November 3, 2022

REGISTERED MAIL

Hershey Friedman
President
The Friedman Family Foundation/La Fondation Familiale Friedman
1810 Ave. Lajoie
Outremont QC H2V 1S3

BN: 892342569RR0001
File #: 0874156

Dear Hershey Friedman:

Subject: Notice of Penalty

We are writing further to our letter dated March 1, 2021 (copy enclosed), in which you were invited to submit representations as to why the Canada Revenue Agency (CRA) should not assess a penalty to The Friedman Family Foundation/La Fondation Familiale Friedman (the Foundation) in accordance with section 188.1 of the Income Tax Act.

We have reviewed and considered your written response of November 29, 2021. However, notwithstanding your reply, our concerns with respect to the Foundation's non-compliance with the requirements of subsections 110.1(6) and 118.1(16) (loanback provisions) of the Act have not been alleviated. Failing to reduce the fair market value of gifts in accordance with the loanback provisions resulted in the issuance of incorrect information on donation receipts in accordance with the Act, and is therefore, subject to a penalty under subsection 188.1(7) of the Act

Failure to issue donation receipts in accordance with the Act

As per the representations, the Foundation believes that an educational approach is the appropriate compliance treatment for a first-time offence particularly because there was prompt payment once they were made aware of the loanback provisions. It was also noted that any loanback amounts were inadvertent and made with a well-intentioned purpose. Also, the Foundation indicated that its long history of charitable giving should be considered when deciding the appropriate compliance action.

Further, the Foundation stated in its representations that the CRA's application of the loanback rules was incorrect as it resulted in the application of the full amount of any loans made by the Foundation to each and every donor instead of applying each loan against the corresponding donor's donation. In addition, when calculating the proposed penalty, the CRA should not have included [redacted] as this corporation was not related to the donors and consequently not part of the proposed penalty. Finally, the representations argued that the Minister failed to apply the loanback rules to the earliest taxation years to which such rules apply thus reducing the value of the gift on a

"first in first out basis". As such, the CRA should have applied the rules 60 months before the first loans were made and hence applied back as far as 2007 in some cases.

CRA's response

As a general rule, the CRA considers educational outcomes, where possible, to promote compliance, and then moves progressively through to compliance agreements, sanctions, and finally revocation, where warranted. The CRA has the authority to select the tool that is appropriate to the circumstances. As such, in serious cases of non-compliance, we are prepared to move directly to a sanction or revocation.

Serious cases of non-compliance are assessed taking into account variables such as:

- the non-compliance reaches certain thresholds;
- the non-compliance involves breaches of the core requirements of the Income Tax Act;
- repeat and/or continuous non-compliance, for example, when an organization is not abiding by the terms of a compliance agreement in which it has previously agreed to implement corrective measures; or,
- the non-compliance involves breaches of the Criminal Code or other quasi-criminal statutes.

Cases of aggravated non-compliance are likely to result directly in revocation of charitable registration. These include cases where one or more of the following factors are present:

- the organization has a previous record of serious non-compliance, and the current form of non-compliance is both serious and intentional;
- the non-compliance has resulted in a substantial adverse impact on others (beneficiaries, donors, or funders), particularly where the organization cannot or will not remedy the harm done; or,
- the organization cannot or will not bring itself into compliance.

Our audit identified serious and material non-compliance. However, the Foundation's desire and willingness to become compliant was the primary reason behind our decision to assess an intermediate sanction (i.e., subsection 188.1(7)) against the Foundation in lieu of considering a revocation of the Foundation's charitable status under paragraph 168(1)(b) of the Act.

With regard to the calculation of the penalty, the CRA followed the direction of Ruling 2009-0307941E5 (Back to Back Loan Provisions) that contained the following: "Subsection 118.1(17) of the Act applies on a taxpayer by taxpayer basis and as such, where multiple individuals gift to a qualified donee and a person with which these individuals do not deal at arm's length uses property of the donee and the property was not used in the carrying on of the donee's charitable activities, the provision will be

applied to each donor separately." This interpretation supports our position as outlined in our letter of March 1, 2021. As a result, it is our conclusion that we have applied the calculation correctly, as the subsection intended.

With respect to [redacted] (Corporation) and the related donors, pursuant to paragraph 251(1)(c) of the Act, it is a question of fact whether persons not related to each other are at a particular time, dealing with each other at arm's length. It is the CRA's position that Mr. Friedman, a director of the Foundation, has de facto control of the Corporation. In addition, this particular loan of USD $375,000 was transacted on the same day with the same terms as the other loans and the loan was guaranteed by Mr. Friedman with his signature on the loan document. Therefore, it continues to be our position that this relationship was non-arm's length between the Corporation and Mr. Friedman.

With regard to the application of the ordering rule for loanbacks, subsection 118.1(17) of the Act does not restrict the CRA from applying to reduce the fair market value (FMV) of a gift in a subsequent year when the FMV of previous gifts have not been reduced. In the context of the Foundation, it was free to reduce gifts that were received in 2007 when it made the loans in 2012 as the loans met all of the conditions to trigger the loanback rules in subsection 118.1(16) of the Act. However, the Foundation failed at that time to reduce the amount of those charitable donation receipts. When the CRA's audit identified the non-compliance with respect to the loanback provisions, we applied the legislation to reduce the FMV of the gifts received during the audit period, that being between 2016 to 2017. The fact that the FMV of gifts received in 2007 was not reduced by the Foundation did not preclude us from applying subsections 118.1(16) and 118.1(17) to the 2016 to 2017 fiscal years as a balance of the loans remained to be applied.

Conclusion

It remains our view that the receipts issued and not adjusted in accordance with the loanback provisions amount to serious non-compliance, as they resulted in a total of $8,992,990 of overstated official donation receipts being issued during the audit period.

Consequently, for each of the reasons mentioned in our letter dated March 1, 2021, we will assess a penalty against the Foundation pursuant to subsection 188.1(7) of the Act.

Penalty assessment

The penalty to be assessed by the CRA is calculated as follows:

Fiscal period ending	**Sept. 30, 2016**	**Sept. 30, 2017**
Total amount of incorrect receipts issued	$4,318,550	$4,674,440
Penalty as per subsection 188.1(7)	5%	5%
Total penalty owing per subsection 188.1(7)	$215,928	$233,722
Total penalties for all years		$449,650

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). 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, (mailed to the address below), signed by an authorized representative of the eligible donee, confirming that the organization meets the definition of an eligible done, that the penalty payment was received and the amount paid; and
- a copy of either the cancelled cheque or evidence of a non-cash transfer.

Please note that in accordance with subsection 149.1(1.1) of the 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.

Conversely, should you choose instead to make your payment to the CRA, please make the cheque payable to the “Receiver General for Canada”. For more information about payments by cheque, go to canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/pay-cheque.html.

In either case, all documentation regarding the penalty payment should be mailed to:

Charities Directorate
Canada Revenue Agency
Ottawa ON K1A OL5

The penalty takes effect immediately, and by virtue of paragraph 189(9)(b) of the Act, any amount of the penalty that remains unpaid as of the day that is one year after the mailing date of the Notice of assessment is subject to interest in accordance with subsection 161(11) of the Act.

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

Appeal process

Should you wish to appeal this notice of penalty in accordance with subsection 165(1) of the Act, 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 the Notice of Assessment that will be mailed to you separately. The notice of objection should be sent to:

Assistant Commissioner
Appeals Intake Centre
Post Office Box 2006, Station Main
Newmarket ON L3Y 0E9

Public notice

By virtue of paragraph 241(3.2)(g) of the Act, the following information relating to the Foundation's penalty assessment will be posted on the canada.ca/charities-giving website. While the effective date of the penalty is the date of this notice, the CRA will delay posting this information online until the Foundation has exhausted its appeal rights, should it decide to object to the assessment of this penalty. Should the Foundation choose to not exercise its appeal rights, the penalty will be posted online after 90 days of the date of the Notice of Assessment, which will be sent to you separately.

Penalty

Reason for penalty:	Incorrect information on donation receipts
Amount of penalty:	$449,650
Income Tax Act reference:	188.1(7)

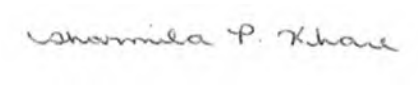
A registered charity must comply with all provisions of the Act. The CRA strongly encourages the Foundation to take appropriate actions to remedy the incorrect information

on donation receipts that led to the 188.1(7) assessment of the penalty which may be subject to a future review.

If you have any questions or require further information or clarification regarding the penalty payment, please contact Karen Lockridge at 905-706-7792 or you can contact the Charities Directorate's Client Services area toll-free at 1-800-267-2384.

We trust the foregoing fully explains our position.

Yours sincerely,



Sharmila Khare
Director General
Charities Directorate

Enclosures

- CRA letter dated March 1, 2021
- Foundation's response of November 29, 2021

c.c.: [redacted]

March 1, 2021

Hershey Friedman
President
Friedman Family Foundation/La Fondation Familiale Friedman
1810 Ave. Lajoie
Outremont QC H2V 1S3

BN: 8292342569RR0001
File #: 0874156

Dear Hershey Friedman:

Subject: Audit of the Friedman Family Foundation

This letter results from the audit of the Friedman Family Foundation/La Fondation Familiale Friedman (the Foundation) conducted by the Canada Revenue Agency (CRA). The audit related to the operations of the Foundation for the period of October 1, 2015, to September 30, 2017.

The audit 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	**Reference**
1.	Failure to issue donation receipts in accordance with the Act	149.1(4), 168(1)(d), 188.1(7), 118.1(16), 118.1(17) Regulation 3501
2.	Failure to devote resources to charitable activities - Gifting to non-qualified donees	149.1(4), 168(1)(b)
3.	Failure to file an accurate T3010, Registered Charity Information Return	149.1(4), 149.1(14) 168(1)(c), 188.1(6)

This letter describes the areas of non-compliance identified by the CRA relating to the legislative and common law requirements applicable to registered charities, and which may be subject to sanctions under the Act. The Foundation will be provided with the opportunity to make 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. These include suspension of the Foundation'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 Foundation by issuing a notice of intention to revoke in the manner described in subsection 168(1) of the Act.

General legal principles

In order to maintain charitable registration under the Act, Canadian law requires that an organization demonstrate that it is constituted exclusively for charitable purposes (or objects) and that it devotes its resources to charitable activities carried on by the organization itself in furtherance thereof.[1] To be exclusively charitable, a purpose must fall within one or more of the following four categories (also known as "heads") of charity[2] and deliver a public benefit:

- relief of poverty (first category);
- advancement of education (second category);
- advancement of religion (third category); or
- certain other purposes beneficial to the community in a way the law regards as charitable (fourth category).

The public benefit requirement involves a two-part test:

- The first part of the test requires the delivery of a **benefit** that is recognizable and capable of being proved, and socially useful. To be recognizable and capable of being proved, a benefit must generally be tangible or objectively measurable. Benefits that are not tangible or objectively measureable must be shown to be valuable or approved by the common understanding of enlightened opinion for the time being.[3] In most cases, the benefit should be a necessary and reasonably direct result of how the purpose will be achieved and of the activities that will be conducted to further the purpose, and reasonably achievable in the circumstances.[4] An assumed prospect or possibility of gain that is vague, indescribable or uncertain, or incapable of proof, cannot be said to provide a charitable benefit.[5]

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[1] See subsection 149.1(1) of the Act, which requires that a charitable organization devote all of its resources to "charitable activities carried on by the organization itself" except to the extent that an activity falls within the specific exemptions of subsections 149.1(6.1) or (6.2) of the Act relating to political activities, and Vancouver Society of Immigrant and Visible Minority Women v MNR, [1999] 1 SCR 10 at paras 155-159 [Vancouver Society]. A registered charity may also devote resources to activities that, while not charitable in and of themselves, are necessary to accomplish their charitable objectives (such as expenditures on fundraising and administration). However, any resources so devoted must be within acceptable legal parameters and the associated activities must not become ends in and of themselves.

[2] The Act does not define charity or what is charitable. The exception is subsection 149.1(1) which defines charitable purposes/objects as including "the disbursement of funds to qualified donees". The CRA must therefore rely on the common law definition, which sets out four broad categories of charity. The four broad charitable purpose/object categories, also known as the four heads of charity, were outlined by Lord Macnaghten in Commissioners for Special Purposes of the Income Tax v Pemsel, [1891] AC 531 (PC) [Pemsel]. The classification approach was explicitly approved of by the Supreme Court of Canada in Guaranty Trust Co of Canada v MNR, [1967] SCR 133, and confirmed in Vancouver Society, supra note 4.

[3] See generally Vancouver Society, supra note 4 at para 41, Gonthier J. dissenting; Gilmour v Coats et al, [1949] 1 All ER 848 [Gilmour]; National Anti-Vivisection Society v IRC, [1947] 2 All ER 217 at 224 (HL), Wright LJ [National Anti-Vivisection Society].

[4] See for example In re Grove-Grady, [1929] 1 Ch 557 at 573-574; Plowden v Lawrence, [1929] 1 Ch 557 at 588, Russell LJ; National Anti-Vivisection, supra note 6 at 49, Wright LJ; IRC v Oldham Training and Enterprise Council, [1996] BTC 539 [Oldham]; Pemsel, supra note 5 at 583.

[5] See National Anti-Vivisection Society, supra note 6 at 49, Wright LJ; In re Shaw decd, [1957] 1 WLR 729; Gilmour, supra note 6, Simonds LJ at 446-447.

- The second part of the test requires the benefit be directed to the **public** or a sufficient section of the public. This means a registered charity cannot:
  - have an eligible beneficiary group that is negligible in size, or restricted based on criteria that are not justified based on the charitable purpose(s); or
  - provide an unacceptable private benefit. Typically, a private benefit is a benefit provided to a person or organization that is not a charitable beneficiary, or to a charitable beneficiary that exceeds the bounds of charity. A private benefit will usually be acceptable if it is incidental, meaning it is necessary, reasonable, and not disproportionate to the resulting public benefit.[6]

As well, a charitable purpose[7] should not be broad or vague. If the wording is too broad or vague, it will not be clear that a purpose is charitable (falls within a charitable purpose category and provides a public benefit) and defines the scope of the organization's activities. "Broad" means the purpose may allow for both charitable and non-charitable activities and/or the delivery of unacceptable private benefits. "Vague" means the wording may be interpreted in different ways. A purpose that is too broad or vague may not be eligible for registration[8].

To comply with the requirement that it devote all of its resources to charitable activities carried on by the organization itself; a registered charity may only use its resources (funds, personnel and/or property) in two ways:

- for its own charitable activities - undertaken by the charity itself under its continued supervision, direction and control; and
- for gifting to "qualified donees" as defined in the Act.[9]

A charity's own charitable activities may be carried out by its directors, employees or volunteers, or through intermediaries (a person or non-qualified donee that is separate from the charity, but that the charity works with or through, such as an agent, contractor or partner). If acting through an intermediary, the charity must establish that the activity to be conducted will further its charitable purposes, and that it maintains continued direction and control over the activity and over the use of the resources it provides to the intermediary to carry out the activity on its behalf.[10]

Although there is no legal requirement to do so, and the same result might be achieved through other arrangements or means, entering into a written agreement can be an effective way to help meet the own activities test. However, the existence of an

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[6] For more information about public benefit, see CRA Policy Statement CPS-024, Guidelines for Registering a Charity: Meeting the Public Benefit Test.

[7] For more information about charitable purposes see CRA Guidance CG-019, How to Draft Purposes for Charitable Registration.

[8] Vancouver Society, supra note 4 per Iacobucci J at para. 158; Travel Just v. Canada Revenue Agency, 2006 FCA 343, [2007] 1 C.T.C. 294.

[9] A "qualified donee" means a donee described in subsection 149.1(1) of the Act.

[10] For more information, see CRA Guidance CG-002, Canadian Registered Charities Carrying Out Activities Outside Canada and Guidance CG-004, Using an Intermediary to Carry Out Activities Within Canada.

agreement is not enough to prove that a charity meets the own activities test. The charity must be able to show that the terms establish a real, ongoing, active relationship with the intermediary,[11] and are actually implemented. A charity must record all steps taken to exercise direction and control as part of its books and records, to allow the CRA to verify that the charity's funds have been spent on its own activities. While the nature and extent of the required direction and control may vary based on the particular activity and circumstances, the absence of appropriate direction and control indicates that an organization is resourcing a non-qualified donee in contravention of the Act.

The CRA must be satisfied that an organization's activities directly further charitable purposes in a manner permitted under the Act. In making a determination, we are obliged to take into account all relevant information. Accordingly, the current audit encompassed an enquiry into all aspects of the Foundation's operations. The fact that some of the areas of non-compliance identified in this letter may, or may not, have been evaluated in preceding audits does not preclude the need for compliance with existing legal requirements. Furthermore, the CRA may take a position that differs from that reached previously based on reconsideration of the pertinent facts and law.[12]

Background of the Foundation

The Foundation was registered as a private foundation effective October 31, 1990. The Foundation has had three prior audits, all ending in education letters. The first was completed by Consulting and Audit Canada for the period ending September 30, 2001, and identified the following non-compliance:

- Donation receipts did not fully comply with the requirements of Regulation 3501 as they did not contain the donor's name and address, the date of donation, and some receipts were not signed by an authorized individual.
- Books and records were not adequate as there were inadequate loan documentation, donor names could not be verified, and sales tax receivable was not accurately calculated.
- The Foundation gifted $84,615 to non-qualified donees.
- T4/T4A slips were not issued to individuals who received payments for fundraising services.
- Interest free loans were given resulting in benefits being conferred to the loan recipients.
- The T3010, Registered Charity Information Return, was not accurately completed as revenue was not accurately reported on the correct lines of the return, gifts to qualified donees were inaccurate and the worksheet was not accurately completed.

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[11] See notably Canadian Committee for the Tel Aviv Foundation v Canada, 2002 FCA 72 at para 30, [2002] FCJ no 315 [Canadian Committee for the Tel Aviv Foundation].

[12] See for example Canadian Magen David Adom for Israel v MNR, 2002 FCA 323 at para 69, [2002] FCJ no 1260, Sharlow JA.

The second audit was completed by the CRA for the period ending September 30, 2005, and identified the following:

- The Foundation continued to gift to non-qualified donees, albeit nominal amounts.
- The calculated disbursement quota was incorrect.
- The Foundation was informed that it had not been approved to undertake its own charitable activities and objects would need to be amended if there were going to be changes to the activities in the future.

The third audit was completed by the CRA covering the periods October 1, 2012, to September 30, 2015, and found that the Foundation was not issuing receipts as required, as the receipts did not state that it was an official receipt for income tax purposes, and the name and website of the CRA was not included on the receipts.

The balance of this letter describes the areas of non-compliance identified during the current audit and the sanction proposed in further detail.

Identified areas of non-compliance where sanctions may apply

Failure to issue donation receipts in accordance with the Act

Failure to reduce the fair market value of a gift in accordance with loanback provisions:

Pursuant to subsections 110.1(6) and 118.1(16) of the Act, the loanback provisions apply when a donor makes a gift to a qualified donee and within 60 months of making the gift, at least one of the following two situations occur:

i. the qualified donee holds a non-qualifying security of the donor that it acquired after the time that is 60 months before the gift was made.
ii. the donor (or a person or partnership not dealing at arm's length with the donor) uses the qualified donee's property under an agreement that was made or modified after the time that is 60 months before the gift was made and the property was not used by the qualified donee in its charitable activities.

When either situation exists, subsections 110.1(6) and 118.1(16) of the Act provides that the fair market value of a gift by a donor to a private foundation is reduced by the fair market value of:

- the consideration which the foundation gave to acquire a non-qualifying security of the donor;
- any property of the foundation that the donor (or a person or partnership not dealing at arm's length with the donor) uses under an agreement, for purposes other than the foundation's charitable activities; provided that the foundation held the non-qualifying security, or made or modified the agreement after the time that is 60 months before the date of the gift.

- any new loan provided by the foundation to the donor (or to persons or partnerships who do not deal at arm's length with the donor) within 60 months after the time of the gift.

Subsection 118.1(17) of the Act applies an ordering rule for the purposes of applying subsection 118.1(16) and provides that the fair market value of a property described in subparagraph 118.1(16)(c)(ii) is deemed to be that value, minus any portion of the property's fair market value that has been applied under that subsection to reduce the fair market value of another gift made before that time by the taxpayer.

Subsection 118.1(17) of the Act applies on a taxpayer by taxpayer basis and applies to corporations by virtue of subsection 110.1(6) of the Act. Where multiple taxpayers make a gift to a qualified donee and persons with which these taxpayers do not deal at arm's length use property of the donee, the provision will apply to each donor separately. Where multiple donors who do not deal at arm's length with each other make a gift to a qualified donee and an amount is loaned by the donee to one of more of these donors, the total amount of the loans will be taken into account to reduce the fair market value of the gift made by each of the donors.

Audit findings

Loans provided or modified within 60 months of making a gift are subject to the loanback provisions. The following non-arm's length loans were outstanding during the audit period:

Name of Debtor	Date of Loan	Loan Amount
[redacted]	January 13, 2012	$ 375,000USD
	January 13, 2012	$ 375,000USD
	January 13, 2012	$ 375,000USD
	January 13, 2012	$ 375,000USD
	January 13, 2012	$ 375,000USD
	January 13, 2012	$ 375,000USD
	January 13, 2012	$ 375,000USD
	October 7, 2015	$1,000,000
	December 17, 2015	$ 750,000

The audit revealed that the loanback provisions apply to reduce the fair market value of the donations made by non-arm's length donors. It does not appear that the Foundation adjusted the receipted amount of the gift to account for the reduced fair market value, based on the unpaid amount of the non-arm's length loans outstanding at the time of the gift. As a result, the following amounts of total donations that were incorrectly receipted are:

Fiscal Period Ending	Incorrect Amount Receipted
September 30, 2016	$4,318,550.00
September 30, 2017	$4,674,439.50
Total	$8,992,989.50

Details of the incorrect receipted amounts are included in Appendix A. If there are questions relating to the calculation, please contact the undersigned for further clarification.

Penalty proposed

It is our view that the receipts issued and not adjusted in accordance with the loanback provisions amounts to serious non-compliance as it resulted in a total of $8,992,989.50 of receipts being overstated during the audit period. As a result, we are proposing that the following penalty should be applied to the Foundation under subsection 188.1(7) as a result of issuing incorrect information on the receipts:

Fiscal Year Ending	Total receipts subject to penalty	Sanction %	Penalty Amount
Sept. 30, 2016	$4,318,550.00	5%	$215,927.50
Sept. 30, 2017	$4,674,439.50	5%	$233,721.98
Total subsection 188.1(7) Penalty			$449,649.48

Identified areas of non-compliance not subject to penalty

Failure to issue donation receipts in accordance with the Act

Donation receipt content issues

Subsection 3501(1) of the Regulations provides that each official donation receipt that a registered charity issues must include, in a manner that cannot be readily altered, the prescribed contents of a receipt.

Audit findings

The audit showed that the donor's full address was not recorded on all donation receipts, and the CRA's website on the official donation receipts contained a typographical error by listing the website address of www.cra-arc.qc.ca, rather than www.cra-arc.gc.ca. For reference purposes, the new website address to include on receipts is canada.ca/charities-giving. As the errors relating to the donation receipt content issues are not material, sanctions are not being proposed for the receipts that were not issued in accordance with Regulation 3501 of the Act.

Failure to devote resources to charitable activities

The Act permits a registered charity to carry out its charitable purposes both inside and outside Canada in only two ways: it can make gifts to other organizations that are on the list of qualified donees set out in the Act, and it can carry on its own charitable activities under its own direction and control. In contrast to the relatively passive transfer of money or other resources involved in making gifts to qualified donees, carrying on one's own

activities implies that the charity is an active and controlling participant in a program or project that directly achieves a charitable purpose.

A "qualified donee" means a donee defined in subsection 149.1(1). Qualified donees are as follows:

- a registered charity (including a registered national arts service organization);
- a registered Canadian amateur athletic association;
- a listed housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged;
- a listed Canadian municipality;
- a listed municipal or public body performing a function of government in Canada;
- a listed university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada;
- a listed charitable organization outside Canada to which Her Majesty in right of Canada has made a gift;
- Her Majesty in right of Canada or a province; and
- the United Nations and its agencies.

As the Act specifically states what constitutes a qualified donee, applying the maxim "expressio unius est exclusio alterius" means that entities not expressly stated in this list are not considered qualified donees.

Audit findings - Gifting to non-qualified donees

The following amounts were gifted to organizations after their charitable status was revoked:

Chasdei Avos Foundation	$ 6,000
Vaad Mishmeres Mitzvos	$38,346

The following amounts could not be traced to a qualified donee based on the available information:

2017		**2016**	
Yad L'Kallah	$ 72.00	Cdn. Frds. Of Yeshiva Torah	$5,000.00
Beth Jerusalem Girls School	$ 36.00	Cdn. Frds. Of Yulbai	$ 540.00
C. Fiteicis	$500.00	Beth Jacob Seminary/Achosainu	$ 18.00
Ezer Mitzion	$100.00	Bnos Jerusalem D'Achasedei Belz	$ 18.00
Rav Tov	$100.00	Yad Eliezer	$ 100.00
Mesivta Ladies Aux.	$100.00	Ezur Mishon	$ 100.00
	$908.00	Ladies Mitvah	$ 75.00
			$5,851.00

As a result of the audit, it appears that the Foundation gifted a total of $51,105 to non-qualified donees during the audit period. Please note that paragraph 149.1(4)(b.1) states that a private foundation may have its registration revoked under subsection 168(1) if it makes a disbursement by way of a gift, other than a gift made in the course of its own charitable activities, or to a donee that is a qualified donee at the time of the gift.

Failure to file an accurate T3010, Registered Charity Information Return

Pursuant to subsection 149.1(14) of the Act, every registered charity, within six months from the end of each taxation year of the charity and without notice or demand, file with the Minister both an information return and a public information return for the year in prescribed form and containing prescribed information.

It is the responsibility of the Foundation to ensure that the information provided in its T3010 returns, schedules and statements, is factual and complete in every respect. A charity is not meeting its requirements to file an information return in prescribed form if it fails to exercise due care with respect to ensuring the accuracy thereof. The Federal Court of Appeal has confirmed that major inaccuracies in a T3010 are a sufficient basis for revocation.[13]

Audit findings

The following errors were noted on the T3010 returns filed during the audit period:

Form T1236, Qualified Donees Worksheet

- Gifts recorded in the general ledger as "Miscellaneous" were grouped together and recorded as "Balances <$100" rather than recording each organization separately.
- 13 of the organizations that received gifts were filed on the worksheet with incorrect names and/or business numbers.
- The city and province (or the complete mailing address of organizations outside of Canada) were not recorded as required.

Form T1235, Directors/Trustees and Like Officials Worksheet
The telephone numbers for the directors were not completed on the Worksheet as required for both years under audit. It was also noted that there were two directors listed during the audit period, however, as per By-Law Three - Article 1 of the governing documents, the Foundation is required to have three directors.

Line 4510, Total amount received from other registered charities
The Foundation received $5,098 from Kollel Yisroel Dovid, a registered charity, in 2016. The Foundation incorrectly included the amount on Line 4500 instead of 4510.

Allocation of expenses on Lines 5000-5040
The Foundation did not allocate any expenses other than gifts to qualified donees on the T3010 Return as required.

Please note that filing incomplete and/or erroneous information returns can result in either a suspension or revocation of a registered charity's status.

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[13] Opportunities for the Disabled Foundation v MNR, 2016 FCA 94 at paras 48-51.

Conclusion

Due to the serious nature of the non-compliance issue related to the loanback provisions as described above, it is our view that a penalty under subsection 188.1(7) should be applied to the Foundation. 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 registration.

The Foundation's options:

a) Respond

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 Foundation, we 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
- giving notice of its intention to revoke the registration of the Foundation by issuing a notice of intention to revoke in the manner described in subsection 168(1) of the Act.

b) Do not respond

You may choose not to respond. In that case, we 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 Foundation by issuing a notice of intention to revoke 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 with the party's name, contact information, and clearly specify the appropriate access granted to the party to discuss the file with us. For more information on how to authorize a representative, go on our website at www.canada.ca/en/revenue-agency/services/forms-publications/forms/aut-01.html.

If you have any questions or require further information or clarification, please do not hesitate to contact me at the numbers below. My manager, Michael Speakman, may also be reached at (343) 543-7518.

Yours sincerely,

[redacted]

Katie Kesselring
Audit Division
Kitchener/Waterloo TSO
Telephone: 226-989-2784
Facsimile: 519-585-2803
Address: 166 Frederick St.
Kitchener ON N2H 0A9

Enclosure

cc: [redacted]

[redacted]

November 29, 2021

DELIVERED VIA EMAIL (KATHLEEN.KESSELRING@CRA-ARC.GC.CA)

Katie Kesselring
Charities Directorate
Legislative Policy & Regulatory Affairs Branch
Canada Revenue Agency
Mobile: 226-989-2784
kathleen.kesselring@cra-arc.gc.ca

RE: Proposed Financial Penalties against the Friedman Family Foundation (BN: 892342569) and Mehaduras Friedman Foundation (BN: 888386414)

Please accept this letter in response to our meeting with you on October 14, 2021, in which you allowed us to make representations about your proposal to impose financial penalties of 5 percent against the Friedman Family Foundation and the Mehaduras Friedman Foundation (collectively, the "**Foundations**").

For the reasons set forth below, we respectfully request that you withdraw the proposal to impose financial penalties and instead consider the issuance of an education letter. We believe this measure is the most appropriate and proportionate responses in the present circumstances.

I. BACKGROUND

The Foundations

The Foundations have an extensive history of charitable activity. Over the past several decades, they have made significant contributions to the promotion and advancement of their charitable purposes. They have both been recognized as being in the top 400 of over 81,000 registered charities in Canada with the largest annual charitable expenditures.[1]

Over the past twenty years, Mr. Hershey Friedman and several corporations within his group of companies (collectively referred to as the "**Related Donors**") have made gifts totalling nearly $80 million to the Foundations. A history of the amounts of the gifts made by the Related Donors to the Foundations in the past twenty years is attached at Exhibit "A".[2]

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[1] See canadiancharitylaw.ca/uploads/Canadian_Private_Foundations_%E2%80%93_Who_had_the_largest_total_expenditures_in_2015.pdf.

[2] The attached only accounts for the charitable history of the Foundations and the Related Donors for the past twenty years. However, the history of charitable giving extends far beyond this.

[redacted]

[redacted]

Loans by the Foundations

In late 2017, the Foundations became aware that they may have inadvertently triggered subsections 118.1(16) and (17) of the Act (the "**Loanback Rules**") as a result of making interest-bearing loans to certain Related Donors in 2012, 2013, and 2015. This was the first time that the Foundations had ever loaned-back amounts to the Related Donors, which occurred for the purpose of easing liquidity issues faced by certain of the Related Donors. Upon discovering the inadvertent triggering of the Loanback Rules, Mr. Friedman, the Related Donors and the Foundations took immediate steps to arrange for repayment of any amounts potentially caught by the Loanback Rules. By the fall of 2018, all such amounts had been fully repaid to the Foundations, with interest.

Previous Audits of the Foundations

In January of 2016, the Minister of National Revenue (the "**Minister**" or the "**CRA**") commenced an audit in connection with the Mehaduras Friedman Foundation's ("**Mehaduras**") 2013 and 2014 taxation years. Mehaduras was not previously the subject of an audit.

In August of 2016, the Minister commenced an audit in connection with the Friedman Family Foundation's ("**FFF**") 2013 and 2014 taxation years. The only non-compliance that the Minister identified was a failure by FFF to issue receipts stating that it was an "*official receipt*" for income tax purposes, and a failure to include the CRA's name and website on the receipts. FFF had been previously subject to two audits (one completed in 2001, and one in 2005), neither of which identified serious non-compliance. All three of these audits ended in the issuance of education letters by the Minister. In all cases, FFF took immediate steps to correct any non-compliance.

Neither of the previous audits against Mehaduras nor FFF identified non-compliance with the Loanback Rules.

The Audits at Issue and the Minister's Proposals

In 2018, the audit period for both Foundations was expanded to include the 2016 and 2017 taxation years.

On March 1, 2021, on the completion of these audits, the Minister issued a letter to each of the Foundations (the "**Foundations Audit Letters**"), proposing to impose a 5 percent penalty on the Foundations pursuant to subsection 188.1(7) of the Act, in part on the basis that the Foundations had failed to adjust the amount reported on the donation receipts issued to the Related Donors as a result of the application of the Loanback Rules. In the case of Mehaduras, the proposed penalty was $482,842.61, and in the case of FFF, the proposed penalty was $449,648.48.

The Foundations Audit Letters included schedules showing the Minister's reduction of the fair market value of donations made by the Related Donors pursuant to the Loanback Rules. It is clear from these schedules that each time the Minister applied the Loanback Rules to reduce the fair market value of any gifts made by a particular Related Donor to FFF or Mehaduras, the Minister re-applied the full amount of any loans made by FFF and Mehaduras, as the case may be, to the particular Related Donor. This had the effect of multiplying the loans potentially subject to the Loanback Rules, which in turn caused the amounts for which the Foundations could be liable to be greatly overstated.

[redacted]

[redacted]

The Foundations Audit Letters also indicate that the Minister made certain assumptions in computing the amount of the loans made by the Foundations that could be subject to the Loanback Rules. In particular, in respect of loans made by FFF, the Minister assumed that a loan in the amount of US$375,000 made from FFF to [redacted] should be subject to the Loanback Rules and applied against the Related Donors, on the basis that [redacted] dealt at non-arm's length with FFF.[3] However, [redacted] is unrelated to and deals at arm's length with the Related Donors. [redacted] is wholly owned by [redacted] who is not related to Mr. Friedman or any of the Related Donors. Additionally, with respect to Mehaduras, the Minister assumed that the full amount of a CDN$4.3 million loan from Mehaduras to Mr. Friedman was outstanding and should be subject to the Loanback Rules. In reality, US$3.225 million of this loan had already been repaid to Mehaduras by the Hershey Friedman Family Trust on Mr. Friedman's behalf, before the vast majority of donations at issue had been made. Accordingly, the Minister should have used a figure closer to CDN$927,500[4] as the outstanding amount of any loans made by Mehaduras to any of the Related Donors.[5]

The Foundations Audit Letters also noted other areas of non-compliance, including some minor issues about missing information or typographical errors on donation receipts, making certain gifts to certain non-qualified donees, missing or incorrect information on the T3010 returns, and in the case of Mehaduras, incorrect registration documents. No specific penalties were proposed by the Minister in response to these other areas of non-compliance. Responses to certain of these other non-compliance issues were provided to you on October 4, 2021, by [redacted]

II. REASONS NOT TO IMPOSE FINANCIAL PENALTIES

For the reasons detailed below, the Foundations respectfully request that the Minister consider withdrawing its proposal to impose financial penalties on the Foundations. Instead, our view is that an education letter without financial penalties is the most appropriate measure in response to any non-compliance that may have resulted from the Loanback Rules.

With respect to any other areas of non-compliance, although the Minister did not propose any specific penalties, we also ask that the Minister refrain from considering financial penalties.

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[3] This was based on the Minister's assumption that Mr. Friedman was also the vice president of [redacted] and personally guaranteed the amount under the note.

[4] That is CDN$4.3 million less the Canadian dollar equivalents of the US$2.5 million repayment in 2013 and US$725,000 repayment in 2014 (approx. CDN$3,372,500).

[5] [redacted]

[redacted]

[redacted]

(1) The Non-Application of Financial Penalties is Fair and Appropriate in the Circumstances and Consistent with the Minister's Guidelines

First, we believe that this first-time violation of the Loanback Rules falls entirely within the Minister's published guidelines to take an "education-first approach".[6]

In particular, the Minister's guidelines are clear that the CRA will "give the charity the chance to correct its non-compliance through education or a compliance agreement *before it resorts to other measures such as sanctions or revocation*".[7] Our view is that the most fair and appropriate corrective measure is the issuance of an education letter, particularly because the Foundations and the Related Donors had already taken unilateral, unprompted action to remedy their non-compliance. We do not think that the inadvertent application of the Loanback Rules in the present case should be considered among the "very small proportion" of CRA audits that result in serious consequences, which we believe should be reserved for cases involving sham or the dishonest exploitation of the charitable donation rules, or according to the Minister's own published position, cases involving "tax shelters or issuing false receipts".[8]

The above is also consistent with the Minister's "Guidelines for applying sanctions", which states that "as a general rule, the Directorate intends to start with educational methods to obtain compliance, and then move progressively through compliance agreements, sanctions, and the ultimate sanction of revocation, if necessary."[9] In this regard, the Minister's guidelines clearly rank the potential tools for corrective action in the following order of severity:

- **Education** (for example, by making written advice available in publications and on this website, answering questions from individual charities, and offering advice during an audit) - An audit may result in what is called an "education letter" that explains the rules to a charity.

- **Compliance agreement** - Such an agreement is reached through discussion with, and agreement from, the charity. The terms of the agreement are spelled out in a formal document called a compliance agreement that is signed by both the charity and the CRA. The agreement identifies the problems, the steps the charity will take to bring itself into compliance, and the potential consequences to the charity of not abiding by the agreement.

- **Sanction** – A financial penalty, or a suspension of the charity's status as a qualified donee along with its ability to issue official donation receipts.

- **Revocation of the charity's registration**.[10]

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[6] See heading "What types of letter might a charity receive after it has been audited?" at: https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/compliance-audits/audit-process-charities.html.

[7] *Ibid.*

[8] *Ibid.*

[9] See canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidelines-applying-sanctions.html#sanctions.

[10] *Ibid.*

[redacted]

[redacted]

The guidelines further state that in cases of "serious non-compliance," for example, breaching the *Criminal Code,* not abiding by the terms of a compliance agreement, or breaching the requirement of a charity to be established exclusively for charitable purposes, the Minister is "prepared to move directly to a sanction or revocation."[11] None of these situations are applicable in the present circumstances. The Foundations' inadvertent violation of the Loanback Rules and their immediate action to remedy the violation does not amount to a serious case of non-compliance and it would therefore be unfair and inappropriate to proceed directly to imposing a financial penalty.

While we recognize that the guidelines also consider serious non-compliance to include cases where certain monetary thresholds are reached (either in absolute dollar amounts, or as percentages),[12] for the reasons discussed more fully below in section (5), we believe the Minister incorrectly applied the Loanback Rules and incorrectly computed the amounts at issue, which had the effect of increasing the Foundations' potential liability far beyond the correct amount (if any). Our view is that the actual amounts for which the Foundations may have issued erroneous receipts are far lower than the amount computed by the Minister, and does not cross the threshold into serious non-compliance.

A compliance agreement, although more appropriate than a financial penalty, is unnecessary in the circumstances. A compliance agreement functions to ensure that a charity will, in good faith, not repeat the violation and cure the non-compliance. In the present case, the Foundations' immediate action to cure any non-compliance under the Loanback Rules, without prompting or warning by the Minister, clearly illustrates that the Foundations and the Related Donors always maintained good faith intentions and a desire to comply with the charity rules and that it is unnecessary. Further, as previously noted, the Foundations have always taken steps to remedy non-compliance after receiving education letters.

In the Minister's own words, it is the "organizations that deliberately flout the law, or ignore their agreements with us" that signal to the Minister that "stronger measures are necessary" and it is only in these circumstances that the Minister "will use one of the sanctions or revoke a registration."[13] The Foundations clearly do not belong in the same category as these types of organizations and, for this reason, we respectfully submit that they should not be subject to a financial penalty.

(2) First Time Offence and Prompt Repayment of all Loans

This was the first instance in which the Foundations had loaned-back any amounts to the Related Donors in violation of the Loanback Rules. When the Foundations became aware that the Loanback Rules may have been triggered, immediate steps were taken to arrange for repayment of any outstanding amounts to put the Foundations back into compliance. This occurred without any notification by the Minister or any threat of penalties, sanctions, or other corrective measures. This is consistent with the Foundations' past behaviour to take immediate steps to correct areas of non-compliance in all previous audits.

Moreover, this was the first instance in which the Loanback Rules were ever raised by the Minister. The Foundations Audit Letters were not preceded by education letters or other correspondence. It would seem

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[redacted]

[redacted]

unfair to impose financial penalties of nearly $1 million in aggregate when the Foundations were not previously aware of the existence of the Loanback Rules nor initially offered education letters as a first-time offender of these rules.

In our view, the immediate, unprompted action by the Foundations, Mr. Friedman, and the Related Donors to repay any loans, as well as the Foundation's demonstrated behaviour of taking immediate, corrective action in any previous cases of non-compliance, favours the issuance of an education letter.

(3) Any Loanback Amounts Were Entirely Inadvertent and Made in Good Faith

As described above, the application of the Loanback Rules was entirely inadvertent. Loans were extended to Mr. Friedman and certain of the Related Donors for the well-intentioned purpose of providing liquidity relief to these entities. The parties ensured that the loans were interest-bearing to avoid any possibility that they could be considered to confer a benefit on a Related Donor or any person, and they were made entirely in good faith. The loans were not made as part of a tax scheme to give the impression that amounts had been gifted by the Related Donors to the Foundations, in order to obtain a deduction from income, while circulating such amounts back to the Related Donors. This is the type of scheme that the Loanback Rules are intended to discourage.

On the contrary, when all of the gifts made by the Related Donors during the years under audit are aggregated, it is clear that this amount far exceeds the amounts loaned back by the Foundations (particularly in light of the fact that a significant amount of any loans had, in fact, already been repaid, as discussed more fully below). Therefore, the Foundations were clearly enriched by the amounts gifted by the Related Donors, and the Related Donors were, as a whole, impoverished by such amounts. This result accords with the purpose and rationale behind the charitable donation rules.

(4) The History of Charitable Giving by the Related Donors and the Foundations

As discussed above and as set out in Exhibit "A", the Related Donors have a long history of charitable giving, having donated nearly $80 million to the Foundations in the past twenty years, and many millions more in the preceding years. The Foundations have been recognized nationally as being among the top 400 private foundations for charitable amounts expended on a yearly basis. Together, these entities have made a considerable impact in Canada for the advancement of the causes supported by the Foundations.

We bring these facts to your attention because they illustrate the significant extent of the combined efforts of the Related Donors and the Foundations to carry out and promote charitable purposes in Canada. Given this extensive history and all the good that the Foundations and the Related Donors have achieved, we believe the Foundations deserve your reconsideration for corrective action that does not involve financial penalties, and therefore an education letter is the most appropriate measure.

(5) Financial Penalties are Premature and Inappropriate at this Time

Lastly, we believe the imposition of a 5 percent penalty against the Foundations is inappropriate and premature at this time.

[redacted]

[redacted]

First, as aforementioned, the Foundations' inadvertent non-compliance with the Loanback Rules for the first time does not amount to "serious non-compliance" as contemplated by the CRA's guidelines. Second, the imposition of a financial penalty is inappropriate in light of a number of our concerns that the Ministry incorrectly interpreted and applied the Loanback Rules to the Foundations and the Related Donors. As alluded to above, the effect of these failures was that the potential amounts for which the Related Donors and Foundations could be liable have been significantly and erroneously overstated, which in turn affects the computation of the 5 percent penalty under subsection 188.1(7). The detailed reasons for our positions are set out in [redacted], one of the Related Donors, [redacted]". However, we also provide a summary of these positions below.

We believe that the positions below have merit and are supported in fact and law, and therefore it would be inappropriate and premature to impose financial penalties.

- **(5)(a) The Minister's Incorrect Application of the Loanback Rules and the Harshness of the Results**

First, as described above, in applying the Loanback Rules, the Minister re-applied the full amount of any loans made by the Foundations to each and every Related Donor, rather than applying such loans to reduce the aggregate fair market value of all the gifts made by the Related Donors to the Foundations.

Effectively, this resulted in a multiplication of the amounts loaned back to the Related Donors such that no Related Donor could ever be able to deduct any amount for any gifts made to the Foundations, notwithstanding that the Foundations were enriched as a whole and the Related Donors were impoverished as a whole.

Our view is that this interpretation and application of the Loanback Rules was incorrect and has produced an absurd result.

This absurdity is apparent in the following example. Suppose 10 related donor corporations each made a gift of $1,000 to the same charitable organization. Suppose also that each of the donors deducted $1,000 from their taxable income in respect of their gifts, pursuant to subsection 110.1(1). Now suppose the charitable organization lends $100 to each of the 10 donors, for an aggregate loan of $1,000. According to the Minister's interpretation of subsection 110.1(16), the aggregate amount of the loans, $1,000, would be applied to each donor to reduce the fair market value of the $1,000 gift made by such donor. Accordingly, on the Minister's interpretation of subsection 110.1(16), the fair market value of each donor's gift would be reduced to nil such that no amounts could be deducted by any donor.

The result is that, the charitable organization has been enriched by at least $9,000 (that is, the aggregate $10,000 worth of gifts less the $1,000 loaned back to the donors) and the donors have been collectively impoverished for the same amount, yet no deduction for any amount will be permitted.

This result is not only excessively harsh and punitive, but entirely inconsistent with one of the fundamental principles of Canadian taxation, which is to avoid duplicate taxation.

[redacted]

[redacted]

In this example, the donors will not have suffered double or triple taxation, but taxation multiplied by a factor of 10. In the present case, taxation will have been multiplied by a factor higher than 10, given that at least 14 of the Related Donors have been, or will be, reassessed.

The harshness of this result has even been previously acknowledged by the Minister. In CRA document 2009-0307941E5 -- *Back to back loans provisions*, the Minister expressed reservations that its interpretation of the Loanback Rules in situations involving multiple related donors was correct, saying that "the amount of the loan *appears* to be taken into account in determining the fair market value of the gift made" to multiple donors (our emphasis).

The Minister concluded by stating "[w]e have brought this result to the attention of the Department of Finance for their consideration."[14] Accordingly, the Minister's own published statements on the Loanback Rules clearly acknowledge that its interpretation not only results in an overly harsh result, but one that is also incompatible with the principles of the Act as a whole

- **(5)(b) The Minister's Incorrect Computation of Amounts Loaned by the Foundations**

In addition, our view is that the Minister erred in computing the amount of loans made by the Foundations to which the Loanback Rules could apply, by (i) incorrectly including amounts that had already been repaid to the Foundations prior to the time at which the vast majority of gifts by the Related Donors had been made, and by (ii) incorrectly including amounts that were loaned to arm's length parties (e.g. [redacted]). The result of this error was that the loans by the Foundations were significantly overstated.

In respect of FFF the Minister incorrectly assumed that [redacted] was related to the Related Donors, when in fact, it is wholly owned by [redacted] who is not related to Mr. Friedman nor any of the Related Donors. Moreover, Mr. Friedman is not a director of [redacted] and does not otherwise have any legal, factual, operational, effective, or actual control of [redacted]

In respect of Mehaduras, the Minister assumed that the full amount of a CDN$4.3 million loan from Mehaduras to Mr. Friedman was outstanding and should be subject to the Loanback Rules. In reality, US$3.225 million of this loan had already been repaid to Mehaduras by the Hershey Friedman Family Trust on Mr. Friedman's behalf, before the vast majority of donations at issue had been made.[16] Therefore, the loan amount for purposes of the Loanback Rules should have been closer to CDN$927,500.[17]

Accordingly, our view is that the actual amount of any outstanding loans made by the Foundations was far less than what the Minister computed. Therefore, in accordance with subsection 118.1(16), the Loanback Rules should have applied only to such remaining unpaid amounts, not to the full amount of the loans initially made by the Foundations. This is consistent with the CRA's interpretation in document 2019-

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[14] CRA document 2009-0307941E5 - Back to back loans provisions.

[15] [redacted]

[16] [redacted]

[17] That is CDN$4.3 million less the Canadian dollar equivalents of the US$2.5 million repayment in 2013 and US$725,000 repayment in 2014 (approx. CDN$3,372,500). [redacted]

[redacted]

[redacted]

080187117 – Loanbacks, in which the CRA confirmed that the fair market value of a gift is reduced only by the *unpaid balance* of a loan at the time of the gift:

> In our view, subsections 118.1(16) and 110.1(6) of the Act apply to reduce the fair market value of a gift by a donor to a private foundation, by the *unpaid balance* at the time of the gift, of any loan advanced by the foundation to the donor (or to persons or partnerships who do not deal at arm's length with the donor) prior to the time of the gift pursuant to an agreement entered into in the 60 months prior to the time of the gift. [emphasis added]

In the present case, the computation of any liability of the Related Donors or the Foundations will be greatly reduced, since the vast majority of gifts made by the Related Donors took place after a significant amount of the loans had already been repaid. Again, this in turn directly affects the computation of the 5 percent penalty.

- **(5)(c) The Minister's Failure to Apply the Loanback Rules to the Earliest Taxation Years to which Such Rules Apply**

Finally, our view is that Minister erred in its application of the Loanback Rules by failing to apply any amounts loaned by the Foundations to gifts that were made within the 60 month period preceding the date of any amounts loaned to a Related Donor, on a "first in, first out" basis. The result of this error was that the Minister applied a larger loanback amount than it otherwise would have been permitted to apply in reducing the fair market value of gifts made by the Related Donors in the taxation years that have been reassessed. This in turn affected the calculation of the 5 percent penalty proposed against the Foundations.

Subsection 118.1(16) of the Act provides that the fair market value of a gift made at "any particular time" is to be reduced by the fair market value of amounts loaned back to the donor (or a non-arm's length person) from a donee, where there is an outstanding loanback amount within 60 months of the date of the gift (i.e. the "particular time").

Subsection 118.1(17) provides for an ordering rule for the application of the Loanback Rules. In general, it provides that for the purpose of applying subsection 118.1(16) to determine the fair market value of a gift, the fair market value of amounts loaned to the donor (or a non-arm's length person) is deemed to be that value otherwise determined minus any portion of it that has been applied to reduce the fair market value of another gift made before that time by the taxpayer.

In other words, subsection 118.1(17) applies so that the reduction of the value of a gift occurs on a "first in, first out"[18] basis.

Paragraph 110.1(1.1)(b) provides that deductions for gifts must be taken in the order in which they were made.

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[18] The same phrase is used in the Department of Finance's Technical Notes to subsection 118.1(17).

[redacted]

[redacted]

The Minister erred in failing to apply the Loanback Rules to the earliest taxation years to which the Loanback Rules should have applied.

In the case of FFF, any loans arose as early as January 13, 2012.[19] Therefore, the Minister should have first applied the Loanback Rules to reduce the fair market value of gifts made 60 months before January 13, 2012 (i.e. to gifts made by the Related Donors to FFF beginning on January 13, 2007). Instead, the Minister incorrectly applied the amount of loans made by FFF to reduce the value of gifts commencing as late as 2015.[20]

In the case of Mehaduras, such amounts arose as early as January 16, 2013.[21] Therefore, the Minister should have applied the Loanback Rules to reduce the fair market value of gifts made 60 months before January 16, 2013 (i.e. to gifts made by the Related Donors to Mehaduras beginning on January 16, 2008). Instead, the Minister incorrectly applied the loans made by Mehaduras to reduce the value of gifts commencing in 2013.[22]

The effect of these failures was that the amount of the loans by the Foundations (which, as submitted above, were already incorrectly computed) were vastly overstated during the years at issue (2013 onwards) because they were not initially reduced by the fair market value of gifts made by Related Donors in 2007 or 2008 onwards, respectively.

Subsections 118.1(16) and 118.1(17) are mandatory and do not provide the Minister with discretion as to their application. Subsection 118.1(16) clearly provides that the Loanback Rules apply to reduce the fair market value of gifts to a donee made as far back as 60 months from the date on which an amount was loaned from the donee to the donor.

Subsection 118.1(17) provides that the value of a loanback amount pursuant to subparagraph 118.1(16)(c)(ii) at any time is the value of that loanback amount otherwise determined, minus any portion of it that has been applied to reduce the fair market value of gifts made before that time. In other words, any loanback amount is reduced in successive years, beginning with the earliest applicable year in accordance with subsection 118.1(16).

Accordingly, the loans made by FFF as of 2015 should have been reduced by the aggregate fair market value of gifts made by the Related Donors beginning in 2007 onwards, and the loans made by Mehaduras as of 2013 should have been reduced by the aggregate fair market value of gifts made by the Related Donors beginning in 2008 onwards.

This result is obtained notwithstanding that some or all of the prior taxation years in which gifts were made by the Related Donors may have been statute-barred. The limitation period provided in subsection 152(4)(b)(vi) of the Act in relation to assessments under subsection 118.1(16) only precludes the Minister from issuing a notice of assessment to a taxpayer. It does not alter the fact that the Minister is required

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19 [redacted]

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[redacted]

[redacted]

under subsections 118.1(16) and 118.1(17) to reduce the fair market value of the amount of a loanback by the amounts applied against gifts made at a prior time.

This is consistent with the Minister's own published practices and interpretation. In CRA document 2016-063163117, the Minister took the position that it could modify the adjusted cost base of a capital property for a later transfer pricing adjustment, even if the year in which the property was acquired was statute-barred. The Minister's reason was that "[a] modification to the adjusted cost base of a capital property does not necessarily lead to an assessment under Part I for the year of acquisition." Similarly, in CRA document, 2002-0157005, the Minister adjusted the taxpayer's RDTOH in a statute-barred year for the purposes of denying a dividend refund in a non-statute barred year.

The case law has also long held that the Minister can make changes to balances arising in statute-barred years, even if it may not reassess such years. For instance, in *New St. James*,[23] the taxpayer's 1955 taxation year was statute barred, but the Minister considered that certain amounts should have been capitalized rather than currently deducted and adjusted the loss carry forward balance which the taxpayer sought to apply in subsequent open taxation years. See also *Clibetre*,[24] where the taxpayer claimed non-capital losses from its mining business for the taxation years 1980 through 1995. In 1996, it had income and carried forward its non-capital losses from 1989 to 1995. However, there were insufficient non-capital losses in those years to offset the 1996 income. The taxpayer requested that the expenses that created the non-capital losses for the years 1980 through 1995 be characterized as Canadian exploration expenses. The Federal Court of Appeal found that there was no statutory bar to the requested recharacterization, because the taxable income and tax payable would be nil whether the expenses were treated as deductions from income resulting in a non-capital loss or as Canadian exploration expenses.

Similarly, the Tax Court in *Lussier* has also expressed that a statute-barred year does not prevent the Minister from fixing the cost of an asset in a statute-barred year for a later capital cost allowance claim.[25] Finally, in *Okafor*,[26] the Minister denied a donation carry-forward from a statute-barred year that was applied in a non-statute barred year.

Here, there will be no adjustment under Part I of the Act in connection with any statute-barred years, but this does not alter the fact that any loanback amounts must be first applied against gifts made in earlier years.

III. CONCLUSION

In summary, we believe there are several reasons why the Minister should consider withdrawing its proposal to impose a 5 percent penalty against the Foundations in respect of any non-compliance resulting from the application of the Loanback Rules:

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[23] *New St. James Ltd. v MNR* [1966] Ex CR 977 (Exchq Ct).

[24] *Clibetre Exploration Ltd. v R* (2003 FCA 16) at para 6.

[25] *Lussier v R*, [1998] 2 CTC 2794 at para 15.

[26] *Okafor v The Queen*, 2018 TCC 31 at para 23.

[redacted]

[redacted]

- The non-imposition of financial penalties is fair, appropriate, and consistent with the Minister's published guidelines;
- The Foundations were first time offenders of the Loanback Rules and their actions and audit history demonstrates a desire to comply with the charities rules;
- The loans made by the Foundations were made entirely in good faith, not with the intention of taking advantage of the charitable donation rules, and the Foundations were ultimately enriched by the donations and the Related Donors ultimately impoverished;
- The Foundations and the Related Donors have a considerable history of charitable activities that should be recognized with leniency rather than harshness; and
- The imposition of financial penalties is premature and inappropriate in light of our positions that (i) the Foundations' non-compliance does not amount to "serious non-compliance" as contemplated by the CRA's guidelines and (ii) the Minister has made errors in the interpretation and the application of the Loanback Rules, the result of which may directly affect the amount of the 5 percent penalty.

Our view is that the issuance of an education letter is the most appropriate and proportionate response to any non-compliance that may have resulted from the application of the Loanback Rules. Therefore, we kindly ask the Minister to consider this request.

We look forward to hearing from you.

Your truly,

[redacted]

Enclosures

[redacted]

EXHIBIT "A"

TABLE OF HISTORICAL DONATIONS

THE MEHADURAS FRIEDMAN FOUNDATION
DONATION RECEIVED FROM
RELATED PARTIES

[redacted]

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	TOTAL
						500,000		118,000	352,990	494,550		154,485					**1,620,025**
	100,000				50,000		386,628	1,090,000	386,877	149,455	400,000	411,130	210,450	455,700	614,960	1,519,440	**5,774,640**
150,000	100,000		100,000		100,000	100,000	50,000	150,000	50,000	115,000		200,000	135,000	305,000	150,000	50,000	**1,755,000**
100,000	235,500	560,000	130,000	406,350	113,400		138,081	236,000	411,960	395,640	475,000	540,698	470,900	831,025	532,480	1,500,000	**7,877,034**
20,000	300,000	400,000	250,000	250,000		50,000	100,000		100,000	300,000	150,000	200,000		250,000		350,000	**2,720,000**
							25,000				7,000						**32,000**
																36,360	**36,360**
50,000	157,000	280,000	45,500	100,000	325,000	300,000	250,000	200,000			50,000		100,000	80,000	150,000	100,000	**2,187,500**
									50,000						50,000		**100,000**
																162,325	**162,325**
175,000		100,000					275,000	150,000	50,000	75,000	50,000	150,000	175,000		100,000	325,000	**1,625,000**
25,000	120,890	105,000	130,000	166,100	170,100	250,000	287,209	442,500	1,349,688	247,275	300,000	180,233	474,935	350,000	100,000	64,930	**4,763,866**
158,000	392,500	140,000	65,000	116,100	113,400		307,558	59,000	102,990		225,000		393,288	250,000			**2,322,836**
	85,000	50,000	75,000		50,000		45,000			50,000	75,000			50,000		150,000	**630,000**
	7,000							100,000			77,000		165,675		300,000	150,000	**789,675**
				58,000								6,694					**64,694**
	125,600		65,000	58,000	226,800	100,000	303,779		205,980						432,480	162,325	**1,679,964**
678,000	**1,623,490**	**1,635,000**	**880,500**	**1,154,550**	**1,148,700**	**1,300,000**	**2,168,255**	**2,545,500**	**3,060,485**	**1,826,920**	**1,800,000**	**1,843,240**	**2,125,248**	**2,571,725**	**2,429,920**	**4,570,380**	**33,350,913**

THE FRIEDMAN FAIMLY FOUNDATION
DONATION RECEIVED FROM
RELATED PARTIES

[redacted]

1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	TOTAL
100,000								550,000			354,985								**1,004,985**
		75,000						105,395		606,745	100,000	100,000	250,000	200,000	254,155	250,000	600,000	800,000	**3,341,295**
140,000	200,000	100,000		100,000			100,000	100,000	50,000	50,000	50,000	25,000	50,000		100,000	140,000	400,000	100,000	**1,705,000**
200,000	222,000	250,000		145,370	230,580	400,000	114,020	110,790		122,757	157,478	103,860	50,000			122,970	396,630	931,996	**3,558,451**
90,000	105,000	25,000		50,000	100,000	300,000	100,000	25,000		450,000	100,000	25,000	100,000	10,000		200,000	600,000	350,000	**2,630,000**
350,000	200,000	160,000		60,000	100,000	100,000	175,000	250,000	200,000	200,000			51,570		50,000	80,000	150,000	100,000	**2,226,570**
											50,000						50,000		**100,000**
																		279,981	**279,981**
																6,000	7,000		**13,000**
290,000	300,000	50,000				100,000	75,000	50,000	175,000		359,970	175,000	75,000		150,000	125,000	300,000	325,000	**2,549,970**
120,000	132,000	38,500			75,000	185,610	57,010	250,000	245,000	101,402		1,175,090		200,000	104,155	184,455	350,000	100,000	**3,298,222**
167,500	99,000	127,400		79,954	25,000	50,000		50,000	80,000	163,431	104,985		76,570			200,000	263,582		**1,487,422**
110,000	73,000				25,000		25,000		25,000			50,000		80,000	75,000			100,000	**563,000**
													25,392			200,000	300,000	150,000	**675,392**
287,500		250,000						210,790	200,000	156,745							150,000	277,985	**1,533,020**
1,855,000	**1,311,000**	**1,076,900**		**435,324**	**555,580**	**1,135,610**	**646,030**	**1,781,975**	**975,000**	**1,851,080**	**1,277,418**	**1,653,950**	**678,532**	**490,000**	**733,310**	**1,508,425**	**3,867,212**	**3,514,962**	**24,966,308**