds to his children, the court relied on the fact that he had a history of making significant gifts to his children. As well, the court relied on the letters to the charity, which indicated that Benquesus was transferring money on behalf of his children and that should they require the funds for their own use,



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the charity was to repay any amounts so requested.

On the question of acceptance, the minister argued that although the children were "generally aware" of the terms of the letter to the charity, this was not sufficient to constitute acceptance of the gifts. The court relied on the fact that the appellants were aware of the transfers to the charity and that the appellants provided instructions to the charity regarding gifts and requests to take monies back to conclude that the appellants had accepted the gifts from their father. The minister also argued that there was no "coincidental acceptance" by the charity of the terms set out in the letters. However, the court relied on the fact that the charity had reflected the transfers as loans on their financial statements as evidence that they accepted these terms. As well, when requested, the charity returned monies to the children.

Finally, on the question of the sufficiency of delivery of the gift, the court looked to whether Benquesus had retained any control over the funds in question. The court was forced to decide this question without the benefit of any evidence from the charity. The court relied on the fact that the appellants had instructed the charity regarding monies to be kept and monies to be returned to them to conclude that they effectively took control of the monies. The court stated that any suggestion by the minister that Benquesus could have had the monies returned to him or that the monies remained under his control was mere speculation.

The court was limited in this case by minimal evidence provided in an agreed Statement of Facts. The court acknowledged the possibility that Benquesus was merely transferring non-transferable donation tax credits to his children, given that they were of no value to him, but the court stated that on balance, the facts did not support such a finding. The court queried whether a gift to children in the hopes that they use the money in a certain way rendered the gift ineffective. The court declined to conclude that it did, but did say that this was perhaps an issue of abuse of the *Income Tax Act* in the nature of an avoidance transaction rather then an imperfect gift.

This case is one that turned on the fact that the gifts in question were gifts to children and that Benquesus had made prior gifts of some significance to his children. Had these been transfers on behalf of Canadian resident arm's length persons to a Canadian charity by a non-resident of Canada, it is more likely that the court would have concluded that the gifts were invalid. It is also possible that were this to be the case, the minister would be more inclined to pursue an avoidance transaction argument rather than an imperfect gift argument.

Amanda Stacey is an associate in the Tax, Estates and Trusts Group of Miller Thomson LLP. Her practice is focused on charities, estates and personal tax matters.