

Recent Tax Developments

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Amendments to the *Income Tax and Tax Court of Canada Acts*

A further amendment to fine-tune the rules in the *Income Tax Act* relating to charities is proposed by the Notice of Ways and Means Motion to amend the *Income Tax Act* and to make a related amendment of the *Tax Court of Canada Act* dated May 9, 1985. Subclause 98(1) proposes to amend Part V of the *Act* which imposes a special tax in respect of certain transactions entered into by charitable foundations and, where the registration of a charity is revoked, to add a new subsection 189(7) providing that interest will be payable on such special tax at prescribed rates.

May 23, 1985 Budget

Three resolutions of the May 23, 1985 Budget are also of interest to charities. Two of the resolutions encourage gifts of property to charities and the third resolution will make it possible for charities to engage in some political activities.

Resolution 33 of the Budget proposes to encourage artists to donate their works to registered charities or to Her Majesty by providing that an individual artist who makes a gift of a work of art created by him to a registered charity, or to Her Majesty, that is inventory, be permitted after 1984 to elect, as his proceeds of disposition and therefore the amount of such gift, any amount not greater than the fair market value of the property. At present, section 69 of the *Act* requires the fair market value of such works of art given to a charity to be included in income. However, the deduction available to the donor under paragraphs 110(a) and (b) would not offset the income inclusion if the deduction exceeded 20 per cent of the donor's income.

Resolution 34 of the Budget provides that where a taxpayer makes a gift of appreciated tangible or intangible capital property to a registered charity or to Her Majesty after 1984, the taxpayer will be permitted to elect any amount between the fair market value and the adjusted cost base as the proceeds of disposition and the amount of the gift. This extends the current rules in subsection 110(2.2) of the *Act* which permit a rollover where tangible property is given to a charity which can be used by the charity in carrying on its charitable activities. The proposed amendment will permit intangible capital property, such as shares, to be gifted to a charity on a rollover basis, and removes the requirement that the property so donated be used by the charity in carrying on its

activities. This proposal, which permits such property to be given to a charity without a realization for capital gains tax purposes in the donor's hands, should encourage gifts of appreciated capital property to charities.

Resolution 63 of the May 23, 1985 Budget proposes that for the 1985 and subsequent taxation years, registered charities be permitted to engage in some political activities that are related to their charitable purposes provided they do not directly or indirectly support any candidate or political party and that the charity donates substantially all of its resources to charitable activities. This proposal is the result of a continuing debate between taxpayers and charities and Revenue Canada regarding the right of charities to engage in political activities and lobbying for the purpose of changing laws in ways which the particular charity believes would be for the betterment of the community.

The Hon. Perrin Beatty, then Minister of National Revenue, subsequently issued a Background Statement regarding political activities of charitable organizations. In the statement he comments on three types of political activity and their treatment under the proposed amendment. The first, partisan support of candidates and political parties, will not be permitted. The second, direct presentation of information and views to government, and third, indirect activities intended to influence public opinion generally, will be allowed.

Applications of Interest

Prior to the Budget announcement, Revenue Canada dealt with two applications by groups for registration as charities. In one case—an application by the Federated Anti-Poverty Groups of B.C.—Revenue Canada gave in and registered the charity notwithstanding that it proposed to lobby and engage in political activities; in the other, *Scarborough Community Legal Services v. R.*, 85 DTC 5102, the Federal Court of Appeal discussed the substantive issue of what type of political activities would disqualify an otherwise charitable organization from registration and found the particular activities engaged in by that applicant were not charitable.

Federated Anti-Poverty Groups of B.C.

The application by the Federated Anti-Poverty Groups of B.C. to be registered as a charity for income tax purposes never came before the courts. Revenue Canada capitulated first. The overall object of the group was “to strengthen and unite the voices of groups concerned with low income people or social problems in B.C. around agreed-upon issues” (*Globe and Mail*, September 13, 1984). The group lobbied over such issues as health program cutbacks and renters' grants. In 1983, Revenue Canada told the group that it did not qualify for charitable status because of its political activities and lobbying. Revenue Canada's position was that the organization was trying to change government policy and this was a political rather than a charitable activity. The group launched an appeal to the Federal Court of Appeal but, before it was heard, Revenue Canada backed down and agreed to register the group as a charity. The matter therefore never came before the courts.

Scarborough Community Legal Services v. R.

In *Scarborough Community Legal Services v. R.*, the Federal Court of Appeal for the first time considered the substantive issue of what type of political activities will disqualify an otherwise charitable organization from registration. It also considered the procedural issue that natural justice and procedural fairness dictate that a charity should receive prior notice of the reasons for the denial by Revenue Canada of its registration and an opportunity to refute the case prior to the Minister's final determination.

With respect to the political issue, the court accepted the appellant's argument that the Minister must first make a distinction between the primary and incidental purposes of any charitable organization but concluded that the appellant's efforts to influence policymaking decisions and change the law were an essential part of its activities and not merely incidental to its other charitable activities. It therefore was not a charity.

With respect to the procedural issue, the appellant argued that the decision by Revenue Canada to register or not register an applicant for charitable status had to be taken as a judicial decision subject to the laws of natural justice or, in the alternative, if it were an administrative decision, one which required the authority to act fairly with the result that the Minister could not reach a conclusion adverse to the applicant without first giving it prior notice of the case against it and an opportunity to meet that case. The applicant referred to *Renaissance International v. M.N.R.*, [1983] 1 F.C. 860, 83 DTC 5024. Each of the Judges, Marceau, Urie and Heald, wrote separate judgements.

Marceau, J. distinguished the *Renaissance* case on the basis that it was concerned with the revocation of an organization's registration as a charity. In his view, the function of the Minister in dealing with an application for registration as a charity under the *Income Tax Act* is a strictly administrative function and, based on the case of *M.N.R. v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, 78 DTC 6528, is not subject in its exercise to judicial or quasi-judicial process. Marceau, J. did not accept the appellant's suggestion that procedural fairness would call for a hearing. In his view, such a requirement would go beyond Parliament's will as reflected in the legislation and such a hearing would not better achieve justice and equity. A decision could be appealed if it was wrong in law and, if it was wrong based on the facts, an applicant could renew his application. He therefore concluded there was no obligation on the part of the Minister to invite submissions or conduct a hearing prior to refusing an application for registration as a charity.

Urie, J. agreed with the conclusion reached by Marceau, J. on the procedural issue, but set forth his reasoning separately. He pointed out that when an application is made for registration as a charity, prescribed material is filed in support. The applicant knows the law and the contents of the material, and is not precluded from making submissions in support of its application or to explain deficiencies or defects therein or from filing additional supporting material to

demonstrate that it truly is a charity. He concluded that the failure to call for representations could not vitiate the Minister's decision.

Heald, J. dissented. He would not have required a full hearing but thought the appellant should have been invited to make further submissions.

In view of the decision of the Federal Court of Appeal on the substantive issue, charities seeking registration in the future should ascertain the Department's views on the application informally before a formal decision is rendered, and make further submissions if required.