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Corporate Tax Centre - In this article Vern Krishna discusses the definition of "gifts" for tax purposes in the wake of the SCC Guindon decision, and gives some examples of what would qualify in the eyes of the CRA as a gift.

The Meaning of Gift for Tax Purposes (Vern Krishna)

Date: August 17, 2015

The Canada Revenue Agency's victory in *Guindon,* 2015 SCC 41, which upheld penalties of $546,747 under section 163.2 of the *Income Tax Act* is a warning to tax advisors who opine on tax planning arrangements, such as gifts to registered charities. The potential penalties are larger than they would be in most criminal cases, but without the legal protection of the Charter or Rights.

The *Income Tax Act* does not define the term "gift" for tax purposes. At common law, a gift is the voluntary transfer of property from a donor to a donee for which the donor receives no benefit or consideration, and is a transfer without expectation of economic reward or material return. The donor must impoverish himself or herself by the transfer. Thus, the essence of a gift is a transfer motivated by detached and disinterested generosity.

The four key elements of a "gift" are as follows:

a) The donor must own the gifted property;

b) The donor must transfer the property voluntarily;

c) No consideration can flow to the donor in return for the gift; and

d) The subject of the gift must be property, and not services.

The overarching consideration is that the taxpayer must have an intention to donate the property to the charity. Intention to donate depends upon the facts of the arrangement, and is intrinsic to the notion that the transfer of the property must impoverish the donor.

In *Burns*, for example, the taxpayer's payments to the Canadian Ski Association were not gifts, but were made to secure "a material advantage" for the taxpayer; namely, to train his daughter as a skier. The court said:

> The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the donee without receiving any such compensation.

The concepts of "impoverishment" and "donative intent" are closely linked. There is an element of impoverishment, which

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must be present for a transaction to be characterized as a gift. Whether this is expressed as an *animus donandi*, a charitable intent or an absence of consideration the core element remains the same. However, recent amendments to the *Income Tax Act* have changed the “impoverishment rule” to permit tax credits where the donor obtains partial value in exchange.

A gift for tax purposes must involve the transfer of “something known to law as property”; that is, something within the usual meaning of the term. “Property” does not include the supply of services without compensation.

Subject to the recent amendments, the requirement that the donor not receive material advantage does not preclude an individual from obtaining a tax credit in exchange for his or her donation. The fundamental purpose and policy of the credit is to provide a material cash incentive to donate to worthy causes. Hence, the tax advantage that the donor receives from his gift is not normally considered a “benefit”, for to do so would render the charitable donations deductions unavailable to many donors. However, a donor’s expectations that the donee will use his or her donation in a particular manner do not negate the character of the donation as a gift.

For example, an individual who donates art and jewelry to a charity will be considered to have the requisite donative intent, even though her primary motivation is to receive a tax advantage. The tax advantage is not a disqualifying benefit.

However, although an individual is entitled to take advantage of the tax credit, the magnitude of economic material benefit from the donation itself can sometimes suggest the absence of donative intent. The anticipation of substantial material benefit can invalidate a donation, even where the donor is under no legal obligation to contribute.

The CRA is increasingly aggressive with charitable donations to determine whether individuals are making genuine gifts, or merely seeking inflated tax breaks that go with them. *Guindon* changes the ground rules of the game for lawyers who give tax opinions. We can expect the CRA to step up their review of charities and those who advise them.

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