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SUBJECT Donation to private foundation

SECTION ITA 38(a.1), 69(1), 69(4)

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: Can a transfer of property by a corporation to its sole shareholder that is a private foundation be a gift for purposes of paragraph 38(a.1)?

POSITION: It depends on whether the transfer of property constitutes a gift at law.

REASONS: Legal meaning of "gift".

XXXXXXXXXXXX 2016-064262

Alex Johnstone

May 31, 2017

Dear XXXXXXXXXXXX:

Re. Donation of listed securities to a private foundation

This is in reply to your email of April 14, 2016, in which you ask about the application of paragraph 38(a.1) of the Income Tax Act to a scenario where a private foundation is the sole shareholder of a corporation.

In the scenario described, the shares of the corporation held by the private foundation qualify as exempt shares as defined in subsection 149.1(1). Accordingly, the private foundation does not have a divestment obligation percentage, as defined in subsection 149.1(1), in respect of such shares. Your question is whether a transfer of publicly listed securities held by the corporation to its sole shareholder for no proceeds may be a gift to a qualified donee for purposes of

paragraph 38(a.1). In your view, the application of subsection 69(4) could result in a gain, but where the transferred securities are capital property, the taxable capital gain would be nil because of the application of paragraph 38(a.1).

Our Comments

This technical interpretation provides general comments about the provisions of the Income Tax Act and related legislation (where referenced). It does not confirm the income tax treatment of a particular situation involving a specific taxpayer but is intended to assist you in making that determination. The income tax treatment of particular transactions proposed by a specific taxpayer will only be confirmed by this Directorate in the context of an advance income tax ruling request submitted in the manner set out in Information Circular IC 70-6R7, Advance Income Tax Rulings and Technical Interpretations.

Paragraph 38(a.1) provides that a taxpayer's taxable capital gain from the making of a gift of certain securities, including shares listed on a designated stock exchange, to a qualified donee is nil. Under common law, a gift is a voluntary transfer of property without valuable consideration. Generally, for purposes of sections 110.1 and 118.1, a gift under common law is made if a taxpayer has donative intent and all three of the following conditions are satisfied:

- * there must be a voluntary transfer of property to a qualified donee;
- * the property transferred must be owned by the donor; and
- * no benefit or consideration must flow to the donor. (footnote 1)

In general, where a taxpayer has disposed of anything by way of gift to any person, paragraph 69(1)(b) will apply to deem the taxpayer to have received proceeds of disposition equal to the fair market value ("FMV") of the disposed property. Similarly, subsection 69(4) generally provides for deemed proceeds of disposition at FMV where property of a corporation has been appropriated to or for the benefit of a shareholder under certain circumstances. Where the property disposed of was capital property, a capital gain could result if the deemed FMV proceeds under subsection 69(1) or (4) exceed the adjusted cost base of the property.

As noted above, paragraph 38(a.1) will apply to deem a taxpayer's taxable capital gain from a disposition of certain securities to be nil when the disposition is the making of a gift to a qualified donee. Whether a transfer of property constitutes a gift is a factual determination having regard to the legal meaning of a gift. Accordingly, in the scenario described, the specific facts and circumstances of the transfer would need to be reviewed to determine whether the transfer meets the requisites of a gift under common law.

We hope that these comments will be of assistance.

Yours truly,

Jenie Leigh
Manager
Financial Institutions Section
Financial Industries and Trusts Division
Income Tax Rulings Directorate
Legislative Policy and Regulatory Affairs Branch

FOOTNOTES

Note to reader: Because of our system requirements, the footnotes contained in the original document are shown below instead:

1 Note that the meaning of gift under common law is modified under subsection 248(30), which allows for the recognition of a gift for tax purposes by a taxpayer in certain circumstances even though some form of benefit or consideration flows back to the taxpayer.