Tax Court Implies Split-Receipting Possible Prior to Amendments

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Introduction

Prior to the 2002 proposed amendments to the *Income Tax Act* ("Act"), the general view in the charitable sector was that charitable "gifting" was possible only if the donor received no payment or other benefit in connection with the donation - if the donor benefited, the donation lost its legal status as a "gift" and no official donation receipt could be issued. This forbearance of "split-receipting" followed logically from the common law definition of "gift" - a voluntary transfer of property from one person to another gratuitously and not as the result of a contractual obligation without anticipation or expectation of material benefit - as set out in previous Federal Court of Appeal decisions.

However, this strict approach was not applied consistently across Canada because tax law in Quebec is based on the Quebec civil code, not common law jurisprudence. This meant that Quebec donors arguably enjoyed a unique freedom to make split gifts (ones with some donor benefit). This inconsistency raised obvious fairness issues. Moreover, the narrow definition of "gift" stifled more creative donation structures, which might otherwise increase levels of charitable giving.

Responding to concerns over the strict common law approach, Parliament amended the Act (sections 248 (30) - (40)) to provide for split-receipting so that a donor, who makes a "gift" and concurrently receives a benefit from the donation, may still enjoy the tax advantages of the "gift" captured in a charitable donation tax receipt.

Split-receipting prior to 2002

While at first glance the amendments to the Act reflect a new approach to "gifts" for the Canada Revenue Agency, the Tax Court of Canada now appears to have approved the practice of split-receipting as far back as 1993 in its 2006 decision in *882885 Ontario Limited* v. *The Queen*.

882885 Ontario Limited v. *The Queen*

In February of 1993, the appellant corporation acquired a plot of land in downtown Windsor by exercising an option to purchase the property for $600,000. The property was close to the present Windsor Casino and the Windsor-Detroit tunnel. A building, previously used as a fast food restaurant, stood on the land.

Prior to the acquisition, the appellant had been approached by an official from the City of Windsor's Property Department to negotiate the purchase of the property. The City was searching for land and facilities suitable for its Parking Operation Division. The appellant's property, and its location, presented a good fit for the City's purpose.

Negotiations resulted in agreement on a total purchase price of $1,175,000. The purchase price comprised three components: $175,000 cash on closing, a $450,000 mortgage repayable in three equal annual instalments and a charitable donation tax receipt from the City (a "qualified donee" under the Act) in the amount of $550,000.

The appellant filed its 1993 tax return reporting a capital gain on the transaction of $571,548 (which at the time was 75% taxable) and claimed a charitable donation in the amount of $550,000, deducting the amount of $340,632 as a charitable donation for 1993. The appellant carried forward the balance of the $550,000 to 1994 in the amount of $205,687 and to 1995 in the amount of $3,681.

In assessing, the CRA assumed that the fair market value of the property at the date of sale, February 23, 1993, did not exceed $810,000 and determined that the fair market value of that portion of the property that could be accepted as a gift to the City of Windsor was $185,000 that is, the difference between the CRA's position on fair market value of all the property ($810,000) and the amount of cash paid on closing ($175,000) plus the amount of the mortgage ($450,000). The Minister also reduced the capital gain in 1993 to $206,548 (a taxable capital gain of $154,911).

882885 Ontario Limited appealed the assessment made under the Act for the 1993 taxation year.

In deciding the case in 2006, Justice Rip considered the issues on appeal to be:

1. Whether the appellant 882885 Ontario Limited made a gift to the City of Windsor in 1993 when it sold real property to the City for consideration that included a charitable donation receipt?
2. And, if so, what was the value of the gift to the City of Windsor?

Despite the fact that title was transferred for arm's length consideration, the Minister disputed that the stated purchase price reflected the fair market value of property on the date of the transaction. Several experienced land appraisers in Windsor gave evidence as to the fair market value of the property at the date of sale. After wading through the appraisals and undertaking his own analysis, Justice Rip concluded that the fair market value of the property on February 23, 1993 was $948,084.

The appeal for the 1993 taxation year was allowed and the assessment was referred back to the Minister for reconsideration and reassessment on the basis that the fair market value of the gift of property in 1993 by the appellant to the City of Windsor was $323,074 (i.e., the fair market value of the property on the date of sale less the aggregate of the cash portion of the purchase and the mortgage). Since the fair market value of the donation to the City was less than the amount of $340,632 deducted by the appellant as a charitable donation in computing income for 1993, there was no amount available to be carried over to 1994 or 1995 (and appeals for those years were dismissed).

Conclusion

In his reasons, Justice Rip concentrated on establishing the value of the gift without undertaking any analysis of whether a gift existed in the first place. Assuming the donation in question was a gift, the reasons for judgment, and the valuation determinations contained in it make sense. However, it remains unclear if the decision stands for an expansion of the common law to embrace split-receipting or an oversight by the Court to address whether a "gift" existed at all.

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