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Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: The taxpayer requested clarification of the measures enacted in Bill C-13 (2011 Federal budget) with respect to the donation of publicly-listed securities to registered charities.

POSITION: General comments provided.

REASONS: Legislation.

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2012-043791

Bob Naufal

October 16, 2012

Dear XXXXXXXXXX:

Re: Donation of flow-through shares

We are writing in response to your emails dated February 20, 2012 and May 14, 2012, regarding the income tax implications involving donations of flow-through shares.

Briefly, based on our understanding of the information provided in your emails, you acquired units of a limited partnership (“LP”) under two separate limited partnership offerings. You acquired the LP units of the first offering in 2010 and the LP units of the second offering after March 22, 2011. Generally, the LP enters into an agreement with a resource company whereby the LP subscribes for shares of the resource company that are listed on a designated stock exchange. Each share of the resource company is a “flow-through share” as defined in subsection 66(15) of the Income Tax Act (the “Act”). Within a specified period (estimated to be 2 years), the LP would exchange the flow-through shares for shares of a mutual fund corporation (“MFC”). The LP will wind-up and distribute the MFC shares to the limited partners. Alternatively, the LP may simply wind-up and distribute the flow-through shares to the limited partners. You anticipate that you will donate the MFC or flow-through shares, as the case may be, that you receive on the wind-up of the LP to a registered charity and have requested our comments on the income tax implications of the donation.

Our comments

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. Depending on a taxpayer’s particular circumstances, the potential income tax implications arising from the donation of flow-through shares may be complex. In this regard, you may wish to seek professional tax advice. However, we can offer the following general comments which may be of some assistance.

Taxable capital gains

In general, paragraph 38(a) of the Act provides that a taxpayer’s taxable capital gain from the disposition of property is one-half of the taxpayer’s capital gain for the year from the disposition of the property. However, subparagraph 38(a.1)(i) of the Act provides for an exemption from capital gains tax when a taxpayer makes a donation to a qualified donee of certain types of securities such as publicly-listed flow-through shares as well as shares of a MFC. A qualified donee is defined in subsection 149.1(1) of the Act and includes registered charities.

Whether a gain on the disposition of a property is on account of income or on account of capital is generally a question of fact that can only be determined on a case-by-case basis.

The 2011 Budget measures

The 2011 Budget announced certain measures that, in effect, allow the above-described exemption from capital gains tax on donations of shares of a class in which a taxpayer acquired shares issued under a flow-through share agreement only to the extent that cumulative capital gains in respect of that class exceed the original cost of the flow-through shares. These measures (described in the sections that follow) were enacted on December 15, 2011, and

generally apply to donations of flow-through shares that were issued pursuant to a flow-through share agreement entered into on or after March 22, 2011. A donation of flow-through shares that were issued pursuant to a flow-through share agreement entered into before March 22, 2011 will generally not be subject to these measures.

Deemed capital gain

Under subsection 40(12) of the Act, generally, where a taxpayer disposes of one or more capital properties included in a “flow-through share class of property” to a qualified donee and subparagraph 38(a.1)(i) of the Act applies to the disposition, the taxpayer will be deemed to have an additional capital gain from the disposition of another property equal to the lesser of:

- * the amount of the taxpayer's “exemption threshold” in respect of the “flow-through share class of property”; and
- * the total capital gains from the disposition of the actual property.

As a result, the taxpayer will report, in computing income, a taxable capital gain equal to one-half of this additional capital gain.

Flow-through share class of property

Generally, a “flow-through share class of property”, as defined in section 54 of the Act, is a group of properties, comprised of all shares of a class if any share in the class is a flow-through share to any person. The definition also includes rights to acquire a share of such a class. A flow-through share class of property also means a group of properties, each of which is an interest in a partnership, if at any time more than 50% of the fair market value of the partnership's assets is attributable to property included in a flow-through share class of property.

Exemption threshold

A taxpayer's “exemption threshold” is defined in section 54 of the Act and is used to determine the deemed gain, if any, of a taxpayer under subsection 40(12) of the Act. The exemption threshold in respect of a flow-through share class of property is generally a pool of the actual cost to the taxpayer of flow-through shares acquired after the later of March 22, 2011 and the taxpayer's “fresh-start date”, less prior capital gains of the taxpayer from the disposition of the shares.

As noted above, a flow-through share class of property may also include a partnership interest. In general terms, a taxpayer's “exemption threshold” in respect of such partnership interest includes the total of each amount that would be the adjusted cost base to the taxpayer of the partnership interest (computed without reference to any deductions for Canadian exploration and development expense or Canadian exploration expenses that might be available to the taxpayer in respect of flow-through shares held by the partnership), but only if the taxpayer made a contribution of capital to the partnership on or after August 16, 2011 or the taxpayer

acquired the partnership interest on or after the taxpayer's "fresh-start" date (and was not obligated, before August 16, 2011, to acquire that interest, pursuant to the terms of a written agreement) and certain other conditions are met.

Fresh-start date

The term "fresh-start date", which is defined in section 54 of the Act, is relevant to calculating a taxpayer's "exemption threshold" (as described above). The fresh-start date of a taxpayer at a particular time in respect of a flow-through share class of property is, except in the case of a partnership interest, the day that is the later of March 22, 2011, and the last day, if any, before the particular time, on which the taxpayer disposed of a property that is included in the flow-through share class of property and at the end of which the taxpayer held no such property. In the case of a partnership interest, a taxpayer's fresh-start date at any particular time is the later of August 16, 2011 and the last day, if any, before the particular time, on which the taxpayer held an interest in the partnership.

Tax-deferred transactions

We also note that special rules in section 38.1 of the Act may apply where a taxpayer acquires a property ("acquired property") that is included in a flow-through share class of property in certain tax-deferred transactions. To the extent that paragraph 38.1(a) of the Act is applicable, the taxpayer is essentially deemed to have an exemption threshold for the acquired property equal to a proportion of the transferor's exemption threshold for that property, and the transferor's exemption threshold for that property is reduced by the same amount.

Further, to the extent that paragraph 38.1(b) of the Act is applicable (generally if the transferor receives property in return that is publicly-listed shares or shares of a MFC), those shares are deemed to be flow-through shares of the transferor for the purposes of section 38.1 and subsection 40(12) of the Act. In such circumstances, the transferor is generally deemed to have a new exemption threshold for the shares received equal to a proportion of the transferor's exemption threshold for the property that was transferred. It is a question of fact whether the special rules in section 38.1 of the Act apply in a particular situation.

For a more detailed discussion of these provisions, you may wish to refer to the Department of Finance Explanatory Notes which can be accessed at <http://www.fin.gc.ca/drleg-apl/bia-leb-0911n-eng.pdf>.

We trust that our comments will be of assistance.

Yours truly,

Jenie Leigh
Section Manager
for Division Director

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Financial Industries and Trusts Division
Income Tax Rulings Directorate
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