2009-0322801E5 -- Gift to U.S. charitable organizations

PRINCIPAL ISSUES: Guidance requested with respect to gifts to U.S. Charitable organizations

POSITION: General comments provided.

2009-032280

XXXXXXXXXX Sylvie Danis

(613) 957-3496

Attention: XXXXXXXXXX

July 17, 2009

Dear XXXXXXXXXX:

Re: Principal-Protected Loans (“PPLs”)

This is in response to your request for an advance income tax ruling dated May 11, 2009 concerning charitable gifts to a U.S. organization.

We are unable to provide an advance income tax ruling since written confirmation of the tax implications inherent in particular transactions is given by this Directorate only where the transactions are proposed and are the subject matter of an advance income tax ruling request

submitted in the manner set out in Information Circular 70-6R5, Advance income Tax Rulings, dated May 17, 2002. Accordingly, a refund of your deposit will be sent to you under separate cover. Notwithstanding the above, we are prepared to provide the following general comments, which may be of assistance.

Section 118.1 of the Income Tax Act (the "Act") provides that individual taxpayers may claim a credit against taxes payable, within specified limits, for an eligible amount of a gift made to a qualified donee, if supported by an official receipt. Section 110.1 of the Act permits a corporation to claim a deduction, within specified limits, in computing taxable income in respect of an eligible amount of a gift made by the corporation to a qualified donee, if supported by an official receipt. Generally donors can claim gifts in the year of the gift or in any of the five years immediately following, up to a limit of 75% of net income.

A qualified donee as defined in subsection 149.1(1) of the Act includes a registered charity which is defined in subsection 248(1) of the Act as a charitable organization, private foundation or public foundation that is resident in Canada and was either created or established in Canada that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation.

A qualified donee also includes a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift in the year or in the 12 months immediately preceding that year. A list of such charitable organizations is available in IC84-3R5 [Information Circular 84-3R5]—attachment. This Information Circular and other Canada Revenue Agency publications can be accessed on the internet at http://www.cra-arc.gc.ca. According to the IC84-3R5 [Information Circular 84-3R5] attachment revised May 7, 2009, Her Majesty in right of Canada has not made a gift to XXXXXXXXXX in recent years.

The term "gift" is not defined in the Act and therefore assumes its common law meaning. Under common law, a bona fide gift is a voluntary transfer of property from a donor, who must freely dispose of his or her property, to a donee, who receives the property given with no right, privilege, material benefit or advantage conferred on the donor or any person designated by the donor in exchange for the donor making the gift. However, proposed subsections 248(30) to (32) of the Act allow for the recognition of a gift for tax purposes in certain situations where

a donor, or a person who does not deal at arm's length with the donor, receives consideration or other advantages for property transferred. Pursuant to proposed subsection 248(31) of the Act, the eligible amount of a gift is the excess of the fair market value of the property transferred to a qualified donee over the amount of the advantage provided.

Where a taxpayer makes a loan to an organization, the loan is not a gift. However, where the loan is interest bearing, the taxpayer may subsequently transfer the interest earned on the loan to the organization. In such a case, the eligible amount of the gift made by the taxpayer for purposes of the donation tax credit or deduction will, subject to the limitations discussed above, be the amount of the interest transferred provided that the organization is a qualified donee. The taxpayer will, however, be required to include the amount of the interest earned in the calculation of income.

Where the loan is interest free, the taxpayer will not be in receipt of income and will not be entitled to a donation tax credit or deduction.

To the extent that any portion of the principal is forgiven, the forgiven amount can generally be considered a gift to the donee.

Under subsection 118.1(9) of the Act, an individual who resided in Canada near the Canada and U.S. border throughout a taxation year and commuted to his or her principal place of employment or business in the United States may claim a tax credit for gifts made to a religious, charitable, scientific, literary or educational organization created or organized under U.S. law that would be allowed as a deduction under the United States Internal Revenue Code. Such gifts are not limited to U.S. source income but are included in the individual's “total charitable gifts” for purposes of section 118.1(1) of the Act and are treated in the same manner as gifts to Canadian registered charities. To qualify under this provision, the individual's chief source of income for the year must be from that employment or business.

The Convention Between Canada and The United States of America With Respect to Taxes on Income and on Capital Signed on September 26, 1980, as Amended by the Fifth Protocol signed on September 21, 2007 (the “Canada-U.S. Treaty”) also provides limited tax relief with respect

to gifts made by Canadian residents to certain U.S. organizations. Pursuant to paragraph 7 of Article XXI of the Canada-U.S. Treaty, for the purposes of Canadian taxation, gifts by a resident of Canada to an organization that is a resident of the United States, that is generally exempt from United States tax and that could qualify in Canada as a registered charity if it were a resident of Canada and created or established in Canada, shall be treated as gifts to a registered charity to the extent they do not exceed 75% of the taxpayer's income from U.S. sources.

We trust the above comments are of assistance. However, as stated in paragraph 22 of Information Circular 70-6R5, the above comments do not constitute an income tax ruling and accordingly are not binding on the Canada Revenue Agency in respect of any particular situation.

Yours truly,

Terry Young, CA

A/Manager

Charitable and Financial Institutions Sectors

Financial Sector and Exempt Entities Division

Income Tax Rulings Directorate

Legislative Policy and Regulatory Affairs Branch

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