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Tax Notes

July 2010
Number 570

Estate Cases Raise Taxing Issues

This article discusses a couple of recent cases – both involving estates – that raise interesting tax-related issues. The first illustrates the insidious effect that "boilerplate" provisions in a will can have on qualifying spouse trust status. The second shows that while the attribution rules relating to spousal transfers stipulate that the transferor-spouse must report the gain on a subsequent disposition, this does not necessarily mean that spouse is contractually responsible to *defray* the taxes.

Balaz – Rectification of a Spouse Trust Will

The first case, *Balaz*,[1] involves a rectification order to a will in which a number of so-called boilerplate provisions were deleted; the objective being to create a qualifying spouse trust so as to permit a rollover of assets into the trust.

Besides the requirement that during his or her lifetime, the spouse must be entitled to all of the income of the trust, another key requirement for qualifying spouse trust status is that no person other than the spouse may, before the spouse's death, receive or otherwise obtain the use of any of the income or capital of the trust.

As it relates to boilerplate provisions in a will, this requirement is discussed in Chapter 8 of our book, *Tax and Family Business Succession Planning*,[2] as follows:

> As the "no use" requirement must presumably be met under the terms of the trust, appropriate language should be inserted in the document. It therefore appears to be advisable to examine closely the powers given to trustees in a spouse trust in order to make sure . . . that the "boilerplate" does not trip over the "no use" requirement, e.g., by providing for a power to lend on any terms they see fit.[3]

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Another example of boilerplate which could be problematic relates to provisions allowing the use of real estate, such as a home or vacation property, on non-commercial terms.[4]

Both of these provisions were the subject of the *Balaz* rectification order.[5] The order also struck out a third provision which I found to be of interest: a standard corporate boilerplate provision allowing the trustees to incorporate and transfer assets of the estate into the corporation on such terms as they consider advisable.[6] The rationale for striking this clause stems from the fact that a corporation is a separate person – and the no-use requirement is that no *person* other than the spouse may, before the spouse's death, receive or otherwise obtain the use of any of the income or capital of the trust.[7]

The rectification order was granted on the grounds that it was the intention of the testator to create a qualifying spouse trust so as to defer death tax exposure.[8] Interestingly, the CRA did not oppose the order.[9] It appears from the court proceedings that the issues emanated from the surviving spouse's tax advisor, rather than adverse proceedings on the part of the CRA.

I am not aware of the CRA taking the position that a provision allowing the estate to form a corporation and transfer property thereto on such terms as the trustee see fit disqualifies spouse trust status.[10] However, what is becoming increasingly obvious is that, from a technical standpoint, it is surprisingly easy to trip over the "no-use" requirement. As another example, as discussed in Chapter 8 of our book, Question 14 of the 2008 APFF Round Table[11] may suggest that a spouse trust should contain a non-assignability clause.

TAX NOTES

Published monthly by CCH Canadian Limited. For subscription information, see your CCH Account Manager or call 1-800-268-4522 or (416) 224-2248 (Toronto).

For CCH Canadian Limited

ROBERT SPENCELEY, Editor
(416) 224-2224, ext. 6279
e-mail: Robert.Spenceley@wolterskluwer.com

ROBIN MACKIE, Director of Editorial
Tax, Accounting and Financial Planning
(416) 228-6135
e-mail: Robin.Mackie@wolterskluwer.com

MATTHEW BISWAS, Marketing Manager
(416) 224-2224, ext. 6496
e-mail: Matthew.Biswas@wolterskluwer.com

PUBLICATIONS MAIL AGREEMENT NO. 40064546
RETURN UNDELIVERABLE CANADIAN ADDRESSES TO
CIRCULATION DEPT.
330–123 MAIN ST
TORONTO ON M5W 1A1
email circdept@publisher.com

Zeitler – The Attribution Rules Apply, But Who Pays the Tax?

The second case, *Zeitler*,[12] was recently decided by the British Columbia Court of Appeal and dealt with the spousal attribution rules, which generally require the *transferor-spouse* to pay the tax on a subsequent disposition of a transferred property.[13] The *Zeitler* case dealt with whether, in spite of the attribution rules, there was an implied term in the transfer agreement in question that the *transferee-spouse* should defray the tax.

The case involved a wife's purchase of two rental properties in the mid-1980s. A couple of years after the purchase, the properties were transferred to the husband for fair market value consideration.[14] After the transfer, the wife had no further involvement with the properties. The husband passed away intestate, such that the husband's children would be entitled to most of the estate, but under the attribution rules, the wife would have to pay tax on a deemed disposition of the property, arising from the husband's death.[15]

The Court held that the operation of the attribution rules so as to tax the gain in the hands of the wife (i.e., transferor-spouse) was not determinative as to whether there was a *contractual* obligation for the transferee-spouse to defray these taxes.[16]

The Court further held that there was an implied term in the transfer agreement between the spouses that the husband – now his estate – would pay the taxes on a subsequent disposition. Although a court should be reluctant to rewrite contracts, cases indicate that this can be done based on the *presumed intention* of the parties where the implied term must be necessary to give business efficacy to a contract.[17] The judgment indicates that it seems to be "obvious that, if asked at the time they formed the contract which of them was to be responsible for the tax, both parties would have said that Mr. Zeitler would be responsible. He acquired both the legal and the beneficial interest in the property. He was entitled to the gain for his sole use."[18]

These sorts of issues might arise, for example, on a second marriage for both spouses. Suppose that the husband and wife's assets are each to be left to children of their first marriages. However, the husband agrees to fund the purchase of a luxury vacation property to be owned by the wife – and to be left to her children.[19] If the wife were to predecease the husband,[20] the husband may assert that, based on *Zeitler*, there is an implied term that the wife's estate, i.e., the children from her first marriage, should pay the taxes on the deemed disposition of the vacation property.

But when should there be such an implied term?[21] In the *Zeitler* case itself, it appears that the transfer price was at or near the cost of the properties, so that the implied obligation of the transferee-spouse to pay tax in respect of the transferred properties did not have to take into account deferred tax liability existing at the time of the transfer. Suppose, however, that this was not the case – i.e., there *was* deferred tax exposure at the time of the transfer. Should there still be an implied term? Does this depend on the magnitude of the deferred tax exposure relative to the total tax? Should the implied term relate only to post-transfer appreciation?

While it may be said that the *Zeitler* case could add some uncertainty as to who must pay the tax when the attribution rules apply, the situations in which this may actually be in dispute may be fairly limited, in view of the fact that specific rules apply when spouses separate.[22]

– David Louis, tax partner, Minden Gross LLP, a member of MERITAS law firms worldwide. David's practice focuses on tax and estate planning for entrepreneurs and their corporations (dlouis@mindengross.com). *The author wishes to thank his tax partner at Minden Gross, Joan Jung, for originally pointing out these cases as well as her insights thereon.*

Notes:

[1] *Balaz v. Balaz, et al.*, 2009 CanLII 17973 (ON S.C.).

[2] By the author, Michael Goldberg, and Samantha Prasad, 2009 CCH Canadian Limited. See also "Spousal Trusts", by the authors of *Tax and Family Business Succession Planning*, in the August 2009 edition of TAX NOTES (No. 560).

[3] As pointed out in Chapter 8, Document No. 2003-0019235 (July 17, 2003) indicates that where the trust permits funds to be loaned (or any other form of assistance to be provided) to anyone other than the spouse for inadequate consideration, this would disqualify the trust, whether or not such a loan was actually made.

[4] Paragraph 16 of Interpretation Bulletin IT-305R4 sanctions the renting of real estate at market value or the lending of money on commercial terms (including market rates of interest, appropriate securities, and a reasonable repayment schedule).

[5] The real estate provision contained a clause allowing the trustees to lease real estate upon such terms, covenants, and conditions the trustees deemed appropriate, etc.

[6] The following is the wording of provision that was struck:

"At the expense of my estate to incorporate or cause to be incorporated alone or in conjunction with any person or persons one or more corporations (any portion of the outstanding shares of which may form part of my estate) under the laws of the Province of Ontario or any other jurisdiction, which corporation or corporation [*sic*] may have whatever objects and undertakings and continue or carry on any business or businesses that my Trustees in their absolute discretion consider to be in the best interest of my estate and the beneficiaries thereof, and my Trustees may in their absolute discretion at any time or times sell, convey or otherwise transfer any part or parts of my estate for the time being (including any business or businesses) to any such corporation at such prices and subject to such terms and conditions as my Trustees shall in their absolute discretion consider advisable and in consideration for any such sale, conveyance or transfer may accept as consideration securities (whether or not such securities have been issued by such corporation) or other real or personal property and any such consideration so received shall be an authorized investment under this Will."

[7] Should the concern be about whether a transfer to the corporation *per se* violates the no-use requirement – i.e., because another person has the use of the capital, or whether the power of the trustees to transfer assets from the estate *on such terms the trustees consider advisable* means that the consideration for the transfer could be on non-commercial terms and/or not fair market value? As pointed out previously, the CRA's position has been that the no-use requirement will be met if the use of real estate or a loan is at fair market value/commercial terms. Therefore, the latter concern seems to be more analogous to the CRA's position – e.g., the CRA has not taken the position that a loan or rental of real estate *per se* violates the no-use requirement. The rectification Endorsement itself alluded to the concern that the three provisions to be deleted could be construed as "conferring a benefit" to someone other than the surviving spouse [paragraph 5].

[8] The lawyer who drafted the will deposed that the provisions in question were included inadvertently in the Secondary Will, without the testator's knowledge or approval.

[9] It approved the form of the draft judgment submitted by the applicant.

[10] Paragraph 1 of the Endorsement indicates that, without the rectification of all three clauses in question, the CRA "would take the position that the Secondary Will did not create a valid spousal trust within the meaning of the *Income Tax Act*".

[11] Document No. 2008-0285071C6, October 10, 2008.

[12] *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216.

[13] See, in particular, section 74.2.

[14] Consisting of the assumption of liabilities and a promissory note for the difference.

[15] Subsection 74.5(1) provides that the attribution rules no longer apply if the property is transferred at fair market value and the parties elect to opt out of the spousal rollover in subsection 73(1). The Court of Appeal's judgment makes no reference to this provision.

[16] See paragraph 22. In paragraph 23, the Court indicated that the joint and several liability of the transferee for the transferor's tax under the attribution rules (per paragraph 160(1)(*d*)) was an "even stronger reason, as between the parties, for not visiting liability for the tax on Mrs. Zeitler".

[17] In this respect, the Court cited *Reigate v. Union Manufacturing (Ramsbottom)* [1918] 1 K.B. 592 at 605 (C.A.), where Scrutton L.J. said:

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'"

[18] Paragraph 35.

[19] In a second marriage scenario, it is possible that such a transfer could be subject to a formal agreement between the spouses so as to bring into consideration the case law on contracts as considered in *Zeitler*. In Ontario at least, it is also quite possible that the provisions of a marriage contract may be applicable, e.g., entered into in order to prevent the surviving spouse from opting for an equalization in *lieu* of the provisions of the will; for example, there could be a separate property regime.

[20] If the husband predeceases the wife, the attribution rules would cease to apply and the wife/wife's estate must pay tax on the gain.

[21] Paragraph 37 of the judgment indicates: "I do not consider that the implied term I would find to be present in this case must be found to be present in every transfer of real property between spouses. Whether there is such an implied term will depend on the circumstances in each case."

[22] See subsection 74.5(3).

News Release Regarding TFSA Overcontributions

Reproduced below is a joint statement from the Department of Finance and the Canada Revenue Agency, dated June 25, 2010, concerning issues around overcontributions to TFSAs in 2009.

The Government of Canada would like to provide an update on the recent administrative concerns expressed by some Canadians regarding the Tax Free Savings Account (TFSA).

2009 was the first year of the program and the response to the TFSA has been overwhelmingly positive. Approximately 4.7 million Canadians have taken out a TFSA since the program was initiated.

Our government recognizes that there was some genuine confusion about the rules for the TFSA in the first year. We understand that it may take time for some Canadians to learn about the program and for some financial institutions to properly inform their clients about this product.

The Government of Canada confirms that for the 2009 filing year, the first year of the program, we have taken the decision to be as flexible as possible in cases where a genuine misunderstanding of the TFSA contribution rules occurred. Our intention is to review each situation on a case-by-case basis and, where appropriate, waive taxes on excess contributions for this year.

For instance, individuals who used their TFSA as a regular banking account in 2009, making deposits and withdrawals on a frequent basis, or who have transferred funds between TFSAs at different institutions, but whose net contributions never exceeded the 2009 limit of $5000, may not be required to pay the tax on excess contributions for this year.

Of the nearly 4.7 million Canadians who have a TFSA, less than 2% (70,000) have recently received a letter from the Canada Revenue Agency asking to provide further information about their accounts before June 30, 2010. We have decided to extend this deadline from June 30 to August 3, 2010, to allow ample time for Canadians to provide the necessary information about their accounts.

If you received a TFSA return letter:

- You are encouraged to respond to the CRA letter by providing additional information or explanations that you may have in respect of your over-contributions.
- If no additional information is provided or you do not contact the CRA, a notice of assessment will be issued. Only at that time should you use the request for taxpayer relief form or a formal notice of objection.

If you have questions about your TFSA, you are encouraged to contact the CRA at 1-800-959-8281 or visit our Web site at: www.cra-arc.gc.ca.

On its Web site, the CRA describes the package that it has sent to some TFSA holders, which includes a cover letter, form RC243, a transaction summary, and a self-addressed return envelope. An excerpt from this Web site is reproduced below.

TFSA Return explained

For each year where a TFSA holder is subject to one or more tax, they must file an RC243, Tax-Free Savings Account (TFSA) Return 20__, and remit any tax owing no later than June 30, following the calendar year for which the tax is payable.

If you are in a situation of excess contributions with respect to your TFSA (Excess TFSA amount), the CRA will mail a TFSA Return (a pre-populated and pre-calculated TFSA Return), which will inform you of the amount of tax owing on the excess TFSA amount.

The TFSA Return package will include the following:

- Cover letter – it advises you that based on information received from your financial institution(s), you are subject to tax on the excess TFSA amount for 2009. It explains what you have to do review the return and either agree or disagree with the calculations. If you disagree with any of the information provided by your financial institution(s), you are to contact them directly.
- RC243-P-E – *Tax-Free Savings Account (TFSA) Return 2009* – it is the TFSA return and indicates the applicable taxes.
- Transaction Summary – it shows your TFSA contributions and withdrawals to your TFSAs for 2009 as submitted by your financial institution(s).
- Self-addressed return envelope – it is provided to mail your return and payment, as applicable, back to the TFSA Processing Unit.

Note

A pre-populated Schedule A, Excess TFSA Amounts, and Schedule B, Non-resident contributions to a Tax-Free Savings Account (TFSA), are not being sent.

Basic process – after the return has been issued

You have until August 3 (previously June 30, see Minister's statement of June 25, 2010 [above]) to respond to the TFSA Return by either agreeing to pay the amount

indicated or by making changes to your TFSA Return and sending it back to the CRA.

If you sign and return the TFSA Return (including the payment) by August 3, we will assess your return based on the existing information and any new information or documentation which has been provided, by you and your financial institution(s), and issue a notice of assessment.

If you do not respond by August 3, we will assess your return based on the data available and issue a notice of assessment.

A late filing penalty as well as interest may be charged if the return is received after August 3 and the tax owing was not paid on time.

What should you do if you disagree?

If you disagree with your notice of assessment or reassessment, contact us for more information. If you still disagree, you can make a formal objection by sending a completed Form T400A, Objection – *Income Tax Act*, or a signed letter to the Chief of Appeals at your tax services office or tax centre on or before whichever of the following two dates is **later**:

- one year after the due date for the return; or
- 90 days after the date of the notice of assessment or notice of reassessment.

For more information, see Pamphlet P148, Resolving your Dispute: Objections and Appeals Rights Under the *Income Tax Act*.

Should taxpayers be filing the Fairness relief form or a Formal Notice of Objection?

No, you should not be filing the Fairness relief form or a Formal Notice of Objection. The return does not automatically mean that you will be subject to a tax. You may need to supply additional information and are encouraged to respond to the CRA letter by providing additional information or explanations that you may have in respect of your over-contributions.

The letter you received provides instructions on how to proceed.

If no additional information is provided or you do not contact the CRA, a notice of assessment will be issued. Only at that time should you use the Fairness relief form or a Formal Notice of Objection.

Revised Information Circulars

On June 25, 2010, the CRA released Information Circular IC 78-10R5, "Books and Records Retention/Destruction" and IC 05-1R1, "Electronic Record Keeping". These revised circulars cancel and replace IC 78-10R4, and IC 05-1, respectively, both dated June 2005. On June 16, 2010, the CRA posted an update to the attachment to Information Circular 84-3R5, "Gifts to Certain Charitable Organizations Outside Canada". The attachment sets out organizations outside Canada to which donations have been made by Her Majesty in right of Canada. Subparagraph 110.1(1)(*a*)(vii) and the definition of "total charitable gifts" in subsection 118.1(1) of the Act set out that a charitable donation for a corporation or an individual includes a gift to a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift in the taxation year or 12 months preceding the taxation year. These documents have been posted on CCH Tax PROTOS® and CCH's federal income tax News Tracker and will be reproduced on CCH Online and on DVD and in Volume 2 in print.

Technical News No. 42

The CRA released Technical News No. 42, dated May 31, 2010. It sets out the CRA's view on some of the issues arising from the adoption of International Financial Reporting Standards ("IFRS") by publicly accountable enterprises and those other corporations that choose to apply IFRS. Publicly accountable enterprises must use IFRS for financial reporting for fiscal years beginning on or after January 1, 2011. Since some corporations have adopted IFRS early, the CRA will accept early adoption of IFRS for years beginning on or after January 1, 2009. The Technical News notes, however, that the Superintendent of Financial Institutions has prohibited early adoption by all federally regulated financial institutions. The CRA is of the view that references to GAAP in the *Income Tax Act* or any CRA publication can be read as references to IFRS for those corporations that report under IFRS. While financial statements prepared using IFRS result in an acceptable starting point for the calculation of income for tax purposes, the CRA notes that if a taxpayer is not required to use IFRS for accounting purposes, there is no requirement to prepare financial statements using IFRS just for tax purposes. Technical News No. 42 states that the CRA does not expect that taxable income will be greatly affected by the switch to IFRS for financial reporting, but does set out some examples where reporting under IFRS could impact the Schedule 1 adjustments for corporate tax returns. These include revaluation of certain assets such as property, plant and equipment, intangible assets, and investment properties; revenue recognition; and inventory valuation. Technical News No. 42 has been posted on CCH Tax PROTOS and CCH's federal income tax News Tracker.

Recent Cases

Company was a personal services business – Disallowance of expenses justified

The individual taxpayer, N, and his former spouse were the sole shareholders of the corporate taxpayer 609309 Alberta Ltd. ("609309"). During 1993 and 1994, N was employed by Spantec Constructors Ltd. ("Spantec"). During 1998 and 1999, 609309 began providing Spantec with N's personal services as an employee of 609309. Spantec also paid N a living out allowance (the "LOA") to cover his expenses travelling from his home to Spantec's project site. The Minister denied 609309 some business expense deductions on the grounds that it was a "personal services business", and that those expenses were not incurred to earn income, but were N's personal or living expenses, and were not a reasonable amount. The Minister also refused N special worksite tax-free treatment under subsection 6(6) of the *Income Tax Act* for the LOA. Both taxpayers appealed to the Tax Court of Canada.

The taxpayers' appeals were dismissed. The personal services business issue required an analysis of whether N could reasonably be regarded as Spantec's employee but for the existence of 609309. In this context, the intention of the parties was neither helpful nor relevant. However, applying the other independent contractor criteria established in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (S.C.C.) and *Wiebe Door Services Ltd. v. M.N.R.* (87 DTC 5025) (F.C.A.), i.e., ownership of tools, opportunity for N to make a profit, and control, it was difficult to conclude that, apart from the existence of 609309, N was anything other than Spantec's employee. 609309, therefore, was a personal services business. Without adequate documentary evidence and explanatory testimony to prove that the expenses claimed by 609309 were actually incurred and related to its business, the Minister's disallowance of those expenses was justified. Finally, since N returned to his home almost every night, the expenses for which he received the LOA were not incurred for board and lodging at or near Spantec's special worksite at Joffre, Alberta. Therefore, the LOA did not qualify for exclusion from N's income under s. 6(6). The Minister's reassessments were affirmed accordingly.

609309 Alberta Ltd. et al., 2010 DTC 1136

Taxpayers' free education was a "qualifying educational program"

The taxpayers were enrolled as full-time post-graduate medical residents at McMaster University. They paid no tuition and McMaster University paid no tuition on their behalf. In reassessing the taxpayers for 2006, the Minister denied them the education and post-secondary textbook tax credits claimed, on the grounds that the program in which they were enrolled was not a "qualifying educational program" because the taxpayers derived a "benefit" by receiving instruction at no charge. The taxpayers appealed to the Tax Court of Canada.

The taxpayers' appeals were allowed. Subsection 118.6(1) of the *Income Tax Act* defines "qualifying educational program" to exclude a program if the student receives "any . . . benefit . . . in respect of the program . . .". In this context, "benefit" is intended by Parliament to mean an economic or material benefit that can be measured in monetary terms, rather than an intangible advantage. The free education the taxpayers received in this case involved no measurable monetary benefit for them. The program in which they were enrolled was, therefore, a "qualifying educational program", which entitled them to the credits claimed. The Minister was ordered to reassess accordingly.

Pan et al., 2010 DTC 1138

Taxpayer acquired properties with views to their rapid resale

On reassessment, the Minister treated the taxpayer's proceeds of disposition of three properties (the "Properties") in 2004 and 2005 as income, and disallowed the deduction of both capital cost allowance (the "CCA") and some related expenses. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. Applying the well-known capital versus income criteria, the proceeds of disposition of the Properties constituted income, since the taxpayer (a general contractor) had acquired them with a view to their rapid resale. The Minister's disallowance of the CCA claimed was therefore justified, since the Properties were inventory. The taxpayer's deduction of the expenses for the Properties could not be justified without proper documentary evidence.

Ayala, 2010 DTC 1148

Taxpayer could not deduct ABIL for funds advanced from joint account to company of which her husband was shareholder

In September 2001, the taxpayer deposited $95,000 in a joint bank account held between she and her husband. The taxpayer's husband then advanced these funds from that account to a Canadian-controlled private corporation, Ontario Institute of Information Technology Inc. ("OIIT"), of which he was a shareholder. OIIT stopped operating in 2003 when it became insolvent. On reassessment, the Minister disallowed the taxpayer's deduction of $95,000 as an allowable business investment loss ("ABIL") for 2004. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. OIIT was never indebted to the taxpayer so that she was not entitled to deduct the ABIL claimed. This conclusion was sufficient to dispose of the taxpayer's appeal. However, there were further reasons for disallowing the taxpayer's ABIL claim. The taxpayer did not acquire the $95,000 debt to earn income, the $95,000 did not become a bad debt in 2004 but in 2003, and by mid-2003, OIIT was no longer carrying on an active business and, therefore, in 2004, was not a "small

business corporation" as defined in s. 248(1) of the *Income Tax Act*. The Minister's reassessment was affirmed accordingly.

Charran, 2010 DTC 1151

Taxpayer not entitled to claim RRSP contribution twice

In 2005, the taxpayer received a retirement allowance of $29,261. He transferred $15,000 to his RRSP, claimed $11,409 as severance pay, and the remainder as source taxes of $2,852. In effect, he claimed RRSP contributions twice. He argued that he was entitled to deduct RRSP contributions twice because the Canada Revenue Agency had relied on incorrect sections of the *Income Tax Act* (the "Act") to confirm his reassessment. The Minister argued that while the confirmation referred to wrong sections, the reply contained the correct sections of the Act and the appeal moved forward on that basis.

The taxpayer's appeal was dismissed. The full amount of the retirement allowance at $29,261 was to be included as income, and the $15,000 RRSP deduction was allowed. Despite the incorrect provisions relied on in the notice of confirmation, the Minister argued the correct ones in the reply.

Greene, 2010 DTC 1152

Recent Technical Interpretations

Transfer of Latent Capital Losses Between Spouses

The CRA was asked whether the transfer of a latent capital loss between spouses is possible after the Supreme Court of Canada judgment in *Lipson v. The Queen*, 2009 DTC 5016, which upheld the CRA's application of the GAAR to a taxpayer's transaction where section 74.1 operated to attribute a loss back to the spouse who transferred shares to his spouse.

The taxpayer proposed a transfer of property at fair market value between spouses, and the spouses would "elect out" of the application of subsection 73(1) (transfer of property between spouses is at an adjusted cost base unless both parties "elect out"). The fair market value of the transferred property would be less than the vendor spouse's adjusted cost base in the property. In such a case, the superficial loss rules (in section 54, paragraph 40(2)(*g*) and paragraph 53(1)(*f*)) would deny of the availability of the capital loss to the vendor spouse and would add to the adjusted cost base of the acquiror spouse the amount of the loss on the property. The result is that the latent capital loss is not "lost" but is transferred from the vendor spouse to the acquiror spouse.

Before the Supreme Court's decision in *Lipson* the CRA stated in CRA Document No. 2003-00175075 "Transfer of capital losses" (May 27, 2003) that it accepts this type of tax planning.

In the present case, the CRA stated that, consistent with its previously published positions, this type of tax planning remains acceptable. The CRA noted that the type of tax planning described above can only occur when the attribution rules in subsection 74.2(1) (gain or loss remains that of the transferor) do not apply. Additionally, where a capital loss is transferred in a situation other than the one described above, the CRA would consider whether the general anti-avoidance rule in subsection 245(2) would apply.

Document No. 2009-0327081C6, October 9, 2009

Personal Versus Employment Travel

The CRA was asked whether certain travel by an employee using an employer-provided vehicle was a taxable benefit to the employee.

The employee used an employer-provided vehicle to report to an office location and to travel frequently to various predetermined school locations in a school district. The employee was also required to travel to various meetings and conferences throughout the province.

The CRA stated its long-standing position that travel between an employee's home and his/her regular place of employment is personal travel. Whether a particular location is a regular place of employment is a question of fact, and an employee may have more than one regular place of employment. In this case, the employer's office location and the school locations are places of business of the employer where the employee regularly reports for work. Accordingly, the use of the employer-provided vehicle to travel between the employee's home and these locations would be personal travel and the use of the employer's vehicle for this travel would give rise to a taxable benefit under section 6 of the Act.

In respect of the meeting and conference locations, it is a question of fact whether these are regular places of employment to the employee. If these meetings and conferences are not conducted at the employee's regular place of employment, the occasional and infrequent travel between these locations and the employee's home would not be considered personal travel.

Document No. 2009-0311091E5, April 15, 2010

Homebuyers' Plan – Withdrawal Limit

The CRA was asked whether a husband and wife may each withdraw up to $25,000 from their RRSPs under the Home Buyer's Plan ("HBP") (see section 146.01) to acquire a qualifying home.

The CRA stated that an amount may be withdrawn from an individual's RRSP to buy or build a qualifying home in accordance with the HBP. The CRA's general views on the HBP are found in Guide RC4135, "Home Buyer's Plan".

Under the HBP, an individual is permitted to make a single withdrawal or multiple withdrawals from his/her RRSP, subject to the withdrawal limit. For 2009 and later years, the withdrawal limit is $25,000. Therefore, if an indi-

vidual buys a qualifying house with his/her spouse, each may withdraw up to $25,000 from their RRSPs for a combined amount of $50,000.

Document No. 2009-0348001E5, April 7, 2010

Subsection 164(6) Election

The CRA was asked whether an estate was eligible to make a subsection 164(6) election (to carry back losses to the deceased's terminal return). Further, the CRA was asked whether the estate was eligible to make a subsection 107(2.001) election (no rollover pursuant to subsection 107(2)) and whether the stop-loss rules in subsections 40(3.3) and (3.4) would apply.

The taxpayer passed away and certain of her assets were distributed to her nephew and niece. A friend of the taxpayer was named in the will as the residual beneficiary, and the friend inherited the taxpayer's personal residence. Title to the residence had passed from the taxpayer to her estate, after which it was vacant from the date of the taxpayer's death to the date it was transferred to the residual beneficiary in satisfaction of her interest in the trust. However, the value of the residence had declined during the estate holding period, and upon the transfer the estate computed a capital loss.

Upon the death of a taxpayer there is deemed disposition of the taxpayer's capital property under subsection 70(5). In respect of a personal residence, any capital gain on the deemed disposition would be reduced or eliminated under paragraph 40(2)(*b*).

Where an estate distributes property to a residual beneficiary in settlement of all or part of the beneficiary's capital interest in the estate, and the estate does not elect under subsection 107(2.001), subsection 107(2) deems the disposition to have occurred for proceeds of disposition equal to the cost amount of the property to the estate. In this case, subsection 107(2) would operate to deem the estate to have disposed of the residence for proceeds of disposition equal to the estate's adjusted cost base. Pursuant to paragraph 70(5)(*b*), the estate is deemed to have acquired the residence at its fair market value. The CRA stated that, as a result, upon the transfer of the residence to the residual beneficiary no capital loss would have resulted that the estate could carry back to the deceased's terminal return under subsection 164(6).

The election under subsection 107(2.001) to opt out of the application of subsection 107(2) must be made on or before the trust's relevant filing date for the year in which the distribution was made. Here, the trust did not file an election before the deadline. In such a case, the trust may apply for an extension of time to file an election under subsection 220(3.2) (late, amended or revoked elections). If such an extension is granted and subsection 107(2.001) applied, the estate would be deemed to have disposed of the residence at fair market value at the time and, in this case, a capital loss would arise. However, such loss would be subject to the stop-loss provisions in subsections 40(3.3) and (3.4), which suspend or deny a loss where a person affiliated with the trust owns the property. A person who is a majority interest beneficiary (i.e., the residual beneficiary) in a trust is affiliated with the trust under subparagraph 251.1(1)(*g*)(i). Thus the stop-loss rules would suspend the loss on the property until it was disposed of by the residual beneficiary.

Document No. 2009-0349411I7, April 13, 2010

CCH Canadian Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 • 1 800 268 4522 tel
416 224 2243 • 1 800 461 4131 fax
www.cch.ca