PRINCIPAL ISSUES: Whether an amount paid to a U.S. charity is a gift to a qualified donee in a particular situation.

POSITION: Factual determination. General comments provided.

REASONS: 248(31), 118.1(1)

XXXXXXXXXX 2011-040840

Sylvie Danis

(613) 957-3496

June 23, 2011

Dear XXXXXXXXXX:

Re: Gift to a U.S. charity

This is in response to your email dated May 31, 2011, wherein you requested confirmation of the tax implications with respect to a situation concerning gifts by will to a U.S. organization. More specifically, you have advised us that XXXXXXXXXX is administering the XXXXXXXXXX who passed away in XXXXXXXXXX. His will provided that it was his wish to be cryogenically preserved at the XXXXXXXXXX, a U.S. charitable organization, and directed the trustee to pay out amounts for the benefit of the lifetime financial support for his cryopreservation. You've asked us

whether the amounts paid to the XXXXXXXXXX can be considered gifts by will for Canadian tax purposes.

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. Where the particular transactions are completed, the inquiry should be addressed to the relevant Tax Services Office. However, we can offer the following general comments that 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. 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. This limitation is increased to 100% of net income in the year of death.

Pursuant to subsection 118.1(5) of the Act, a gift made by an individual's will is deemed to have been made, for purposes of subsection 118.1(1), immediately before the individual's death, and as such, is claimed in the final T1 return of the deceased taxpayer. For the purposes of this subsection, a gift is considered to have been made “by the individual's will” where the executors of the estate are required to transfer a specific property or amount to a recipient that is a qualified done.

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. 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 or partnership 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), the eligible amount of a gift is the excess of the fair market value (“FMV”) of the property transferred to a qualified donee over the amount of the advantage provided.

It is the responsibility of the donee to determine the value of the advantage provided. As noted in Income Tax Technical News (ITTN) No. 26, if the value of an advantage cannot be reasonably ascertained, no charitable tax credit will be allowed. Note that if the value of the advantage exceeds 80% of the FMV of the transferred property, there will not be an eligible amount of a gift unless the transferor of the property establishes to the satisfaction of the Minister of National Revenue that the transfer was made with the intention to make a gift.

A qualified donee as defined in subsection 149.1(1) of the Act includes a registered charity which is defined in subsection 248(1) 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 of National Revenue 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 the Attachment to IC84-3R6, Gifts to Certain Charitable Organizations Outside Canada.

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 U.S., that is generally exempt from U.S. 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 the percentage limitations of the taxpayer's income from U.S. sources. The Canada Revenue Agency (“CRA”) generally accepts that any organization that qualifies under section 501(c)(3) of the U.S. Internal Revenue Code will qualify for the purposes of paragraph 7 of Article XXI of the Canada-U.S. Treaty.

It is a question of fact whether a gift has been made to a qualified donee in a particular situation. For a transfer of property to qualify as a gift, a requirement is that there must be donative intent. In the situation described, the will clearly indicates that the amount to be paid

out of the estate to the U.S. organization is for the lifetime financial support for cryopreservation of the deceased. This suggests that the amount paid is for services and not motivated by donative intent. Even if donative intent can be established, the cryopreservation services in the situation you describe constitute an advantage which would reduce the eligible amount of the gift, if any, for purposes of the Act as described above.

As noted above, an individual resident in Canada may be eligible to claim tax relief for gifts made to certain U.S. organizations if the individual has U.S. source income. If the donor does not have any U.S. source income (which we understand is the case for the deceased) the donor will be entitled to claim a tax credit for gifts to a U.S. organization only if Her Majesty in right of Canada has made a gift in the year or in the 12 months immediately preceding that year. According to the IC84-3R6 attachment revised May 5, 2011, Her Majesty in right of Canada has not made a gift to the XXXXXXXXXX in recent years.

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 CRA in respect of any particular situation.

Yours truly,

Jenie Leigh

for Director

Financial Sector and Exempt Entities Division

Income Tax Rulings Directorate

Legislative Policy and Regulatory Affairs Branch