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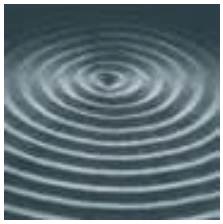

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Current CCRA issues

Robert B. Hayhoe

January, 2003

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*Robert B. Hayhoe**

This paper covers political activities, foreign activities/grant making, terrorist fundraising, directed gifts, art donation programs, related businesses, and the joint regulatory table report — a variety of current issues relevant to many charities. The following edited extract (with footnotes deleted) is from the portion of the paper dealing with art donation programs and related businesses. The entire paper will likely be published in an upcoming issue of the Philanthropist.

Art Donation Programs

Donations by an individual to a registered charity give rise to an individual tax credit while gifts to a registered charity by a corporation give rise to a corporate tax deduction. These tax deductions and credits are only available when the donor is able to include with the applicable tax return an official donation receipt. The Act specifically provides that the improper issuance of a donation tax receipt is cause for revocation of registration. The current issues dealing with art donations arise out of the requirement that a registered charity provide receipts. Art donations typically involve the charity being approached by a promoter who offers to facilitate donations of artwork to the charity by various individuals. The artwork donations are generally accompanied by formal written appraisals from appraisers who appear to be at arm's length from the promoter and which indicate a relatively high value (which is based upon the retail value) for the donated art. After the charity receives the donated art, the promoter often arranges for the charity to sell the donated artwork either to the promoter or to some other entity at a price which is usually much less than the appraised value at which the charity had issued a receipt.

The CCRA has attacked these transactions very aggressively from the donor's side. Typically, the attack is based upon the suggestion that the transaction does not constitute a gift at law (limited CCRA success) or the property transferred as part of the gift is worth very much less than the amount on the donation receipt (significant CCRA success). To the extent that a registered charity issues a donation receipt for an amount which is greater than the fair market value of the artwork transferred to the charity as part of the gift, subsection 168(1) specifically provides that this is an offence which entitles the CCRA to revoke charitable registration.

The CCRA has clearly stated its opposition to these art donation programs and has specifically threatened to revoke the registration of charities which are involved in art donation programs. As well, even if the charity's registration is not revoked for involvement in the art donation scheme, art donation schemes can have very negative effects on a charity's disbursement quota. Since the disbursement quota is calculated on the basis of the value of donation receipts from the charity's previous year, a charity which is funded largely through art donation programs could easily find itself in a situation where it has a very high disbursement quota but where the realized value of the artwork which it has sold does not provide enough funds to enable the charity to meet its disbursement quota. Such a charity should not expect the CCRA to be accommodating in varying its disbursement quota.

Related Businesses

One item which has been an ongoing source of friction between charities and their advisors on one hand and the CCRA Charities Directorate on the other hand is the issue of what constitutes a related business.

Subsection 149.1(6) of the Act provides that "a charitable organization shall be considered to be devoting its resources to charitable activities carried on by it to the extent that (a) it carries on a related business". Subsection 149.1(2) provides that "the Minister may ... revoke the registration of a charitable organization ... where the organization (a) carries on a business that is not a related business of that charity". Subsection 149.1(1) defines related business to include:

> "Related business in relation to a charity, includes a business that is unrelated to the objects of the charity if substantially all persons employed by the charity in the carrying on of that business are not remunerated for that employment".

Only one decided case has considered the application of the above related business provisions to an actual charity: *Alberta Institute on Mental Retardation v. The Queen*. In that case, the Institute collected used goods and provided them to Value Village for sale to the public. The contract between the Institute and Value Village provided that Value Village would cover the charity's collection expenses and pay it a certain additional sum which would eventually be distributed by the Institute to other registered charities involved in dealing with "mental retardation". The Institute had no other charitable activities.

The Federal Court of Appeal found that since all of the monies received from selling the donated goods went to charitable activities by being transferred to other charities, the Institute was operated for exclusively charitable purposes and therefore did not constitute a business. Even if the activities had constituted a business, the Court would have concluded that they were a related business because the monies collected were used for the charitable purposes of the Institute.

As part of the Federal Government's Voluntary Sector Initiative, the Joint Regulatory Table ("JRT") was given the task of developing a new policy for the CCRA on registered charities carrying on business activities. The CCRA Charities Directorate has now published a proposed policy *Consultations on Proposed Policy Guidelines for Registered Charities on Related Business* (the "Proposed Policy") which was developed by the JRT.

As discussed in the Proposed Policy, the CCRA refuses to accept the decision of the Federal Court of Appeal that a related business is a business the profits of which are used to fund charitable activities. The CCRA has stated that "In the CCRA's view, the key decision of the court was that the conversion of donated goods to cash should not be characterized as a business".

Even the Proposed Policy confirms that some members of the JRT disagreed with the Proposed Policy on the basis that the Alberta Institute case mandates a destination of funds test in determining whether a business is a related business. Whether a destination of funds test would be a sensible result from a public policy perspective[1] is a question which is outside the purview of the JRT (which was asked only to consider administrative solutions to the related business issue, not legislative solutions). It seems clear that the *Alberta Institute* case can be read as applying a destination of funds test in determining whether a business is a related business.

Readers should be aware of a related business case which has just been argued in the Federal Court of Appeal, and which raises squarely the correctness of the decision in the Alberta Institute case. This impending appeal is an appeal brought by Earth Fund against the refusal of the Canada Customs and Revenue Agency to register it as registered charity. Earth Fund is an environmental organization which apparently intends to use the revenue from an Internet lottery to make grants to other environmental charities. I understand that judgment has been reserved. It is possible that the CCRA will be successful in narrowing or overturning the *Alberta Institute* case as part of the judgment in *Earth Fund*. However, I understand that there are other issues in the *Earth Fund* case with the result that the related business issue may not be addressed in that decision.

Nonetheless, assuming that the CCRA's position in the Proposed Policy is upheld, it is useful to understand what the Proposed Policy provides. Examples of situations that might not be considered business activities include selling donated goods, entering into a sponsorship deal and managing investments.

The Proposed Policy also provides the CCRA's view on exactly what constitutes a "related business" — a business that is (a) related to the charity's purposes; and (b) subordinate to those purposes. Hospital gift shops and parking lots, museum cafeterias, and university bookstores are examples of businesses

"linked" to a charity's purpose. Renting excess capacity, such as university dorm rooms not used in the summer would also be acceptable, as long as these activities remain subordinate to the charity's overall activities — measured in time expended, staffing, location, etc.

Finally, the Proposed Policy provides some comfort with respect to the de-registration process by giving a charity found in breach of the related business provisions an opportunity to place the business in a separate taxable corporation; invest in that corporation (provided it is an acceptable investment for the charity); and retain control of the corporation (subject to provincial legislation with respect to charities — a significant problem for most Ontario charities).

This is an area which should be monitored. If the CCRA wins the *Earth Fund* case on grounds that narrow or eliminate the *Alberta Institute* destination of funds test, we should expect to see the CCRA begin to audit charities which carry on business and to force those charities which are not compliant with the Proposed Policy to divest themselves of their business activities.

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