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SUBJECT 2015 STEP - Q12 - Gift to public foundation

SECTION 118.1(5), 118.1(18), 118.1(19), 248(25), 251(1)

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Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: Will the gift of a share of the capital stock of a corporation to a public foundation to which subsection 118.1(5) applies after 2015, qualify as an "excepted gift" as defined in subsection 118.1(19) of the Act?

POSITION: No, if the share is considered to be a "non-qualifying security" ("NQS") as defined in subsection 118.1(18) of the Act.

REASONS: For a gift of a share, which is a NQS, to qualify as an excepted gift, the taxpayer, i.e., the estate in this instance, must deal at arm's length with the donee, i.e., the public foundation, pursuant to paragraph 118.1(19). However, the estate and the public foundation are deemed not to deal at arm's length pursuant to paragraph 251(1)(b) of the Act.

STEP CRA Roundtable - June 18, 2015

Q 12 - New Charitable Donation Rules – Part 2

Under the new tax legislation dealing with testamentary gifts, the "taxpayer" making the gift will be the deceased's estate (paragraph 118.1(5)(a) provides that the gift is deemed to be made by the estate and not by any other taxpayer). An estate is a "trust", and generally is both a "testamentary trust" and a "personal trust" for tax purposes. Under paragraph 251(1)(b), a personal trust is generally deemed not to deal at arm's length with any person that is beneficially interested in the trust. Therefore, as a beneficiary of the deceased's estate, the Public Foundation will be beneficially interested in the deceased's estate and will thus be deemed not to deal at arm's length with the deceased's estate. Since the Public Foundation and the estate will be deemed not to deal with one another at arm's length, the gift

will not be an "excepted gift" under subsection 118.1(19). This seems like a bizarre result, in that it essentially prevents all gifts from an estate from being "excepted gifts". If the deceased had made the gift to an arm's length public foundation during his lifetime, the "excepted gift" rules would apply differently. Can the CRA provide its comment on the above interpretation of the new legislation?

CRA Response

Under the new tax legislation dealing with testamentary gifts, paragraph 118.1(5)(a) of the Income Tax Act (the "Act") provides that for deaths occurring after 2015, where an individual by the individual's will makes a gift, the gift is deemed to be made by the estate and not by any other taxpayer. Thus, in applying the rules in respect of gifting under the Act, the taxpayer that will be considered to have made the gift will be the deceased's estate.

For the purposes of the Act, after 2015, an estate would typically be a personal trust (by virtue of the definition of a "personal trust" in subsection 248(1) of the Act). Under paragraph 251(1)(b), a personal trust is generally deemed not to deal at arm's length with any person that is beneficially interested in the trust. Hence, in the given situation, assuming the Public Foundation is a beneficiary of the estate, it will be considered to be beneficially interested in the estate pursuant to subsection 248(25) of the Act. Accordingly, the estate will be deemed not to deal at arm's length with the Public Foundation. Consequently, where the gift is a non-qualifying security ("NQS"), as defined in subsection 118.1(18), and specifically, where the NQS is a share, we agree with your conclusion that the gift will not qualify as an "excepted gift" under subsection 118.1(19) of the Act.

Vyjayanthi Srikanth