



**REGISTERED MAIL**

Free the Children  
233 Carlton Street  
Toronto ON M5A 2L2

**AUG 24 2015**

BN: 886578095RR0001

Attention: [REDACTED]

File #:3002595

**Subject: Notice of Penalty**

Dear [REDACTED]:

We are writing further to our letter dated May 1, 2014 (copy enclosed), in which you were invited to submit representations as to why the Canada Revenue Agency (CRA) should not assess a penalty to Free the Children (the Organization) in accordance with sections 188.1 of the *Income Tax Act*.

We have now reviewed and considered your responses of August 14, 2014, and September 10, 2014, provided by [REDACTED]. However, notwithstanding your reply, our concerns with respect to the Organization's non-compliance with the requirements of Section 3501 of the Regulations of the Act and the common law requirements have not been alleviated. The issuance of incorrect receipts is therefore subject to a penalty under subsection 188.1(7) of the Act.

The *Income Tax Act* permits a registered charity to issue official donation receipts for income tax purposes for donations that legally qualify as gifts. In order to qualify under the Act, a gift must involve the voluntary transfer of property. The Organization has issued donation receipts when there was no transfer of property or rights through a formal agreement.

Audit evidence indicates that there was no "donation of license to use the suites", and therefore no "donation of property" as explained by [REDACTED] in his letter dated August 14, 2014. There was no gift as explained below. The Organization did not even know whether the suites were owned or leased by the suite holders. There was no contractual arrangement and/or transfer of license. The suite holders simply allowed the use of the space for the "We Day". The Organization in return issued donation receipts to the owners of the suites [REDACTED] spoke with Mr. Gary Huenemoeder (Team

Leader, CRA) on September 10, 2014, and confirmed that the Organization had no sublease documents for the suites.

In addition, charities are not allowed to issue donation receipts for gifts of services as specifically stated in Interpretation Bulletin IT-110R3, paragraph 15(d). That publication is noted as archived but it is still reliable.<sup>1</sup>

Contributions of services are not considered as property and therefore they do not qualify as gifts for purposes of issuing official donation receipts. Accordingly, a charity cannot issue an official donation receipt for services rendered free of charge. Our audit revealed that the Organization issued official donation receipts for services rendered.

We have decided to proceed with the sanction strictly based on the selected audit period starting from April 1, 2009 and ending on March 31, 2012. Official donation receipts that do not qualify as gifts outside the selected audit period may be reviewed at a future date. The Organization issued \$1,800,667.89 in donation receipts for gifts that did not qualify legally as gifts during the fiscal years ending March 31, 2010, March 31, 2011, and March 31, 2012.

The details of the gifts receipted by the Organization are as follows:

**Donation receipts issued for the free use of suites for "We Day":**

The following are the details of the donation receipts issued for the free usage of suites and rooms for "We Day" during the audit period:

\$672,416.09 - FYE March 31, 2012  
\$657,083.41 - FYE March 31, 2011  
\$305,000.01 - FYE March 31, 2010

In total, the Organization issued \$1,634,499.51 in donation receipts for the free usage of the suites during the audit period. Please refer to Appendix A.

It is our opinion that there has not been a transfer of property or a right. The lease agreement clearly excluded the suites and there was no evidence provided that the right was transferred or if any property was transferred. As such, no official donation receipts should have been issued.

Recently, Justice Cam Miller in *Ward Carson Vs. The Queen* 2013 TCC 353 rejected the appeal from Mr. Ward Carson stating that "the mere fact of allowing the charity to use the space was not a transfer of property which would be the prerequisite

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<sup>1</sup> On August 1, 2013, a standardized Treasury Board of Canada Secretariat "Archived Content" notice was added to all interpretation bulletins (ITs) on the CRA website. The notice has no effect on the status or reliability of the ITs. They are current up to the effective date stated in each publication.

to qualify as a receiptable gift. There was no formal lease arrangement and thus from a legal point of view, the charity had no right to use the property, just an arrangement which could be terminated at any time."

**Donation receipts issued to photographers:**

The following are the details of the donation receipts issued to the photographers for their time and photography during the audit period:

\$36,746.46 - FYE March 31, 2012

\$27,103.13 - FYE March 31, 2011

\$28,451.92 - FYE March 31, 2010

In total, the Organization issued \$92,301.51 in donation receipts to the photographers during the audit period. Please refer to Appendix B for details.

Based on our review of the receipts issued and the response provided, we have determined that although the image CD's are property, the majority of the receipt value was for services provided by the photographers. As stated above, no official donation receipts should be issued for gifts of services.

**Donation receipts issued to landlord for rent:**

The following are summaries of the donation receipts issued to the landlord in lieu of paying rent during the audit period:

\$46,800 - FYE March 31, 2012

\$64,800 - FYE March 31, 2011

\$54,000 - FYE March 31, 2010

In total, the Organization issued \$165,600 in donation receipts to the landlord instead of paying rent during the audit period. Please see attached Appendix C for details.

We accept the representations from [REDACTED] and the receipts issued to the landlord are not included in the total amount subject to the penalty under Subsection 188.1(7).

**Donation receipts issued for discounts obtained:**

In total, the Organization issued \$21,803.87 in donation receipts for discounts it obtained during the fiscal year ended March 31, 2011. Please refer to Appendix D for details.

The donation receipts were issued for discounts received on furniture rentals and rentals of audio-visual equipment. There were no contractual arrangements. It is our

opinion that there was no transfer of property and no gift. As such, no official donation receipts should have been issued.

**Donation receipts issued for advertisement:**

The following are the details of the donation receipts issued for advertisement during the audit period:

\$18,300 - FYE March 31, 2012

\$33,763 - FYE March 31, 2010

In total, the Organization issued \$52,063.00 in donation receipts for advertising services during the audit period. Please refer to Appendix E for details.

In our opinion there was no contractual arrangement with the service providers and there was no transfer of property. As such, no official donation receipts should have been issued.

**Donation receipts issued for miscellaneous services:**

The Organization issued \$16,680 in donation receipts to [REDACTED] for miscellaneous services. Please refer to Appendix F.

It is our opinion that there has not been a transfer of property or a right in the issuance of the receipts. As such, the receipts were issued improperly. We are excluding these from the penalty calculation because the receipts were issued before the selected audit period.

It is important to note that we are also enclosing a compliance agreement which should be signed by the Organization and returned by September 25, 2015. This agreement outlines the steps the Organization must take to ensure compliance with the Act and/or its Regulations in the future.

**Conclusion:**

Consequently, for each of the reasons mentioned in our letter dated May 1, 2014, we wish to advise you that, pursuant to subsection 188.1(7) of the Act, we propose to assess a penalty to the Organization.

**Penalty assessment**

The penalty assessed by the Canada Revenue Agency for the selected audit period is calculated as follows:



	Fiscal Period Ending March 31, 2012	Fiscal Period Ending March 31, 2011	Fiscal Period Ending March 31, 2010	Total Penalties for the audit period
Receipts issued otherwise than in accordance with the Act	\$727,462.55	\$705,990.41	\$367,214.93	
Penalty applied under subsection 188.1(7) of the Act	5%	5%	5%	
Total Penalty owing as per subsection 188.1(7) of the Act	\$36,373.13	\$35,299.52	\$18,360.75	\$90,033.40

In accordance with subsection 189(6.3) of the Act, the penalty may be paid to an eligible donee as defined in subsection 188(1.3) in the one-year period following the assessment date. An eligible donee in respect of a particular charity is a **registered charity**:

1. of which more than 50% of the members of the board of directors or trustees of the registered charity deal at arm's length with each member of the board of directors or trustees of the particular charity;
2. that is not subject to a suspension of tax-receipting privileges;
3. that has no unpaid liabilities under the *Income Tax Act* or the *Excise Tax Act*;
4. that has filed all its information returns; and
5. that is not subject to a security certificate under the *Charities Registration (Security Information) Act*.

The CRA requires the following documentation to confirm that the eligible donee received the penalty payment:

- a letter addressed to the Director, Compliance Division (mail to address below), signed by an authorized representative of the eligible donee, confirming the penalty payment was received and the amount paid; and
- a copy of either the cancelled cheque or evidence of a non-cash transfer.

Should you choose instead to make your payment to the CRA, please make the cheque payable to the Receiver General for Canada and mail it to:

Director  
Compliance Division  
Charities Directorate  
Canada Revenue Agency  
320 Queen Street, 7<sup>th</sup> Floor  
Ottawa ON K1A 0L5

Please note that in accordance with subsection 149.1(1.1) of the *Income Tax Act* the penalty payment made to an eligible donee shall not be deemed to be an amount expended on charitable activities nor a gift made to a qualified donee.

Failure to pay this penalty amount or make arrangements for payment will result in us reconsidering our decision not to proceed with the issuance of a notice of intention to revoke the registration of the Organization in the manner described in subsection 168(1) of the Act.

If you have any questions or require further information or clarification regarding the penalty payment, please contact Mr. Alexandre Comtois at 514-292-0047.

### **Appeal process**

Should you wish to appeal this notice of penalty in accordance with subsection 165(1) of the Act respectively, a written notice of objection, which includes the reasons for objection and all relevant facts, must be filed **within 90 days** from the mailing of this letter. The notice of objection should be sent to:

Tax and Charities Appeals Directorate  
Appeals Branch  
Canada Revenue Agency  
250 Albert Street  
Ottawa ON K1A 0L5

### **Public notice**

By virtue of paragraph 241(3.2)(g) of the Act, the following information relating to the Organization's penalty assessment will be posted on the Charities Directorate website:

### **Penalty assessment**

Name of organization:	Free the Children
Registration number:	886578095RR0001
Effective date of penalty:	August 24, 2015
Reason for penalty:	Incorrect information
Act reference:	Subsection 188.1(7)
Amount of penalty:	\$90,033

We trust the foregoing fully explains our position.

Yours sincerely,

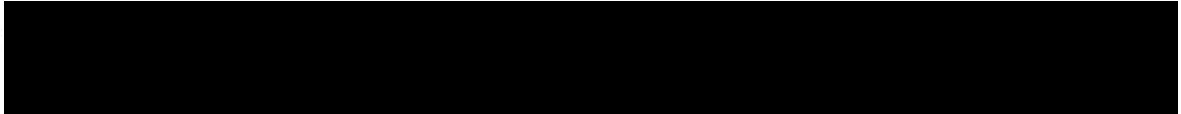
A handwritten signature in dark ink, appearing to read 'Hawara', with a long, sweeping horizontal line extending to the right.

Cathy Hawara  
Director General  
Charities Directorate

Attachments:

- Compliance Agreement
- CRA letter dated May 1, 2014
- Organization's response of August 14, 2014

C.C.:



*Place de Ville, Tower A  
320 Queen Street, 13th Floor  
Ottawa ON K1A 0L5*

## **Compliance Agreement**

**Between:**

**Free the Children (the "Organization")**

886578095RR0001  
233 Carlton Street  
Toronto Ontario M5A 2L2

And

**Canada Revenue Agency (CRA)**

During an audit of the Organization's books and records for the fiscal periods ending March 31, 2010 to March 31, 2012 conducted by the CRA, the following areas of non-compliance with the provisions of the *Income Tax Act* (ITA) and/or its *Regulations* were identified:

### **Areas of Non-Compliance**

#### **A. Failure to issue receipts in accordance with the Act**

The law provides various requirements with respect to the issuing of official donation receipts by registered charities. These requirements are contained in *Regulations* 3500 and 3501 and are described in some detail in Interpretation Bulletin IT-110R3 *Gifts and Official Donation Receipts*.

#### **Missing information**

The audit revealed that the donation receipts issued by the Organization did not comply with the above requirements in that they were missing the following information:

- a. the required statement that it is an "official receipt for income tax purposes"
- b. the name Canada Revenue Agency and CRA website address

*Regulation* 3501(1) requires that every official receipt issued by a registered organization shall contain a statement that it is an "official receipt for income tax purposes" and shall show this clearly, in such a manner that it cannot readily be altered;

Regulation 3501(1) (j) requires that every official receipt issued by a registered charity shall contain the name and internet website address of the Canada Revenue Agency;

#### Gifts in kind

The Organization has issued receipts for gifts of property other than cash, also called gifts in kind, during the audit period. Regulation 3501(1)(e.1) requires that such receipts must show clearly:

- (i) the day on which the donation was received;
- (ii) a brief description of the property; and
- (iii) the name and address of the appraiser of the property if an appraisal is done

An appraisal (preferably by way of independent appraisal for gifts exceeding \$1,000) is strongly recommended to establish the amount that represents the fair market value of the property at the time the gift was made.

Audit evidence indicates that donation receipts were issued for some Gifts in kind without proper supporting documentation (IT-10R3 Paragraph 15(e)). Also, the official receipts issued by the Organization for the gifts in kind during the audit period were missing a brief description of the property, and the name and address of the appraiser of the property (Regulation 3501(1)(e.1)).

Audit evidence also indicates that the Organization was selling the donated shares and mutual funds immediately after the donation and the donation receipts were issued for the least of:

- (i) the fair market value at the time of the donation, and
- (ii) the fair market value at the time of the settlement (after sale)

Receipted amount should be the fair market value at the time of the donation as advised during the audit.

#### Gifts in kind and taxes paid by the donor

The audit revealed that the Organization also issued donation receipts for the gifts in kind including the taxes paid by the donor. For example, receipt # [REDACTED] issued for \$4,520 on Dec 31, 2012 to [REDACTED] for video preparation includes \$520 HST.

The fair market value of an item does not include taxes paid on purchasing the item. Taxes are a cost incurred by the purchaser and are payable to the Crown. The seller merely acts as an agent of the Crown in collecting the taxes. For example, a donor purchases an item from a dealer, pays HST/ sales tax and GST on the transaction, then subsequently donates the item to a registered

charity. The amount entered on the official donation receipt should be the fair market value of the item before taxes [Regulation 3501(1)(h)(ii) and (1.1)(h)(ii)].

### **Issuance of receipts for amounts that do not legally qualify as gifts**

The Organization has issued donation receipt for the gifts of service. Charities are not allowed to issue donation receipts for the gifts of service (IT-110R3 Paragraph 15(d)). A gift must involve property. Contributions of services are not property and do not qualify as gifts. Accordingly, a charity cannot issue an official donation receipt for services rendered free of charge. Additionally, a charity cannot issue an official donation receipt for the payment of expenditures.

There was no contractual arrangement and/or transfer of license but the suite holders simply allowed the use of the space for the "We Day". The Organization in return issued donation receipts. The *Income Tax Act* permits a registered charity to issue official donation receipts for income tax purposes for donations that legally qualify as gifts. In order to qualify under the Act, a gift must involve the voluntary transfer of property. The Organization has issued donation receipts during the "We day" when there was no transfer of property or rights through a formal agreement.

### **B. Failure to issue T4A/ T4A-NR Slips and withholding taxes**

Audit evidence indicates that the Organization failed to issue appropriate T4A slips for several contract payments to the resident individuals and withhold taxes and issue T4A-NR slips for the payments to non-residents for the services during the audit period.

Audit evidence indicates that the Organization issued official donation receipts for services rendered free of charge. Additionally, the Organization has issued receipts in lieu of payment for and/or the reimbursement of expenses and services rendered to it during the audit period. The Organization is required to issue appropriate T4A slips for the contract payments over \$500 to individuals during the calendar year as discussed during the audit.

Subsection 153(1) of ITA imposes withholding obligation on persons who make certain payments to non-residents. Amounts withheld are required to be remitted to CRA on account of the non-resident's potential tax liability. Failure to withhold taxes makes the payer liable to pay as tax on behalf of the non-resident the whole amount that should have been so deducted or withheld. Part XIII withholding tax is applicable to the payments made to the non-residents as discussed during the audit.

Audit evidence indicates that there were several contract payments to the non-residents during the audit period. It appears that the Organization did not withhold taxes on these payments to the non-residents for their services during the audit period.



The Organization is required to withhold appropriate taxes from the contract payments to the non-residents and to issue T4A-NR slips at the end of the calendar year.

The Organization wishes to rectify all identified areas of non-compliance on a voluntary basis. The CRA is prepared to provide the Organization with an opportunity to do so. For this purpose, the parties agree that the Organization shall implement the following corrective measures.

### **Corrective Measures**

#### **A. Failure to issue receipts in accordance with the Act**

- (i) The Organization will comply with the requirements of Regulations 3500 and 3501 of the ITA and Interpretation Bulletin IT-110R3 regarding official donation receipts as discussed above.
- (ii) Donation receipts issued by the Organization will contain a required statement that it is an "official receipt for income tax purposes as required by Regulation 3501(1).
- (iii) Donation receipts issued by the Organization will contain the name Canada Revenue Agency and the CRA website address [www.cra-arc.gc.ca/charities](http://www.cra-arc.gc.ca/charities) as required by Regulation 3501(1(j)).
- (iv) Donation receipts issued by the Organization for gifts in kind will include a description of the property donated as a gift in kind and the name and address of the appraiser of the property, if appraised as required by Regulation 3501(1)(e.1). Also, the Organization will ensure that receipts are issued for the fair market value at the time of donation excluding taxes paid by the donor.
- (v) The Organization will not issue donation receipt for the gifts of service as required by IT-110R3 Paragraph 15(d).
- (vi) The *Income Tax Act* permits a registered charity to issue official donation receipts for income tax purposes for donations that legally qualify as gifts. In order to qualify under the Act, a gift must involve the voluntary transfer of property.

#### **B. Failure to issue T4A/ T4A-NR Slips and withholding taxes**

- (vii) The Organization will issue/file appropriate T4A slips/T4A summary for the contract payments to individuals.

- (viii) The Organization will withhold appropriate taxes from the contract payments to non-residents and issue/file T4A-NR slips/Summary as discussed above.

**Date of implementation of all corrective measures**

The Organization shall implement all corrective measures immediately.

By signing below, the parties certify that they have read, understood, and agree to, the terms of this Compliance Agreement. The Organization further acknowledges that should it fail to implement all corrective measures in accordance with the terms of this Compliance Agreement, the Minister of National Revenue (the Minister) may apply the penalties and suspensions provided for in sections 188.1 and/or 188.2 of the Act, which include suspension of the Organization's authority to issue official receipts and suspension of its status as a "qualified donee". The Minister may, by registered mail, also give notice that the Minister proposes to revoke the registration of the Organization by issuing a notice of intention to revoke in the manner described in subsection 168(1) of the Act.

The agreement should be returned to the address as follows.

Kitchener/Waterloo Tax Services Office  
166 Frederick Street  
Kitchener, ON N2G 4N1

Attn: Tony P. Thomas

**Organization per:** Authorized signatory with the authority to bind the Organization

Witness

Name and position of signatory  
(please print)

Name of witness (please print)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Full name and address of Organization

Date of signing: \_\_\_\_\_, 20\_\_

**CRA per:**

Name and position of signatory  
(please print)

Date of signing: \_\_\_\_\_, 20\_\_



CANADA REVENUE  
AGENCY

AGENCE DU REVENU  
DU CANADA

**REGISTERED MAIL**

Free the Children  
233 Carlton Street  
Toronto Ontario M5A 2L2

BN: 886578095RR0001

Attention: [REDACTED]

File #:3002595

May 1, 2014

**Subject: Audit of Free the Children**

Dear [REDACTED]:

This letter is further to the audit of the books and records of Free the Children (the Organization) conducted by the Canada Revenue Agency (CRA). The audit related to the operations of the Organization for the period of April 1, 2009 to March 31, 2012.

At our meeting of February 21, 2014, you were advised that the CRA has identified specific areas of non-compliance with the provisions of the *Income Tax Act* and/or its *Regulations* in the following areas.

AREAS OF NON-COMPLIANCE		
	Issue	Reference
	Incorrect information	IT-110R3 Paragraph 15(d), Section 3501 of the Regulations, Subsection 188.1(7) and paragraph 168(1)(d)

The purpose of this letter is to describe those areas of non-compliance identified by the CRA during the course of the audit as they relate to the legislative and common law requirements applicable to registered charities, and which may be subject to sanctions under the Act, and to provide the Organization with the opportunity to make

WP #120-1

representations or present additional information as to why a sanction should not be applied.

Registered charities must comply with the law, failing which penalties and/or suspensions may be applicable pursuant to sections 188.1 and/or 188.2 of the Act, which include suspension of the Organization's authority to issue official receipts and suspension of its status as a "qualified donee". While the purpose of a sanction is to provide an alternative to revocation, notice may still be given of our intention to revoke the registration of the Organization by issuing a Notice of Intention to Revoke in the manner described in subsection 168(1) of the Act.

The balance of this letter describes the identified areas of non-compliance and the sanction(s) proposed in further detail.

### **Previous Audit Findings**

The CRA audited the operations of the Organization for the fiscal year ending March 31, 2006. This past audit identified that the books and records of the Organization relating to the operations outside of Canada were inadequate.

### **Identified Areas of Non-Compliance**

#### **Improper receipting – Gifts of Services:**

The Organization has issued donation receipt for gifts of services. Charities are not allowed to issue donation receipts for gifts of services as specifically excluded in Interpretation Bulletin (IT-110R3 Paragraph 15(d)).

The *Income Tax Act* permits a registered charity to issue official donation receipts for income tax purposes for donations that legally qualify as gifts. In order to qualify under the Act, a gift must involve the voluntary transfer of property. Contributions of services, for example, of time, free use of space, skills or efforts, are not property, and therefore they do not qualify as gifts for purposes of issuing official donation receipts. Accordingly, a charity cannot issue an official donation receipt for services rendered free of charge. However, a charity may issue an official donation receipt if a person provides a service to the charity, the charity pays for the service, and the person then returns the payment to the charity as a gift. In such circumstances, two transactions have taken place, the first being the provision of a service and the payment flowing therefrom, and the second being a gift proper. In these circumstances, the parties are advised to proceed by way of an exchange of cheques. This ensures the presence of an audit trail, as the donor must account for the taxable income that would be realized either as remuneration (in which case the charity may also be required to issue a T4 slip) or as business income.

The Organization issued \$2,980,929.14 in donation receipts for the gifts of services during the audit period. Following are the details of the gifts of services receipted by the Organization:

**1. Donation receipts issued for the free use of suites for We Day:**

The Organization issued receipts for the value of the use of suites and rooms for We Day during the audit period. The Organization did not pay an amount for the use of these suites, nor did it enter into any contractual arrangement for the use of these suites. Rather, the suite holders and box holders at the We Day locations (Toronto, Vancouver, Waterloo and Calgary) allowed the Organization to use their suites for the We Day. In return, the Organization issued receipts for the use of these suites and boxes. This does not constitute a gift as there was no donation of property to the Organization (free use of space does not constitute a transfer of property as discussed above).

Following are summaries of the donation receipts issued for the free usage of suites and rooms for We Day during the audit period:

\$305,000.01 during 2009  
\$632,083.41 during 2010  
\$697,416.09 during 2011  
\$907,755.41 during 2012

The Organization issued \$2,542,254.92 in total donation receipts for the free usage of the suites during the audit period.

See attached Appendix A for the details.

**2. Donation receipts issued to photographers:**

The Organization issued receipts for the value of the service provided by the photographers for We Day during the audit period. The Organization did not pay for the services provided by the photographers, nor did it enter into any contractual arrangement for the use of their services. In return, the Organization issued receipts for the services provided by the photographers. This does not constitute a gift as there was no donation of property to the Organization as discussed above.

Following are summaries of the donation receipts issued to the photographers for their time and photography during the audit period:

\$31,081.92 during 2009  
\$29,873.13 during 2010



\$36,746.46 during 2011

\$49,041.70 during 2012

The Organization issued \$146,743.21 in total donation receipts to the photographers during the audit period.

See attached Appendix B for the details.

### **3. Donation receipts issued to landlord for rent:**

The Organization issued receipts for the value of the use of donated space ( [REDACTED] ) during the audit period. The Organization did not pay an amount to the landlord [REDACTED] for the use of [REDACTED]. Also, it appears that the Organization did not enter into any contractual arrangement for the use of the space. Rather, [REDACTED] allowed the Organization to use [REDACTED]. In return, the Organization issued receipts to [REDACTED] for the use of the space. This does not constitute a gift as there was no donation of property to the Organization (free use of space does not constitute a transfer of property as discussed above).

Following are summaries of the donation receipts issued to the landlord instead of paying rent during the audit period:

\$54,000 during 2009

\$64,800 during 2010

\$46,800 during 2011

The Organization issued \$165,600 in total donation receipts to the landlord for rent during the audit period.

See attached Appendix C for the details.

### **4. Donation receipts issued for discounts obtained:**

The Organization issued receipts for the discounts received on furniture rentals, rentals of audio-visual equipment, and walkie-talkies & accessories for the We Day during the audit period. There were no contractual arrangements. The Organization issued receipts for the discounts received on these rentals. This does not constitute a gift as there was no donation of property to the Organization as discussed above.

The Organization issued \$27,244.76 in total donation receipts for the discounts obtained during 2010.

See attached Appendix D for the details.

**5. Donation receipts issued for advertisement:**

The Organization issued receipts for the free advertisement for We Day during the audit period. The Organization did not pay for these advertisements, nor did it enter into any contractual arrangement with the service providers. In return, the Organization issued receipts for these advertisements. This does not constitute a gift as there was no donation of property to the Organization as discussed above.

Following are summaries of the donation receipts issued for advertisement services during the audit period:

\$33,763 during 2009  
\$18,300 during 2011

The Organization issued \$52,063 in total donation receipts for advertising service during the audit period

See attached Appendix E for the details.

**6. Donation receipts issued for miscellaneous services:**

The Organization issued donation receipts for miscellaneous services such as catering, appearance, camera and lighting rentals, massage, event management etc. as detailed in Appendix F (attached) during the audit period. There were no contractual arrangements. The Organization issued receipts for these miscellaneous services received during the audit period. This does not constitute a gift as there was no donation of property to the Organization as discussed above

Following are summaries of the donation receipts issued for these miscellaneous items during the audit period:

\$20,910.84 during 2009  
\$6,949.75 during 2010  
\$19,162.66 during 2012

The Organization issued \$47,023.25 in total donation receipts during the audit period for the miscellaneous gifts of services not included in items 1 to 5 above.

See attached Appendix F for the details.

### **Penalty Proposed**

Subsection 188.1(7) Incorrect information - Except where subsection (8) or (9) applies, every registered charity and registered Canadian amateur athletic association that issues, in a taxation year, a receipt for a gift otherwise than in accordance with this Act and the regulations is liable for the taxation year to a penalty equal to 5% of the amount reported on the receipt as representing the amount in respect of which a taxpayer may claim a deduction under subsection 110.1(1) or a credit under subsection 118.1(3). The penalty increases to 10% of the amount reported on the receipt for a repeat infraction within five years pursuant to subsection 188.1(8) of the Act.

We wish to inform you that pursuant to subsection 188.1(9) of the Act, a registered charity that issues an official donation receipt that includes false information is liable to a penalty equal to 125% of the eligible amount stated on the receipt, where the total does not exceed \$25,000. Where the total exceeds \$25,000, the charity is liable to a penalty equal to 125% and the suspension of tax-receipting privileges as per paragraph 188.2(1)(c).

The Organization issued \$2,980,929.14 in donation receipts for the gifts of services during the audit period. Charities are not allowed to issue donation receipts for the gifts of services (IT-110R3 Paragraph 15(d), Policy Commentary CPC-017, and Summary Policy CSP-S03). A gift of service or provision of free rent is not property and therefore does not qualify for a donation receipt.

Based on these facts, it is our view that the Organization has provided incorrect information with respect to these receipts and has thus contravened subsection 188.1(7). The organization issued receipts that do not qualify as gifts under the Income Tax Act and common law. The amounts of incorrectly issued receipts represent 10.6% of the total donation receipts issued in this period of time. We view this as being a significant portion of the receipted donations. The policies and information related to receipting for gifts of services have been made available to charities for the last 20 years and are easily accessible on our website to encourage charities to exercise their due diligence.

Accordingly, the CRA proposes to assess the Organization penalties for issuing receipts containing incorrect information as per subsection 188.1(7).

### **Monetary value of penalty including detailed calculation <sup>1</sup>**

According to our calculations, the penalty payment would be \$149,046.46 based on the following:

Total receipts containing incorrect information	\$2,980,929.14
Penalty assessed at 5%	\$149,046.46

Due to the serious nature of the non-compliance issues described above, it is our view that a penalty under subsection 188.1(7) should be applied to the Organization. Please note that the CRA is proposing the assessment of a penalty in accordance with section 188.1 of the Act in lieu of issuing a Notice of Intention to Revoke.

### **The Organization's Options:**

#### **a) No Response**

You may choose not to respond. In that case, the Director General of the Charities Directorate may proceed with the application of penalties and/or suspensions described in sections 188.1 and/or 188.2 of the Act or give notice of its intention to revoke the registration of the Organization by issuing a Notice of Intention in the manner described in subsection 168(1) of the Act.

#### **b) Response**

Should you choose to make representations regarding this proposal, please provide your written representations and any additional information regarding the findings outlined above **within 30 days** from the date of this letter. After considering the representations submitted by the Organization, the Director General of the Charities Directorate will decide on the appropriate course of action, which may include:

- no compliance action necessary;
- the issuance of an educational letter;
- resolving these issues through the implementation of a Compliance Agreement;
- the application of penalties and/or suspensions provided for in sections 188.1 and/or 188.2 of the Act; or

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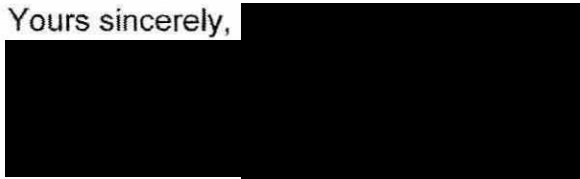
<sup>1</sup> In accordance with subsections 188.1(7)

- giving notice of its intention to revoke the registration of the Organization by issuing a Notice of Intention in the manner described in subsection 168(1) of the Act.

If you appoint a third party to represent you in this matter, please send us a written authorization naming the individual and explicitly authorizing that individual to discuss your file with us.

If you have any questions or require further information or clarification, please do not hesitate to contact me at the numbers indicated below. My team leader, Gary Huenemoeder may also be reached at (519) 584-3982.

Yours sincerely,



Tony P. Thomas

Audit Division

Tax Services Office: 15 - Kitchener/Waterloo

Telephone: 519 - 896-3706

Facsimile: 519 - 585-2803

Address: 166 Frederick Street  
Kitchener, ON N2G 4N1

Internet: [www.cra.gc.ca](http://www.cra.gc.ca)

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Date	Num	Name	Memo	Credit
2011-12-30	37662		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37663		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37664		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37665		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	2,500.00
2011-12-30	37666		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	2,500.00
2011-12-30	37667		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37668		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37669		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37670		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37671		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37672		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37673		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37674		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37675		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	2,500.00
2011-12-30	37676		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	2,500.00
2011-12-30	37677		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	2,500.00
2011-12-30	37678		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	2,500.00
2011-12-30	37679		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-30	37680		Donation In Kind - Free Usage of Suite for We Day Vancouver - Received on October 19, 2011 i...	5,000.00
2011-12-31	37388		Donation In Kind - Hotel accommodations for We Day, 10 rooms for [REDACTED] during Sept 2...	29,500.00
Total 4010 - Donations In Kind				<u><u>1,634,499.51</u></u>



[illegible]

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Appendix B - OFFICIAL DONATION RECEIPTS ISSUED TO PHOTOGRAPHERS (FREE THE CHILDREN)





Date	Num	Name	Memo	Credit
4010 - Donations In Kind				
2009-05-25	36594		Donation In Kind - received on May 14, 2009 for West Fest in the fair mark...	1,500.00
2009-09-17	36606		Donation In Kind - in Free The Children Arizona centre received on May 27, 2...	3,900.00
2009-12-31	36804		Donation In Kind - received on October 5, 2009 for We Day Toro...	2,665.00
2009-12-31	36805		Donation In Kind - received on September 29, 2009 for We Day V...	1,155.00
2009-12-31	36806		Donation In Kind - received on September 29, 2009 for We Day V...	2,895.00
2009-12-31	36807		Donation In Kind - received on September 29, 2009 for We Day V...	1,000.00
2009-12-31	36808		Donation In Kind - received on October 5, 2009 for We Day Toro...	1,200.00
2009-12-31	36809		Donation In Kind - received on September 29, 2009 for We Day V...	500.00
2009-12-31	36810		Donation In Kind - received on October 5, 2009 for We Day Toro...	800.00
2009-12-31	36811		Donation In Kind - received on September 29, 2009 for We Day V...	1,175.00
2009-12-31	36812		Donation In Kind - received on October 5, 2009 for We Day Toro...	2,280.00
2009-12-31	36817		Donation In Kind - Received in the Year of 2009, in the fair market va...	750.00
2009-12-31	36820		Donation In Kind - received on September 29, 2009 for We Day V...	1,000.00
2009-12-31	36824		Donation In Kind - in Arizona received on August 01, 2009 in ...	
2009-12-31	36825		Donation In Kind - received on October 5, 2009 for We day Toro...	261.92
2009-12-31	36826		Donation In Kind - received on October 5, 2009 for We Day Toro...	950.00
2009-12-31	36827		Donation In Kind - on July 9th, 2009 in the fair market value of ____...	600.00
2009-12-31	36832		Donation In Kind - Received on June 6th, 2009 in the fair market value of...	950.00
2009-12-31	36843		Donation In Kind - in Arizona received on August 01, 2009 in ...	7,500.00
2010-03-23	36833		Donation In Kind - Received on February 25th, 2010 in the fair market ...	2,020.00
2010-03-30	36836		Donation In Kind - Received on February 10th, 2009 for We Day Hamilton in t...	750.00
2010-05-13	36845		Donation In Kind - Event for Local Democracy Week at Queen's Park and City ...	1,600.00
2010-12-14	37013		Donation In Kind - Received on September 30, 2010 for We Day Toronto in the...	700.00
2010-12-17	37014		Donation In Kind - Received on September 30, 2010 for We Day Toronto , in t...	1,050.00
2010-12-17	37015		Donation In Kind - Received on October 15, 2010 for We Day Vancouver, in th...	450.00
2010-12-17	37016		Donation In Kind - Received on November 12, 2010 for We Day Montreal, in th...	1,125.00
2010-12-17	37017		Donation In Kind - Received on October 15 and November 12, 2010 for We Day ...	6,200.00
2010-12-17	37018		Donation In Kind - Received on October 15, 2010 for We Day Vancouver, in th...	3,150.00
2010-12-17	37019		Donation In Kind - Received on September 30, 2010 for We Day Toronto, in th...	1,880.00
2010-12-17	37020		Donation In Kind - Received on October 15, 2010 for We Day Vancouver, in th...	2,800.00
2010-12-17	37021		Donation In Kind - Received on November 2, 2010 for Staff Party, in the fai...	825.00
2010-12-17	37022		Donation In Kind - Received on September 30, 2010 for We Day Toronto ,in th...	635.63
2010-12-17	37023		Donation In Kind - Received on October 15, 2010 for We Day Vancouver, in th...	875.00
2010-12-17	37024		Donation In Kind - Received on October 15, 2010 for We Day Vancouver, in th...	1,400.00
2010-12-17	37025		Donation In Kind - Received on September 30, 2010 for We Day Toronto, in th...	500.00
2010-12-31	37233		Donation In Kind - Event photography services received on September 24, 2010 for We Day Toronto,...	2,500.00
2010-12-31	37300		Donation In Kind - Received on September 29, 2010 for We Day Toronto in the...	1,412.50
2011-05-13	37364		Donation In Kind - Received for We Day Event of Sept. 30, 2010, in the fair market val...	2,100.00
2011-05-27	37365		Donation In Kind - Received for Waterloo We Day Event on March 2, 2011 in the fair mar...	1,695.00
2011-12-13	37381		Donation In Kind - Received in the market value of _____...	1,068.21
2011-12-30	37395		Donation In Kind - Received from We Day, in the fair market value of ____...	500.00
2011-12-30	37396		Donation In Kind - Received from We Day Waterloo, in the fair market valu...	500.00
2011-12-30	37397		Donation In Kind - Received for We Day 2011 - Day Rate Photography, in the fair market va...	1,200.00
2011-12-30	37398		Donation In Kind - Received 3 DVDs of edited and retouched images(Toronto, Kitchener and Winnipe...	3,000.00

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Date	Num	Name	Memo	Credit
2011-12-30	37399		Donation In Kind - Received [REDACTED] from We Day Vancouver, in the fair market value of ...	1,150.00
2011-12-30	37400		Donation In Kind - Received [REDACTED] from We Day Toronto, in the...	1,700.00
2011-12-30	37401		Donation In Kind - Received [REDACTED] from We Day Waterloo Nov 16, 2011, in the fair market ...	621.50
2011-12-30	37402		Donation In Kind - Received [REDACTED] from We Day Toronto Set 27, 2011, in the fair market v...	621.50
2011-12-30	37403		Donation In Kind - Received [REDACTED] in the fair market value of _____...	350.00
2011-12-30	37404		Donation In Kind - Received [REDACTED] from We Day Toronto Event (Invoice# [REDACTED], ...	750.00
2011-12-30	37405		Donation In Kind - Received Collection of [REDACTED] We Day Winnipeg, in the fair market value ...	1,200.00
2011-12-30	37406		Donation In Kind - Received [REDACTED] taken at We Day Winnipeg on November 23, 2011, in...	1,500.00
2011-12-30	37407		Donation In Kind - Received [REDACTED] from We Day 2011, in the fair ma...	1,500.00
2011-12-30	37408		Donation In Kind - Received [REDACTED] in the fair market value of _____...	2,000.00
2011-12-30	37409		Donation In Kind - Received We Day 2011 [REDACTED] in the fair market value of _____...	800.00
2011-12-30	37410		Donation In Kind - Received Disk of [REDACTED] from 2 [REDACTED] (Invoice# [REDACTED], in the f...	3,500.00
2011-12-30	37411		Donation In Kind - Received [REDACTED] taken on Wednesday, Nov 23, 2011 at We Day Winnipeg for \$...	1,060.00
2011-12-30	37412		Donation In Kind - Received [REDACTED] containing images from We Day Winnipeg, in the fair marke...	500.00
2011-12-30	37413		Donation In Kind - Received [REDACTED] on Nov 16, 2011, in the fair market value of _____...	1,800.00
2011-12-30	37414		Donation In Kind - Received [REDACTED] ...	500.00
2011-12-30	37415		Donation In Kind - Received [REDACTED] in the fair market value of ____...	1,845.75
2011-12-30	37416		Donation In Kind - Received [REDACTED] of We Day images, in the fair market value of _____...	450.00
2011-12-30	37417		Donation In Kind - Received [REDACTED] of We Day Toronto Event, in the fair market value of _____...	1,950.00
2011-12-30	37418		Donation In Kind - Received [REDACTED] of We Day Toronto (Invoice# [REDACTED], in the fair m...	904.00
2011-12-30	37419		Donation In Kind - Received [REDACTED] of We Day Waterloo (Invoice# [REDACTED]), in the fair ...	904.00
2011-12-30	37420		Donation In Kind - Received [REDACTED] for We Day Winnipeg 2011, in the fair market ...	600.00
2011-12-30	37581		Donation In Kind - Received [REDACTED] for We Day Waterloo in the fair market value of _____...	476.50
Total 4010 - Donations In Kind				<u>97,701.51</u>

Kids Can Free The Children  
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Appendix C - OFFICIAL DONATION RECEIPTS ISSUED for RENT (FREE THE CHILDREN)

	Date	Num	Name	Memo	Credit
4010 - Donations In Kind					
RENT	2009-12-30	36698		Donation In Kind -  Monthly Rent for the period March 1, 2009 to December...	54,000.00
RENT	2010-12-31	37234		Donation In Kind -  Monthly Rent for the period January 1 to December 31,...	64,800.00
RENT	2011-12-31	37389		Donation In Kind -  monthly rent paid Jan 1, 2011 - Aug 31, 2011, for 3 ...	46,800.00
Total 4010 - Donations In Kind					<u>165,600.00</u>



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Appendix D - OFFICIAL DONATION RECEIPTS ISSUED for DISCOUNT (FREE THE CHILDREN)

	Date	Num	Name	Memo	Credit
4010 - Donations In Kind					
DISCOUNT	2010-12-31	37235	<div></div>	Donation In Kind - 50% Discount on ██████████ received in October 2010, in the fair marke...	8,918.87
DISCOUNT	2010-12-31	37237		Donation In Kind - Discount on ██████████ for We Day Montreal 2010 received ...	840.00
DISCOUNT	2010-12-31	37239		Donation In Kind - Discount on ██████████ for We Day Toronto 2010 received in...	7,540.00
DISCOUNT	2010-12-31	37240		Donation In Kind - Discount on ██████████ for We Day Vancouver 2010 received...	4,505.00
Total 4010 - Donations In Kind					21,803.87

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Appendix E - OFFICIAL DONATION RECEIPTS ISSUED for ADVERTISING (FREE THE CHILDREN)

	Date	Num	Name	Memo	Credit
4010 - Donations In Kind					
GOS - ADVERTISEMENT	2009-10-06	36611	<div></div>	Donation In Kind - Advertisement for "Free the Children Fashion Function" in Issue (...)	8,750.00
GOS - ADVERTISEMENT	2009-11-12	36615		Donation In Kind - Advertisement for "We Day" in (Inv # in the fai...	7,165.00
GOS - ADVERTISEMENT	2009-12-31	36748		Donation In Kind - Radio advertisements for annual "Music for Change" concert in Toronto receive...	8,500.00
GOS - ADVERTISING	2009-12-31	36828		Donation In Kind - Received Advertising / Promotion - Signs and Banners for We Day 2009 in the f...	9,348.00
GOS - ADVERTISEMENT	2011-10-04	37377		Donation In Kind - Received Advertising / Promotion - Signs and Banners for We Day 2011 in the f...	6,745.00
GOS - ADVERTISEMENT	2011-10-05	37376		Donation In Kind - Received Advertising / Promotion - Signs and Banners for We Day 2011 in the f...	7,380.00
GOS - ADVERTISEMENT	2011-12-31	37391		Donation In Kind - Advertising for We Day on Invoice# _____...	4,175.00
Total 4010 - Donations In Kind					52,063.00

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Appendix F - OFFICIAL DONATION RECEIPTS ISSUED for MISCELLANEOUS SERVICE (FREE THE CHILDREN)

	Date	Num	Name	Memo	Credit
4010 - Donations In Kind					
	2009-03-20	36524		Donation In Kind - Overtime costs incurred by [REDACTED] and its full time staff for Break the Silent Concert received on March 6, 2	3,340.00
	2009-03-20	36523		Donation In Kind - License Fee for Break the Silence Concert received on March 6, 2009 in the FMV of	13,340.00
Total 4010 - Donations In Kind					16,680.00

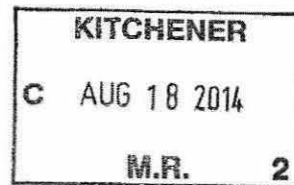
August 14, 2014

Audit Division  
Kitchener Tax Services Office  
Canada Revenue Agency  
166 Frederick St.  
Kitchener, ON N2H 0A9

Attention: Gary Huenemoeder

Dear Gary:

**Re: Free The Children (the "Charity")**  
**Business Number: 886578095RR0001**  
**Your file no: 3002595**



We are writing to you at your request in response to a letter dated May 1, 2014 (the "**CRA Letter**") to the Charity from Mr. Thomas of your office. The CRA Letter suggested that there had been a certain amount of non-compliance on the part of the Charity and proposed penalties. The Charity believes that most of these alleged examples of non-compliance are actually not non-compliance. To the extent that there was any non-compliance it was inadvertent and minor and there should not be any penalties applied.

Specifically, the CRA Letter states that the Charity issued \$2,980,929.14 in donation receipts for gifts of services for the period of April 1, 2009 to March 31, 2013 (the "**Audit Period**"). The Canada Revenue Agency ("**CRA**") therefore proposes to assess, pursuant to subsection 188.1(7), a monetary penalty in the amount of \$149,046.46 – an amount equal to 5% of the total combined value of the alleged inappropriately issued receipts. In addition, it is our understanding that the Charity's name, sanction, effective date and reason for sanction will become a matter of public record.

The vast majority of the official donation receipts that form the basis for the proposed penalties are actually proper receipts. To the extent that there are a very small number of receipts that are questionable, they were issued on the basis of professional advice and do not warrant any monetary sanction.

### **Background**

The Charity is a registered charity federally incorporated corporation under the *Canada Not-for-profit Corporations Act*. It is constituted for the purpose of carrying out poverty relief, healthcare and development initiatives to improve the lives of children in developing countries.

The Charity conducts domestic empowerment and leadership training programs to enable youth to take action to improve the lives of children overseas. One of the Charity's programs known as "We Act" features a one-day event known as "We Day". We Day events take place in major cities across Canada and attract upwards of 160,000 youth, educators and supporters in attendance each year.

To accommodate the large number of attendees, the Charity makes arrangements to host We Day events at large private venues (the "Venues") such as [REDACTED] in Toronto, [REDACTED] in Winnipeg, and [REDACTED] in Saskatchewan. The Venues all feature executive suites that are leased or licensed to suiteholders on an annual basis. In organizing We Day, the Charity enters into agreements (the "Facility License Agreements") with some suiteholders to obtain a license or sublicense to use the suites for the duration of the event (sample copies of Facility License Agreements are attached at **TAB 1**).

#### **A. Donation receipts issued for the free use of suites for We Day**

The CRA Letter raises concern with respect to the donation receipts issued for the value of suites and rooms (the "Suites") that were used by the Charity for its We Day events. Specifically, CRA determined that during the Audit Period the Charity issued \$2,542,254.92 in donation receipts for the use of the Suites. The CRA determined that the use of a Suite does not constitute a gift for which a receipt may be issued on the basis that there is no donation of *property* to the Charity. The Charity acknowledges that in order for a donation to be considered a gift for which a receipt may be issued, there must be a voluntary transfer of property without consideration<sup>1</sup>.

It is our view that the donation receipts were properly issued to the suiteholders because the donation of a license to use the Suites by the suiteholders to the Charity involves a transfer of property.

#### **Analysis**

The common law does not provide a uniform or consistent definition of "property". At its most basic and primitive, the common law considers property being those rights that permit one person to exclude others from the *res* (the thing). Blackstone defines property as follows:

"...the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the rights of any individual in the universe."<sup>2</sup>

In expanding upon this definition, Canadian law professor Bruce Ziff explains that while the essential component of property is the right to exclude others, property also includes, most notably, the rights "to use or enjoy" the *res*<sup>3</sup>. This expanded definition of property serves as a permutation of the original right to exclude – the right "to use or enjoy" something includes not

<sup>1</sup> *Friedberg v. R.* (1991), 92 D.T.C. 6031 (F.C.A.) at 6032 (**TAB 2**).

<sup>2</sup> Blackstone, William. *Commentaries on the Laws of England* 2 (Univ. Chi. Press 1979) (1766) (**TAB 3**).

<sup>3</sup> Ziff, Bruce. *A Property Law Reader: Cases, Questions and Commentary*, Thomson Carswell 2004 at p. 7 (**TAB 4**).

only the right to exclude strangers from the *res*, but also the right to exclude even the original owner thereof from arbitrarily interfering with or trying to take the *res* back<sup>4</sup>.

The right to use/occupy land has been held by the courts to be a transferrable property right.<sup>5</sup> This means that the right to use/occupy land as held by the owner of the property may be assigned to a third party. Such assignment may be effected by lease or license.

A *license to occupy land* has been most commonly defined as

"a personal right between the licensor and the licensee giving the licensee the right or privilege to enter upon and use the licensee's land in a certain manner or for a specified purpose [without which] such entry and use would amount to trespass"<sup>6</sup>.

The Facility License Agreements are all contracts entitling the Charity to occupy *exclusively* certain suites in a stadium facility during a specified period of time. For this reason, the Facility License Agreements fit squarely into the definition of *licenses to occupy land*, as noted above. A license to occupy land in the nature of the Facility License Agreements provides the Charity with the right to exclude others from the Suites while in use by the Charity pursuant to the license, including the licensor (the suiteholders).

Expanding on this concept, the Courts have held that in the context of property transferred as a gift, a right to use (or right to occupy) will only be considered "property" where there is a legally enforceable claim.<sup>7</sup> To truly transfer a right to use, the owner of property must grant the user a license for the use of the property to the exclusion of others (including him/herself). In *Carson v. R* the Tax Court explicitly rejected the notion that the provision of space could not be considered a transfer of property. Specifically, Justice Campbell noted,

"The CRA does not view the provision of office space, apparently even if pursuant to a lease, as a transfer of property, though would accept rent payments returned by the landlord to the charity as an appropriate charitable donation. I am not convinced that this is an accurate reflection of the law. The CRA is presuming that a legal right acquired by lease is not property, only money actually transferring hands is a transfer of property eligible to qualify as a charitable gift."<sup>8</sup>

Although Justice Campbell went on to conclude that the provision of space in *Carson* was not a transfer of property, he made relevant points with respect to when a right to use property may be considered a gift:

<sup>4</sup> A tetralogy of "Ticket Cases" confirms that licenses to occupy land are not revocable at will. See *Hurst v. Picture Theatre Ltd.* [1915] 1 KB 1 (Eng. CA), *Heller v. Niagara Racing Assn* [1925] DLR 286 (Ont. CA), *Winter Garden Theatre (London) Ltd. v. Millenium Productions* [1948] AC (HL), *Davidson v. Toronto Blue Jays* [1998] 170 DLR (4<sup>th</sup>) 559 (GenDiv) (collectively at **TAB 5**).

<sup>5</sup> *Customs and Excise Commissioners v. Zinn et al.*, [1988] STC 57 (**TAB 6**).

<sup>6</sup> Ann Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed., vol. 1 (Thomson Reuters Canada, 2013) at 16:40.20(a) (**TAB 7**), see also *Heffron v. Imperial Parking Co.* (1974), 3 O.R. (2d) 722 (Ont. C.A.) and *Pilcher v. Shoemaker* (1997), 1997 CarswellBC 1913 (B.C. S.C.) for nearly identical definitions (collectively at **TAB 8**).

<sup>7</sup> *Carson v. R*, 2013 TCC 353 [referred to as *Carson*] (**TAB 9**).

<sup>8</sup> *Ibid* at para. 6.

1. There must be a divestiture of the right to use the space by the property owner (donor); and
2. The right to use the space must be assigned to the user by way of a lease or license.

In the present case, the suiteholders assigned their right to occupy the Suites to the Charity (even if only for one day) to the extent that the suiteholders divested their right to enter at will or demand an arbitrary return of the Suites.

We note that the CRA has determined in the past that a right to use property may be considered a gift in kind<sup>9</sup>. Furthermore, CRA has stated that,

"Where it is established on the facts in the case that a donation is a gift in kind the donor is deemed to have received proceeds of disposition equal to the fair market value of the property donated. The fair market value of the gift in kind is also the relevant amount for purposes of calculating, for individuals, the federal tax credit under subsection 118.1(3) of the Act."<sup>10</sup>

Accordingly, the Charity issued valid donation receipts to the suiteholders for their gift of the right to use the Suites for the We Day events. Given that this issue seems to form the basis for the proposed sanction, we assume that it having been addressed, the sanction should be vacated entirely nonetheless, we will address the other issues raised in the CRA letter.

#### **B. Donation Receipts issued to photographers**

The CRA Letter also raises concern with respect to the issuance of donation receipts for services provided by photographers. David Sherman, in his analysis of the definition of "service" under section 123(1) of the *Excise Tax Act* states the following:

"The distinction between "service" and "property" is not always clear. A good way to analyze any given case is to consider what it is that the purchaser wishes to obtain. While a professional photographer might be thought to provide the service of photography, the purchaser is trying to obtain photographs, which are property."<sup>11</sup>

CRA has also stated in its GST/HST Policy Statement P-236<sup>12</sup> that the supply of photocopies is a supply of tangible property. The Charity asserts that the supply of photographs is akin to the supply of photocopies. CRA notes that where the recipient provides the supplier with necessary inputs (i.e. original documentation) to which the supplier simply makes a modification (i.e. makes copies), then the supply of the photocopies would be considered a "service". In the case of the photographs taken at the We Day event, the Charity confirms that it did not supply the photographers with the photographs for modification (i.e. post-processing or copies), but simply accepted the donation of the physical photographs and associated intellectual property.

<sup>9</sup> CRA document number 9503565, July 6, 1995 (TAB 10).

<sup>10</sup> *Ibid.*

<sup>11</sup> Analysis/Commentary – David Sherman's Analysis, 123(1) "service", March 15, 2006, Taxnet Pro (TAB 11).

<sup>12</sup> Canada Revenue Agency, GST/HST Policy Statement P-236, Supply of Photocopies (TAB 12).

As often recorded in the Charity's donation receipts ledger, the donation receipts were not issued for the photography services, but rather for the disc of images containing the photographs from the various We Day events. For this reason, the donation receipts issued to photographers were validly issued at fair market value for the donation of the photographs. Where the donation receipts were improperly recorded as being issued for "photographers", "photography services" or for any other reason that may suggest that the receipt was issued for photography services rather than for images, such record should be attributed to an administrative error as these were still gifts of intellectual property – the photographs.

The same rationale applies to cds supplied by videographers. Such cds and associated intellectual property were donated to the Charity for which the videographer received a receipt for an amount representing the market value of the intellectual property.

### **C. Donation receipts issued to landlord for rent**

The Charity issued receipts for the value of rent at [REDACTED]. The Charity understands that in order to issue receipts which account for rent, the Charity may either:

- (a) document the arrangement by way of a lease or license; or
- (b) first pay the fair market value of such rent to the landlord whereupon the landlord may proceed to voluntarily donate the amount back to the Charity<sup>13</sup>.

While the Charity's position is that it has been occupying [REDACTED] as a licensee, the Charity confirms that it will document its rental transactions, in writing going forward. If it would be helpful, the Charity expects that it could now obtain a written acknowledgment of the past arrangement.

It should be noted as well that the landlord has confirmed the inclusion of the subject rent in determining income for the purpose of assessing income tax payable under the ITA. As such, the Charity's issuance of the donation receipt, albeit not in accordance with the proper protocol, did not assist the landlord in avoiding the payment of taxes otherwise due.

### **D. Donation receipts issued for discounts obtained**

The CRA Letter assesses penalties to the Charity for the value of donation receipts issued to vendors for the discounts provided to the Charity on its purchase or rental of certain furniture and equipment. The Charity understands that this is generally permitted under the split-receipting rules contained in the ITA provided that the eligible amount of the gift is properly reduced to account for the advantage<sup>14</sup> (in this case the discounted amount actually paid to the vendors). The Charity believes that it has done so.

If the CRA has specific discount receipts that it questions, we would be pleased to address them specifically.

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<sup>13</sup> *Carson, supra* note 7.

<sup>14</sup> *ITA*, ss. 248(31) (TAB 13).



### **E. Donation receipts issued for advertisement**

The CRA Letter assesses penalties to the Charity for the issuance of receipts to advertisers on the basis that such advertisers did not donate "property". Where receipts were issued for advertisements placed in magazines and broadcasted on the radio, the Charity concedes that such receipts may have been issued in error. Where receipts were issued for the donation of signs and banners by [REDACTED] however, the Charity maintains that such receipts were validly issued as there was no donation of services, but rather a donation of the physical signs and banners.

In addition to the applicability of our earlier analysis of the donation of photographs to the donation of the We Day signs and banners, the Charity notes that CRA has commented specifically on the provision of a supply of printing. In GST/HST News No. 49<sup>15</sup>, CRA states that,

"In the case of a supply of printing, a client generally contracts with an organization to acquire property in the form of business cards, letterheads, envelopes, brochures, etc. Upon printing of the items, the property is transferred to the client. The primary purpose of the transaction is the transfer of the property."

Given the foregoing, the Charity validly issued donation receipts totaling \$23,473.00 to [REDACTED] for the donation of signs and banners for We Day.

### **F. Donation receipts issued for miscellaneous services**

The CRA Letter highlights several donation receipts which were issued during the Audit Period for "miscellaneous services" and assesses the Charity with penalties for the issuance of such receipts. Where services were clearly provided, the Charity acknowledges that donation receipts were inappropriately issued. CRA, however, has confirmed that

"a right to use property such (eg., a helicopter or equipment) for a period of time could be considered a property and a donation of a right to use property...could be considered a gift in kind."<sup>16</sup>

To the extent that the noted miscellaneous services include equipment rental that may be accounted for separately from any associated services, the Charity submits that it should be permitted re-issue donation receipts with adjusted eligible amounts.

### **Due diligence**

Where official donation receipts are misissued, CRA has the discretion to assess sanctions for incorrect information pursuant to subsection 188(7) of the ITA or for the issuance of false receipts pursuant to subsection 188.1(9). In the present case, CRA has assessed penalties to the Charity pursuant to subsection 188.1(7) for incorrect information.

<sup>15</sup> Canada Revenue Agency, GST/HST News No. 49, Summer 2003 (TAB 14).

<sup>16</sup> CRA document number 9503565, July 6, 1995, *supra* note 9.

Notwithstanding the foregoing analyses, in the event that there is still a CRA view that receipts were misissued, the Charity exercised an appropriate level of due diligence in deciding to issue such receipts. The subject receipts were issued in good faith only once the Charity's external audit firm's tax partner approved their issuance.

It is our view that a 188.1(7) penalty should be classified as a *strict liability offence* which, resultantly, warrants consideration of the noted defence of due diligence.

As set out in the seminal case of *R v. Sault Ste. Marie*<sup>17</sup> the charge of a strict liability offence provides the accused with the option of arguing that it acted with due diligence thereby avoiding conviction. In setting out the test, the SCC determined that the due diligence defence is available to an accused if, on the balance of probabilities, it establishes that:

1. the accused believed in a mistaken set of facts which, if true, would render the act or omission innocent, or
2. the accused took all reasonable steps to avoid the particular event.

The Federal Court of Appeal has stated that the concept of strict liability may extend to administrative penalties (as assessed in the present case against the Charity) such that the due diligence defence is available to a taxpayer upon which such penalty is imposed<sup>18</sup>. The Courts have held however, that in deciding whether the due diligence defence is in fact available, interpretive principles must be applied to the impugned section of the relevant legislation. As confirmed in *Consolidated Contractors*, the analytical framework outlined by Justice Dickson in *Sault St. Marie* for identifying absolute liability offences may be applied to administrative penalties in order to determine whether the subject statutory breach is a strict liability offence. Accordingly, below is a consideration of the relevant factors as applied to subsection 188.1(7) of the ITA.

(i) *Precision of the language used*

In determining whether an offence should be categorized as a *mens rea*, strict liability or absolute liability offence, it is important to consider whether the language explicitly provides evidence as to the legislative intent of the relevant section. The Court in *Consolidated Contractors* noted that words such as "wilfully" or "knowingly" will usually signify Parliament's intent to create a *mens rea* offence, while use of the word "automatic", for instance, will usually signify that the offence is one of absolute liability. Regardless of the actual words used, however, if the intent of the relevant provision is to effect absolute liability, the language must be "precise and explicit"<sup>19</sup>.

Subsection 188.1(7) of the ITA states,

<sup>17</sup> [1978] 2 SCR 1299 [referred to as *Sault Ste. Marie*] (TAB 15).

<sup>18</sup> *Consolidated Canadian Contractors Inc. v. Canada*, (1998) 165 D.L.R. (4<sup>th</sup>) 433 [referred to as *Consolidated Contractors*] (TAB 16).

<sup>19</sup> *Ibid* para. 41.

"...every registered charity...that issues, in a taxation year, a receipt for a gift otherwise than in accordance with this Act and the regulations is liable for the taxation year to a penalty equal to 5% of the amount reported on the receipt as representing the amount in respect of which a taxpayer may claim a deduction under subsection 110.1(1) or a credit under subsection 118.1(3)."

The Court in *Katepwa Park Golf Partnership v. R.*<sup>20</sup> has explicitly stated that the phrase "is liable" does not entail absolute liability. Accordingly, as the provision is clearly not a *mens rea* offence, subsection 188.1(7) does not contain the requisite language to attribute absolute liability in respect of the penalty set forth therein.

(ii) *The importance of the penalty – its impact on the taxpayer (the de minimis principle)*

As stated in *Consolidated Contractors*,

"When examining the importance of the penalty, attention must be paid to the consequences to the registrant [taxpayer under the relevant legislation], as opposed to its significance to the Minister..."<sup>21</sup>

Specifically, the courts will consider the impact of the penalty imposed upon the taxpayer and whether such penalties are of an inconsequential nature.

It is the Charity's understanding, as noted above, that the imposition of a penalty under subsection 188.1(7) results in the Charity's name, sanction, effective date and reason for sanction being made a matter of public record. The Charity submits that while the amount of the taxes imposed is not necessarily severe, the publicizing of the sanction may result in unwanted and negative attention toward the Charity and corresponding damage to the Charity's goodwill. Specifically, the Charity submits that it is conceivable that donors may lose confidence in the Charity and its management – a result that is unfair given the due diligence exercised by its directors.

(iii) *The subject matter of the legislation – the purpose of s. 188.1(7)*

Citing *Sault Ste. Marie*, the court in *Consolidated Contractors* noted that absolute liability will typically be attached to regulatory offences "when the legislation seeks to promote the public interest in terms of health or safety matters."<sup>22</sup> Where public health and safety are not an issue, the court confirmed that there must be persuasive grounds for holding that an implied due diligence defence somehow undermines the incentive goals of the impugned legislation. Operating on the assumption that penalties are imposed by Parliament in order to generate a higher standard of care amongst those to whom the penalties apply, Justice Robertson confirmed that the central question becomes whether "an implied due diligence defence undermines that behavioural effect which penalties are intended to bring about"<sup>23</sup>.

<sup>20</sup> *Katepwa Park Golf Partnership v. R.* [2003] C.T.C. 2043 [referred to as *Katepwa*] (TAB 17).

<sup>21</sup> *Consolidated Contractors*, *supra* note 18, para. 42.

<sup>22</sup> *Ibid* para. 43.

<sup>23</sup> *Ibid* para. 46.

As stated by CRA in its Guidelines for applying sanctions (the "**Guidelines**")<sup>24</sup>, the purpose of a sanction under the ITA, specifically including a sanction under subsection 118.1(7), is to encourage compliance with the legislation. Recognizing that such a purpose was also the purpose of the penalties contemplated under section 280 of the *Excise Tax Act*, Justice Robertson made the following observation,

"Theoretically, a penalty and due diligence defence should have no impact on those who are already "conscientious". As Justice Dickson observed in *Sault Ste. Marie (City)*, if a person is already taking every reasonable precaution, why would a penalty provision compel that person to take additional measures knowing that they will not serve as a defence? It is only with respect to those who are "indifferent" to their legal obligations that one might properly assert that penalties promote adherence to the required standard of care. The question we must address is whether some registrants will consciously decide to remain indifferent to their legal obligations under the *Excise Tax Act* because they know that due diligence may be pleaded as a defence. I doubt that this will occur."<sup>25</sup>

Justice Robertson went on to confirm that even though it may be suggested that penalties have a positive behavioural effect, there is no presumption that the "average registrant would refuse to exercise a modicum of common sense when weighing the cost of compliance with the cost of non-compliance."<sup>26</sup>

Given the similar compliance purpose between section 280 of the *Excise Tax Act* and section 188.1(7) of the ITA, Justice Robertson's observations apply to the present case. Accordingly, there are no persuasive grounds for holding that an implied due diligence defence undermines the incentive goals of subsection 188.1(7) of the ITA.

(iv) *The regulatory framework*

In denying the applicability of a due diligence defence to the imposition of administrative penalties, the court in *Consolidated Construction* stated that it must be proven that such defence is incompatible with the over-all scheme of the relevant statute. In considering this factor, Justice Robertson in *Consolidated Contractors* proceeded to address the compatibility of the penalties imposed under section 280 of the *Excise Tax Act* with other sections of the *Excise Tax Act* submitted by the Minister as incompatible with the impugned section. Having denied each of the Minister's arguments to this end, Justice Robertson concluded that the due diligence defence as applicable to section 280 was not incompatible with the regulatory framework of the *Excise Tax Act*.

Given the foregoing, the Charity submits that there are no sections of the ITA which would be incompatible with the application of a due diligence defence to subsection 188.1(7).

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<sup>24</sup> CRA, Guidelines for applying sanctions, online: < <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/nwsnctns-eng.html> > (TAB 18).

<sup>25</sup> *Consolidated Contractors*, para. 47.

<sup>26</sup> *Ibid*, para. 48.

It is also worth noting that CRA and the Courts have both confirmed that the due diligence defence is available to a taxpayer upon whom a penalty is imposed under the ITA<sup>27</sup>.

The ability of CRA to impose the subject monetary penalties is relatively recent. The 2004 Budget introduced the imposition of the 5% penalty for receipts issued with incomplete information (imposed upon the Charity in the present case). The 2004 budget document notes that these monetary penalties were designed and introduced to ensure compliance with the ITA. The purpose of the penalties would not be properly served if charities that exercised proper due diligence in consulting with auditors or other professional advisors were penalized when the advice of such professionals is subsequently determined to be incorrect.

### Conclusion

In the CRA Letter, CRA proposes to impose penalties upon the Charity for an amount totaling \$149,046.46, based largely on the Charity having issued receipts to suiteholders. This amount is pursuant to a calculation that includes \$2,542,254.92 worth of receipts issued to suiteholders, \$146,743.21 worth of receipts issued to photographers and \$23,473.00 worth of receipts issued for the donation of signs and banners. The Charity asserts that these receipts were validly issued, as supported by the foregoing analysis, and suggests that where receipts may have been issued improperly, the assessed penalties should not be imposed as the Charity engaged in a satisfactory level of due diligence in issuing such receipts. This is particularly so where, on the basis of the analysis above, only a very small portion of the receipts issued during the Audit Period can be argued to have been issued improperly.

Once you have had the opportunity to review this letter, please contact me to arrange a meeting to discuss. If such a meeting requires your Ottawa colleagues, I expect that we could accommodate meeting in Ottawa.

Yours truly,



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<sup>27</sup> CRA document number 035636117, June 18, 2010 (regarding subsection 163(1)) (TAB 19). See also *Katepwa*, *supra* note 20 at para. 37 (regarding subsection 162(7.1)), *Sifto Canada Corp. v. Minister of National Revenue* [2014] FCA 140, at para. 9 (regarding subsection 247(3)) (TAB 20).

