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SUBJECT Gifts by Will
SECTION 118.1(5), 104(6)
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PRINCIPAL ISSUES: 1. Whether the trustees are empowered under the second will to give a charitable gift. 2. Interplay between 118.1 and 104(6)
POSITION: 1. No. 2. See memo.
REASONS: 1. Reading of the second will. 2. See memo.

January 27, 2014

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2012-047216

Gifts by Will of the Late XXXXXXXXXX

We are writing in response to the December 6th, 2012 request from Maria Grieco for our comments as to whether the Estate of the late XXXXXXXXXX (the "Trust") is entitled to the donation tax credits claimed in XXXXXXXXXX and XXXXXXXXXX under subsection 118.1(3) of the Income Tax Act (the "Act"). The late XXXXXXXXXX (the "Deceased") passed away on XXXXXXXXXX. At the time of her death she had three wills in respect of the following defined components of her estate:

* The first will with respect to the "Primary Estate"
* The second will with respect to the "Secondary Estate"
* The third will with respect to the "XXXXXXXXXX Estate"

Based on our understanding of the facts and assumptions made, it is our opinion that under the terms of the second will of the Deceased:

* The quantum of the charitable gifts (the "Gifts by Will") under subsection 118.1(5) of the Act to the named charities listed in paragraph 1 below would be equal to the fair market value ("FMV") of the residue of the Secondary Estate as at the time of death of the Deceased which, based on the facts noted below, is estimated to be about $XXXXXXXXXX. The trustees should first account for such Gifts by Will in respect of distributions to the Charities (as defined in paragraph 1 below).

* It is a question of fact whether the Trust itself has the discretion to make a gift to the Charities under the terms of the second will. In our view, paragraph XXXXXXXXXX of the second will as detailed in paragraph 4 below, does not empower the trustees of the Trust the discretion to make a gift to the Charities. Therefore, the Trust may not claim as gifts any of the trust distributions made to the Charities.
* While we are of the view that the trustees are not empowered to make a gift to the Charities, in our view, even if they could make such a gift, pursuant to subsection 248(28) of the Act, any trust income payable to the Charities that would be accounted for under section 118.1 of the Act as a gift from the Trust could not also be deducted under subsection 104(6) of the Act and vice versa, by the Trust.

Facts and Assumptions Made

1. According to the terms of the second will, the residue from the Secondary Estate, would be divided in accordance with subparagraph XXXXXXXXXX of the second will. Subparagraph XXXXXXXXXX states the following:
XXXXXXXXXX

2. While we are primarily interested in the second will with respect to the Secondary Estate, the following are relevant facts from the other two wills:
* Except for certain specific bequests to certain named charities, none of the Charities were entitled either as “donees of Gift by Will” or as “residual beneficiaries” to the residue of the Primary Estate pursuant to the first will.
* None of the Charities were entitled either as “donees of Gift by Will” or as “residual beneficiaries” to the residue of the XXXXXXXXXX Estate pursuant to the third will.

3. Paragraph XXXXXXXXXX of the second will in part states that XXXXXXXXXX…

4. Paragraph XXXXXXXXXX of the second will in part states that (emphasis added) XXXXXXXXXX.

5. The final taxation year of the Deceased is the XXXXXXXXXX taxation year. The reported income including capital gains from deemed dispositions of capital assets at the date of death pursuant to subsection 70(1) and 70(5) of the Act totaled about $XXXXXXXXXX.

6. During XXXXXXXXXX, the following trust distributions were made to the Charities from the Secondary Estate:

XXXXXXXXXX	$XXXXXXXXXX
XXXXXXXXXX	$XXXXXXXXXX
XXXXXXXXXX	$XXXXXXXXXX

7. The assets transferred into the Secondary Estate at FMV as at the date of death of the Deceased were estimated to have a total value before any distributions to any beneficiaries of about $XXXXXXXXXX in Canadian assets and XXXXXXXXXX$XXXXXXXXXX in XXXXXXXXXX denominated assets or a total of about $XXXXXXXXXX. Under the second will, specific bequests totaled about $XXXXXXXXXX. This meant that the reported quantum of Gift by Will to the Charities would be about $XXXXXXXXXX.

8. On XXXXXXXXXX, a T1 adjustment request was received and it claimed the XXXXXXXXXX trust distribution noted in paragraph 6 above of $XXXXXXXXXX as Gifts by Will in the final return of the Deceased. It is our understanding that there existed about $XXXXXXXXXX in donation amounts carried forward from prior years in the final return of the Deceased. It is also our understanding that of this $XXXXXXXXXX, $XXXXXXXXXX was applied to reduce the tax payable in the final return of the Deceased to nil. The unused donation amount available of $XXXXXXXXXX would be of no further use to the Deceased.

9. In XXXXXXXXXX, the XXXXXXXXXX final return of the Deceased was reassessed on the basis that the FMV of assets transferred to the Secondary Estate was understated by $XXXXXXXXX. In response, the representative of the estate of the Deceased requested that the unused donation amount of $XXXXXXXXX be applied to reduce the additional tax liability to nil. It is our understanding that this reassessment has the following effects:

* It reduced the reported unused donation amount available noted in paragraph 8 above to $XXXXXXXXX which again, would be of no further use to the Deceased.
* It increased the reported quantum of Gift by Will under the second will to about $XXXXXXXXX ($XXXXXXXXX plus $XXXXXXXXX).

10. In the XXXXXXXXX and XXXXXXXXX T3 returns of the Trust, it is our understanding that the following taxable dividends were reported by the Trust in respect of the Secondary Estate:
XXXXXXXXX: $XXXXXXXXX in taxable dividends
XXXXXXXXX: $XXXXXXXXX in taxable dividends

11. In the same XXXXXXXXX and XXXXXXXXX XXXXXXXXX returns of the Trust, the following donation tax credits were claimed and applied representing distributions to the Charities:

	Claimed	Applied	Carry Forward
XXXX:	$ XXXX	$ XXXX	$ XXXX
XXXX:		$ XXXX	$ XXXX

Issue Analysis

12. Subsection 118.1(5) of the Act states that (emphasis added)
Subject to subsection (13), where an individual by the individual's will makes a gift, the gift is, for the purpose of this section, deemed to have been made by the individual immediately before the individual died.

13. In our severed document E2000-0053185 dated April 18th, 2002, we opined as follows
Subsection 118.1(5) deems gifts made by an individual by will to have been made in the year of the individual's death. Where subsection 118.1(5) applies, the deceased would be entitled to a deduction pursuant to subsection 118.1(3), in the year of death, even though the transfer is made after death by the deceased's representatives or by virtue of subsection 118.1(4) to a deduction in the year preceding the year of death.
Whether or not a gift is considered to have been made by a taxpayer "by his or her will" is a question of fact. The CCRA's view is that where the wording of the will is such that
a) it is clear that the deceased taxpayer intended to make a donation to a registered charity;
b) the amount of the donation to be made to the registered charity is stipulated as a specific percentage of the deceased's Estate, or any residual, if applicable;
c) the will clearly specifies what is to be paid from the Estate in determining the amount of any residual, if applicable; and
d) the will does not provide for discretionary capital encroachments by the trustees of the Estate or others,
then a donation will be considered to have been made by the deceased by his or her will for the purposes of subsection 118.1(5).

14. In our severed document E2010-0363131C6 dated June 8th, 2010, we responded to question #13 during the 2010 STEP conference as follows: (emphasis added)
When a gift to a registered charity is made pursuant to an individual's will, subsection 118.1(5) deems the gift to have been made immediately before the individual's death for the purposes of section 118.1. These donations should be included in the individual's final return (or in the prior year's return). The requirements for supporting these donations can be found on page 16 of the guide, T4011, Preparing Returns for Deceased Persons 2009 (explanations for line 349 on donations and gifts):

"You can also claim charitable donations made through the will, as long as you support the donations. The type of support you have to provide depends on when the registered charity or other qualified donee will receive the gift:
* For gifts that will be received right away, provide an official receipt.
* For gifts that will be received later, provide a copy of each of the following:
o the will;
o a letter from the estate to the charitable organization that will receive the gift, advising of the gift and its value; and
o a letter from the charitable organization acknowledging the gift and stating that it will accept the gift."

15. Based on the above, it is our opinion that the quantum of the "Gifts by Will" to the Charities in the current case under subsection 118.1(5) of the Act would be equal to the fair market value of the residue of the Secondary Estate as at the time of death of the Deceased which is estimated to be about $XXXXXXXXXX. The trustees should normally first account for such Gifts by Will in respect of distributions to the Charities.

16. Beyond the quantum of Gifts by Will of up to $XXXXXXXXXX, it is a question of fact whether the Trust has the discretion to make a gift to the Charities under the terms of the second will. In our view, paragraph XXXXXXXXXX of the second will as detailed in paragraph 4 above, does not empower the trustees of the Trust the discretion to make a gift to the Charities. Therefore, it is our opinion the Trust may not claim as gifts any of the trust distributions made to the Charities.

Interplay between section 118.1 and subsection 104(6) of the Act

17. In our severed document E9918215 dated December 1st, 1999, we opined as follows (emphasis added)
Your letter also raised the issue as to the application of subsections 104(6) and 118.1(3) where a specified charity is named as a discretionary income beneficiary of a testamentary trust. Assuming the terms of the will give the trustees discretionary powers to make donations to charities, in our view, it is a question of fact to be determined based on the specific wording of the will and the intentions of the trustees at the time a distribution is made to a charity, whether the payment of amounts to a registered charity by a testamentary trust represent a distribution out of income to a beneficiary of the trust, and therefore fall within the scope of subsection 104(6), or are a charitable donation made by the trust for which a tax credit under subsection 118.1(3) may be claimed by the Estate.

With respect to inter-vivos trust arrangements, your letter raised questions as to the application of subsections 118.1(3) and 107(2) on the distribution of capital property of the trust to discretionary capital beneficiaries. Again, we assume that the terms of the trust provide the trustees with the discretion to make charitable gifts. Based on this assumption, and as indicated above, with respect to the application of subsections 118.1(3) and 104(6), on the distribution of income from a trust to a charity at the discretion of the trustees of the trust, this is a question of fact which depends upon the specific wording of the trust agreement and the intentions of the trustees in making the distribution to the charity. It must be determined whether the intention of the trustee was to have the trust make a distribution to the charity as a donation of capital property of the trust, or in settlement of a capital interest which the charity may have in the trust. Where the facts indicate that the trust has distributed any non-depreciable capital property to a charity, in settlement of a capital interest that the charity is considered to have in the trust, subsection 107(2) would generally apply. If however, the facts suggest that the capital property of the trust was given to the charity as a gift, and not in settlement of any capital interest of the charity in the trust, then subsection 118.1(3) would generally apply.

Trust Distributions beyond the quantum of Gifts by Will
18. While we are of the view that the trustees are not empowered to make a gift to the Charities, in our view, even if they could make such a gift, pursuant to subsection 248(28) of the Act, any trust income payable to the Charities that would be accounted for under section 118.1 of the Act as a gift

from the Trust could not also be deducted under subsection 104(6) of the Act and vice versa, by the Trust.

Yours truly,

Phil Kohnen
for Director
Trusts Section I
Financial Industries and Trusts Division
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