

Section 248(30) to (41): Interpretation**GIFTS AND CONTRIBUTIONS**

At common law, it is generally the view that a gift includes only a property transferred voluntarily, without any contractual obligation and with no advantage of a material character returned to the transferor.

In contrast, under section 1806 of the *Civil Code of Quebec* ("CCQ"), a gift in Quebec is a contract by which ownership of property is transferred by gratuitous title. However, the rights of ownership may be separated, such that it may be possible for a transferor to transfer part of the rights of ownership without any material advantage returned (i.e., by way of gift) and to transfer the other part separately for consideration. It is therefore possible, in Quebec, to sell a property to a charity at a price below fair market value, resulting in a gift of the difference.

Under both the common law and the CCQ, it is generally accepted that a transfer of property is not a gift unless the donor is impoverished by the transfer to the benefit of the donee and it is the donor's intention to enrich the donee without consideration.

At common law there is generally no ability to separate the rights of ownership of a single property in the course of making a gift. As such, at common law a contract to dispose of a property to a charity at a price below fair market value would not generally be considered to include a gift.

Nevertheless, there have been certain decisions made under the common law where it has been found that a transfer of property to a charity was made partly in consideration for services and partly as a gift.

Subsections 248(30), (31) and (32) are added to the Act to clarify the circumstances under which taxpayers and donees may be eligible for tax benefits available under the Act in respect of the impoverishment of a taxpayer in favour of a donee. In addition to the clarification provided by these new rules, on December 24, 2002, the Canada Customs and Revenue Agency released guidelines (*Income Tax Technical News No. 26*) that describe how it will apply the new rules to various situations and fundraising methods commonly used in the charitable sector. Subsection 248(34) provides technical rules regarding the repayment of debt that previously reduced the eligible amount of a gift. Subsections 248(35) to (39) provide technical rules, regarding the eligible amount of a gift or the value of property transferred and benefits receivable, that apply in calculating the eligible amount of a gift or political contribution. New subsection (40) requires a qualified donee to inquire of a donor as to the existence of certain information that the donee would require in order to determine the eligible amount to report on a receipt, if the value of the gift exceeds \$5,000. New subsection (41) deems the eligible amount of a gift to be nil if a donor fails to provide that information.

In general, these provisions are intended to reflect the policy that the amount eligible for an income tax benefit to a donor, by way of a charitable donation deduction or credit or a political contributions tax credit, should reflect the economic impact on the donor (before considering the income tax benefit) of the gift or contribution.

SUBSECTION 248(30) — INTENTION TO GIVE

For the transfer of property to qualify as a gift, it is necessary that the transfer be voluntary and with the intention to make a gift. At common law, where the transferor of the property has received any form of consideration or benefit, it is generally presumed that such an intention is not present. New subsection 248(30) of the Act, which applies in respect of transfers of property after December 20, 2002 to qualified donees (such as registered charities), allows the opportunity to rebut this presumption. New paragraph 248(30)(a) provides that the existence of an amount of an advantage to the transferor will not necessarily disqualify the transfer from being a gift if the amount of the advantage does not exceed 80% of the fair market value of the transferred property.

EXAMPLE

Mr. Short transfers land and a building with a fair market value of \$300,000 to a registered charity. The charity assumes liability for an outstanding \$100,000 mortgage on the property. The assumption of the mortgage by the charity does not necessarily disqualify the transfer from being a gift for the purposes of the Act.

If the value of the mortgage is equal to the outstanding amount (e.g., the interest rate and terms and conditions are representative of current market conditions), the eligible amount of the gift, in respect of which Mr. Short may be entitled to a tax credit under subsection 118.1(3), is \$200,000.

If the amount of an advantage in respect of a transfer of property exceeds 80% of the fair market value of the transferred property, new paragraph 248(30)(b) provides that the transfer will not necessarily be disqualified from being a gift if the transferor can establish to the satisfaction of the Minister of National Revenue that the transfer was made with the intention to make a gift.

In the above example, if the amount of the mortgage outstanding had been greater than \$240,000, Mr. Short (or the charity on Mr. Short's behalf) could apply to the Minister of National Revenue for a determination as to whether the transfer was made with the intention to make a gift.

It is generally accepted that the tax benefit available to a taxpayer, by way of a charitable donation deduction or credit, is not considered an advantage or benefit that would reflect a lack of donative intent on the part of a taxpayer. However, there may be circumstances where the intention of a taxpayer to make a gift is in doubt because of the combination of tax and other benefits to the taxpayer. If the primary motivation of a taxpayer for entering into a transaction or series of transactions is to return a profit to the taxpayer by way of a combination of tax and other benefits, the taxpayer may not be impoverished by the transfer of a property to a charity. Subsection 248(30) is not intended to allow a taxpayer to profit by the making of a gift.

SUBSECTION 248(31) — ELIGIBLE AMOUNT OF GIFT OR MONETARY CONTRIBUTION

New subsection 248(31) of the Act, which applies in respect of gifts and political contributions made after December 20, 2002, defines the eligible amount of a gift or contribution as the amount by which the fair market value of the property that is the subject of the gift or contribution exceeds the amount of the advantage, if any, in respect of the gift or contribution. Subsection 248(31) is added concurrently with amendments to subsections 110.1(1) and 118.1(1) of the Act, which describe the types of gifts in respect of which an eligible amount will qualify for a deduction (for corporations) or a tax credit (for individuals). The amount of the advantage in respect of a gift or contribution is described in new subsection 248(32) of the Act.

It is proposed that subsections 3501(1), (1.1) and (6) of the Regulations be amended to provide that official receipts issued by a registered organization in respect of a gift made after December 20, 2002 contain, in addition to the information already prescribed, the eligible amount of the gift.

SUBSECTION 248(32) — AMOUNT OF ADVANTAGE

New subsection 248(32), which generally applies in respect of gifts or political contributions made after December 20, 2002, describes the amount of an advantage in respect of a gift or contribution as, in general, the total value of all property, services, compensation or other benefits to which the donor of a property is entitled.

Subsection 248(32) is added concurrently with the addition of subsection 248(31) of the Act, which defines the eligible amount of a gift or contribution, and with the amendment of subsection 127(3) of the Act in respect of contributions to a political party. The amount of an advantage reduces the eligible amount of a gift or contribution.

In general, new subsection 248(32) is intended to apply in respect of any transaction or series of transactions having either the purpose or the effect of reducing the economic impact to a donor of a gift or contribution. This includes, for instance, situations where a charity invests funds or acquires property in a manner that benefits the donor. The reduction to an eligible amount also includes an

advantage that is partial consideration for, or in gratitude for, the gift or contribution, or is in any way related to the gift or contribution. An example would include the option of a donor to satisfy or pay a loan by assigning or transferring to another person a property (including the rights under an insurance policy) that has less economic value than the amount of loan outstanding. Another example would include an assumption of a donor's risk by a charity, where the acquisition, directly or indirectly, of an interest in a property of the donor by the charity may have the effect of reducing the potential loss of the donor from that investment. (However, a tax credit or deduction resulting from a charitable donation is not considered a benefit.)

An advantage may exist even though it is not received at the time of the gift or contribution. For example, it may have been received prior to the time of the gift or may be contingent or receivable in the future. The advantage may accrue either to the donor or to a person not dealing at arm's length with the donor. It is not necessary that the advantage be receivable from the donee.

Paragraph 248(32)(b) includes as an advantage any limited-recourse debt in respect of the gift or contribution. For additional details regarding limited-recourse debt, see the commentary to new subsection 143.2(6.1) of the Act.

It is proposed that subsections 2000(1) and (6) and 3501(1), (1.1) and (6) of the Regulations be amended to provide that official receipts issued by a registered organization or political party in respect of a gift or contribution contain, in addition to the information already prescribed, the eligible amount and the amount of the advantage, if any, in respect of the gift or contribution.

SUBSECTION 248(33) — COST OF PROPERTY ACQUIRED BY DONOR

New subsection 248(33) of the Act, which applies in respect of gifts or political contributions made after December 20, 2002, provides that the cost to a taxpayer of property acquired by the taxpayer in the course of the making of a gift or contribution by the taxpayer is the fair market value of the property at the time of the making of the gift or contribution. The fair market value of such a property is relevant in computing the amount of the advantage in respect of the gift or contribution under subsection 248(32).

SUBSECTION 248(34) — REPAYMENT OF LIMITED RECOURSE DEBT

New subsection 248(34) of the Act, which applies in respect of gifts or political contributions made after February 18, 2003, generally provides that a repayment of the principal amount of a limited-recourse debt in respect of a gift or political contribution is deemed to be a gift in the year it is paid. However, in some circumstances the total amount of limited-recourse debt and other advantages to the donor may exceed the fair market value of the property transferred to a charity, resulting in no eligible amount to the donor under subsection 248(31) of the Act. In this case, the donor must pay off the excess amount before any amount will be allowed as a gift. Also, a payment financed by other limited-recourse debt or made by way of assignment or transfer of a guarantee, security or similar indemnity or covenant is not recognized for these purposes. For example, the assumption of a taxpayer's limited-recourse debt by another person, in exchange for an insurance policy in favour of the taxpayer that guarantees a particular rate of return on an investment held by any person, would not qualify as a deemed gift under subsection 248(34).

SUBSECTION 248(35) — DEEMED FAIR MARKET VALUE

New subsection 248(35) of the Act, which applies in respect of gifts made after 6:00 p.m. (EST), December 5, 2003, provides that the fair market value of a property that is the subject of a gift is, for the purposes of determining the eligible amount of a gift under subsection 248(31), deemed to be the lesser of the actual fair market value of the property and its cost to the donor. This rule applies if the property was acquired by the donor as part of a gifting arrangement that is a tax shelter. For more information on gifting arrangements, refer to the commentary for subsection 237.1(1) of the Act.

Unless the donation is made as a consequence of the donor's death, this rule also applies if the property was acquired

- less than three years before the time of donation, or
- less than 10 years before that time, if one of the main purposes of acquisition was to gift the property to a qualified donee.

SUBSECTION 248(36) — NON-ARM'S LENGTH TRANSACTIONS

New subsection 248(36) of the Act applies in conjunction with subsection 248(35), to “look-back” to discern whether a donated property was previously acquired by a person dealing non-arm's length with the donor. If subsection 248(35) applies because the donor acquired the property within the three years of donation, then if a non-arm's length person owned that property within that three-year period, the value of the gift to the donor will be the lower of the taxpayer's cost and the lowest cost to any such non-arm's length person.

Similarly, the rule will apply if subsection (35) applies because the taxpayer acquired the property within the last ten years and one of the main reasons of the acquisition was to gift the property, if a non-arm's length person acquired that property within that ten-year period.

Subsection 248(36) applies to gifts made on or after July 18, 2005.

SUBSECTION 248(37) — NON-APPLICATION OF SUBSECTION (35)

New subsection 248(37) of the Act provides exceptions to the application of subsection 248(35) of the Act where the property that is the subject of a gift is an ecological gift, inventory, real property situated in Canada, publicly-traded securities or cultural property, the value of which is certified by the *Cultural Property Export Review Board*.

In some circumstances, a shareholder might transfer a property to a controlled corporation in exchange for shares issued by the corporation, and then donate the shares. Alternatively, the corporation might donate the property it received. If subsection 248(35) would not have applied to a gift of a property by a shareholder, either because it is a type of property referred to above or because subsection 248(35) would not apply to the shareholder in any event, and if the shareholder donates the share, subsection 248(37) will further exempt the share from the application of subsection 248(35). If subsections 85(1) or 85(2) of the Act applied to the transfer of such an exempt property to the corporation, then subsection 248(37) will preclude the application of subsection 248(35) to that property if it is then donated by the corporation.

SUBSECTION 248(38) — ARTIFICIAL TRANSACTIONS

New subsection 248(38) of the Act applies in respect of gifts made after 6:00 p.m. (EST), December 5, 2003, to prevent a donor from avoiding the application of subsection 248(35) by disposing and reacquiring a property before donating it to a qualified donee. If this is the purpose of any transaction or series of transactions that includes a disposition or acquisition of a property, for such gifts made before July 18, 2005, the cost of the property to the donor for the purpose of subsection 248(35) is deemed to be the lowest cost incurred by the taxpayer at any time to acquire that property or an identical property.

For gifts made on or after July 18, 2005, the eligible amount is deemed to be nil if a transaction or series of transactions

- has, as one of its purposes, the avoidance of the application of subsection 248(35), or
- would otherwise result in a tax benefit to which the General Anti-Avoidance Rule in subsection 245(2) would otherwise apply.

For example, the eligible amount of a gift resulting from a transaction or series to which subsection 248(38) would apply, if the gift were made before July 18, 2005, would be deemed to be nil if instead the gift were made on or on or after July 18, 2005.

The objectives of the provisions in the Act related to gifting are generally described above under the

heading "Gifts and Contributions", but are not limited to that description.

SUBSECTION 248(39) — SUBSTANTIVE GIFT

New subsection 248(39) of the Act, which applies in respect of gifts made after February 26, 2004, prevents a donor from avoiding the application of subsection 248(35) by disposing a property (the "substantive gift") to a qualified donee and donating the proceeds, rather than donating the property itself. The provision applies similarly in respect of political contributions. The fair market value of the gift or contribution of the proceeds, for the purpose of determining its eligible amount under subsection 248(31), is deemed to be the lesser of the fair market value of the property sold and its cost. Subsection 248(39) does not apply if subsection 248(35) would not have applied to a gift by the taxpayer of that property.

SUBSECTION 248(40) — REASONABLE INQUIRY

New subsection 248(40) of the Act, which applies in respect of gifts and monetary contributions made after 2005, requires a person issuing a receipt for tax purposes, with a stated eligible amount in excess of \$5,000, to inquire as to whether certain circumstances exist that would result in an eligible amount being reported on the receipt that is less than the fair market value of the property (determined without reference to the Act). In particular, such information would include that relevant to the application of subsections 248(31), (35), (36), (38) or (39) of the Act. This would include, for example

- the existence of an amount of an advantage in respect of a gift of property or a contribution, including any limited recourse debt as defined under subsection 143.2(6.1) of the Act;
- whether a gifted property was acquired in the context of a tax shelter;
- whether a gifted property was acquired by the donor in the last three years and, if so, the lowest cost to the donor and to any person dealing non-arm's length with the donor who acquired the property at any time in the last three years; or
- if not acquired in the last three years, whether the gifted property was acquired by the donor in the last ten years mainly for the purpose of making a gift and, if so, the lowest cost to the donor and to any person dealing non-arm's length with the donor who acquired the property at any time in the last ten years.

However, a donee need not enquire as to whether the donor will be electing under subsection 110.1(3) or 118.1(6) to reduce amount reported as the fair market value of the gift.

For more information, refer to the commentary for subsections 110.1(3), 118.1(6), 143.2(6.1) and 248(31), (35), (36), (38) and (39).

SUBSECTION 248(41) — INFORMATION NOT PROVIDED

New subsection 248(41) of the Act, which applies in respect of gifts and monetary contributions made after 2005, provides that the eligible amount of a gift is nil if, before an official charitable receipt is issued by a donee, the donor fails to inform the donee of information that would be relevant to the application of subsections 248(31), (35), (36), (38) or (39) of the Act. The donee requires such information for correct the preparation of the receipt. For more information, refer to the commentary for those provisions and subsection 248(40).