Docket: 2006-410(IT)G

BETWEEN:

F. MAX E. MARÉCHAUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 28 - May 1, June 17 - 18, 2009

at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	David W. Chodikoff
	Tarsem Basraon (student-at-law)
Counsel for the Respondent:	Peter Vita, Q.C.
	Aleksandrs Zemdegs

JUDGMENT

The appeal with respect to an assessment made under the *Income Tax Act* for the 2001 taxation year is dismissed, with costs to the respondent.

Signed at Toronto, Ontario this 12th day of November 2009.

"J. M. Woods"

Woods J.

Citation: 2009 TCC 587

Date: 20091112

Docket: 2006-410(IT)G

BETWEEN:

F. MAX E. MARÉCHAUX,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The question to be decided is whether the appellant, F. Max E. Maréchaux, is entitled to a charitable donation tax credit under the *Income Tax Act* in respect of a $100,000 payment made under an arrangement known as the 2001 Donation Program for Medical Science and Technology (the "Program"). The arrangement was marketed by Trinity Capital Corporation ("Trinity").

[2] The appellant is a very experienced real estate lawyer with a respected Canadian law firm.

[3] As a participant in the Program, the appellant claimed a tax credit in respect of a purported $100,000 gift to a registered charity (the “Donation”) made on December 31, 2001.

[4] In a reassessment for the 2001 taxation year, the tax credit was disallowed in its entirety.

[5] The appellant served a notice of objection to the assessment, and subsequently filed an appeal to this Court pursuant to paragraph 169(1)(*b*) of the *Act*.

[6] There are two issues: whether the Donation is a gift, and whether the general anti-avoidance rule is applicable.

[7] I have concluded that the tax credit was properly disallowed because the Donation was not a gift. In light of this conclusion, it is not necessary that I consider the applicability of the general anti-avoidance rule and I do not propose to do so.

Factual Background

[8] For the appellant, testimony was provided by:

- the appellant himself;
- John McKellar, the founder of The John McKellar Charitable Foundation (the “Foundation”);
- Gordon Arnold, who assisted Trinity in the design of the Program. He attended the hearing pursuant to a subpoena issued by the respondent;
- John Thompson, the president of The Mackenzie Institute for the Study of Terrorism, Revolution and Propaganda (“Mackenzie”); and

- Alexander Novakovic, a senior vice-president of Brookfield Asset Management (successor to Trilon Financial Corporation (“Trilon”)).

[9] The only witness called by the respondent was Howard E. Johnson, of Campbell Valuation Partners Ltd.

[10] The Program involved what were called “leveraged donations.” In general, prospective donors were invited to make a donation of at least $100,000 to a registered charity, and were to be provided favourable financing for a large part of the outlay.

[11] The Program was implemented on December 31, 2001, with 118 participants (“Participants”) and donations totalling approximately $18,305,000.

[12] Prospective donors were informed in the promotional materials that the Program had the features below:

- Support of important charities in medical science and technology;

- Cash contribution of 30 percent of the total donation;

- Donation to be enhanced by a loan equal to 80 percent of the total donation;

- Return on donation of up to 62.4 percent depending on the donor’s province of residence;

- No alternative minimum tax consequences; and

- Tax opinion from a firm of respected tax lawyers (the “Tax Opinion”).

[13] The appellant was informed of the Program by Judy Moore, a chartered accountant who for many years had prepared the appellant's tax returns. Ms. Moore provided to the appellant material that had been prepared by or on behalf of Trinity, including the Tax Opinion, and she also provided advice.

[14] Ms. Moore did not testify and it is not entirely clear what advice she gave. Based on the evidence presented, I conclude that the appellant was advised by Ms. Moore that, based on a donation of $100,000, he could expect a net receipt of $14,218, subject to a risk of challenge by the Canada Revenue Agency which was described as "slim." The net receipt was comprised of tax savings of $44,218, less a cash outlay of $30,000 (Ex. AR-2, Tabs 1, 9).

[15] The Program encompassed a number of pre-determined transactions involving quite a few entities. Several of the transactions are outlined in an agreed statement of facts (ASF), which is reproduced in its entirety below.

> The parties, through their counsel, agree to the facts as set out below. Where documents are referred to below the parties have agreed only to their authenticity. This agreement is without prejudice to the right of either party to adduce further evidence provided such evidence is not inconsistent with the facts agreed to by the parties, and the respondent specifically reserves the right to challenge the legal validity of the transactions described herein.
>
> *The Program*
>
> 1. Trinity Capital Corporation ("**Trinity**"), an Ontario corporation, was founded by James D. Beatty ("**Beatty**"), its president and sole director. Trinity's sole shareholder is James D. Beatty & Associates Inc. From 2001 to 2003, Trinity promoted and operated a leveraged donation program. In 2001 the program was referred to as the 2001 Donation Program for Medical Science and Technology (the "**Trinity Program**").
>
> 2. The Trinity Program required participating taxpayers ("**Participants**") to pledge an amount to a registered charity (the "**Pledge**").
>
> 3. Trinity arranged for all Participants to borrow funds for a substantial portion of their Pledge from Capital Structures Ltd. ("**Capital**"), an Ontario corporation incorporated in 2001 whose sole shareholder is Trinity and whose president and sole director is Beatty. Capital was created for the sole purpose of providing loans for the Trinity Program. Marked as Exhibit "1" is a photocopy of the promotional materials that outline the Trinity Program.

4. Originally, Trinity permitted all Participants to borrow 80% of their Pledge from Capital by way of non-interest bearing 20-year loan, open to pre-payment at any time after January 15, 2002 (the "**Loan**"). Participants were to pay the remaining 20% of their Pledge with their own resources, and also were to pay an amount equal to 10% of their Pledge to Capital for fees, insurance and a security deposit.

5. Based on a Pledge of $1,000, the Trinity Program operated such that the Participant would:

   (a) pay $200 to Trinity;

   (b) sign an agreement to borrow a Loan amount of $800 from Capital;

   (c) deposit $80 with Capital as security for the Loan, which was to be invested for the purpose of accreting to $800 in 20 years (the "**Security Deposit**");

   (d) pay Capital $12 as a fee for arranging the Loan (the "**Fee**"); and

   (e) pay Capital an additional $8 as a premium in respect of an insurance policy (issued in Bermuda) that was to insure the risk that the Security Deposit would not accrete to $800 in 20 years (the "**Insurance Policy**").

6. The Trinity Program was subsequently specifically altered to provide that only 70% of the Pledge would come from the Loan amount and the remaining 30% of the Pledge would be paid from the Participant's own resources. The rest of the Loan, equal to 10% of the Pledge, was used for the Fee, Security Deposit and Insurance Policy. The total Loan amount therefore still equalled 80% of the Pledge. Attached as marked as Exhibit "2" is a photocopy of the promotional material that outlines the Trinity Program subsequent to the above alterations.

7. The Trinity Program provided that all Participants could assign the Insurance Policy and the Security Deposit to Capital as full payment of the Loan at any time after January 15, 2002, and Capital was obligated to accept the assignment of the Security Deposit and Insurance Policy as payment in full of the Loan.

The Transfer of Funds

8. The John McKellar Charitable Foundation ("**Foundation**") is a Canadian registered charity which was registered in 1987 by its founder John D. McKellar. The directors of the Foundation are John D. McKellar, Marjorie McKellar and Barbara McKellar.

9. Through the Trinity Program, Trinity facilitated the transfer of funds from the Participants to the Foundation. In return for this transfer, the Foundation issued charitable donation receipts to the Participants in the amount of the transferred funds including the Loan amounts.

10. From the Trinity Program, and through lawyer's trust accounts, the Foundation recorded receipt of $18,305,000 of Pledged funds from 118 Participants in 2001, of which approximately 70% represented the Loan amounts. Marked as Exhibit "3" is a copy of the Foundation's record showing payments received.

The Foundation's Payments

11. The Foundation directed substantially all of these funds to: the Mackenzie Institute for the Study of Terrorism ("**Mackenzie**"), a Canadian registered charity; and Cornell University ("**Cornell**"), a University in the United States of America which is a prescribed university under Schedule VIII (s. 3503) of the *Income Tax Regulations*.

12. The Foundation directed $12,479,024 to Mackenzie and $5,643,000 to Cornell. It received $182,976 for its own purposes. Marked as Exhibit "4" is a photocopy of the Foundation's record showing the directed funds recorded in 2001.

13. In 2001 Trinity also acted as a fundraising agent for Mackenzie. Marked as Exhibit "5" is a photocopy of the Fundraising Agreement.

Mackenzie's Transactions

14. Pursuant to an Exclusive License Agreement, dated December 31, 2001, and an Amending Agreement dated January 15, 2002, Charterbridge Holdings International Ltd. ("**Charterbridge**"), a British Virgin Islands corporation, acquired from Osteopharm Inc. ("**Osteopharm**"), a Canadian corporation, an exclusive license to discover, develop, obtain regulatory approval for, manufacture and sell certain products described in the license agreement (the "**Osteopharm Intellectual Property"**). Marked as Exhibits "6" and "7" are copies of the Agreement and Amending Agreement.

15. Trinity arranged for Mackenzie to be the recipient of $12,479,024 of the Pledged amounts from the Foundation, and so Mackenzie agreed to enter into an Agreement of Purchase and Sale, dated December 31, 2001, to purchase from Charterbridge a 5% interest in the commercial exploitation of the Osteopharm Intellectual Property for $65,000,000. Pursuant to its Agreement, Mackenzie agreed to direct $11,628,887 of the Pledged funds receivable from the Foundation to Charterbridge for a 0.9% interest in the commercial exploitation of the Osteopharm Intellectual Property. Marked as Exhibits "8", "9" and "10" are photocopies of the Purchase Agreement between Mackenzie and Charterbridge, a Direction from The Foundation to Weir Foulds LLP to pay $11,628,887 to Charterbridge, and an acknowledgement letter from Charterbridge.

16. Mackenzie also had $725,274 of the funds receivable from the Foundation directed to Charterbridge. The amount of $748,741 was then directed by Charterbridge, on Mackenzie's instructions, to Trinity as per Mackenzie's fundraising agreement.

The Cornell Transactions

17. LifeTech Corporation ("**LifeTech**") is a public Canadian biotechnology company, whose chairman of the board is Beatty, which was subsequently renamed IATRA Life Sciences Corporation.

18. Pursuant to an Agreement dated December 31, 2001, Charterbridge acquired from LifeTech two level III biocontainment laboratories (the "Laboratories"), together with all relevant patents and all the intellectual property relating to the inventions of an ozone generator and a bolus flow apparatus, and a number of working models of such inventions (the "**Lifetech Intellectual Property**"). The consideration for this transaction included the payment of $600,000 to Lifetech, and the provision to Lifetech of the exclusive right to develop and commercialize

in Canada a proprietary diagnostic test for kidney disease (which was later changed to the exclusive right to develop and commercialize a proprietary diagnostic test for osteoporosis) upon the acquisition by Charterbridge, if any, of such a right. Marked as Exhibit “11” is a photocopy of the Agreement along with associated documentation including press releases.

19. Trinity arranged for Cornell to be the recipient of $5,643,000 of the Pledged funds from the Foundation, and so Cornell agreed to enter into two Agreements, both dated December 31, 2001, to acquire the Laboratories and the Lifetech Intellectual Property from Charterbridge, all for the purchase price of $5,643,000, and to direct all of the funds receivable from the Foundation to Charterbridge. Marked as Exhibits “12” and “13” are photocopies of the Agreements.

The Loan Funds

20. Capital did not have sufficient funds to make Loans to the Participants in the combined amounts of $14,644,000, and so it borrowed the sum of $14,052,000 from Trilon Financial Corporation (“**Trilon**”), a Canadian financial services corporation, by way of daylight loan, and $592,000 from Trinity. Marked as Exhibits “14”, “15” and “16” are the promissory note, the General Security Agreement, and a Direction from Capital to Trinity.

21. Charterbridge directed at least $14,052,000 of the $17,997,161 receivable from Mackenzie and Cornell, to Capital, on the terms and conditions set out in a promissory note dated December 31, 2001, provided by Capital to Charterbridge. Marked as Exhibit “17” is a photocopy of the promissory note from Capital to Charterbridge.

22. Capital directed the $14,052,000 receivable from Charterbridge to Trilon, to repay the daylight loan used to finance the loans.

23. The transfer of funds between the relevant entities occurred on the following dates:

Transaction	**Date**

Trilon, via daylight loan, provided Capital with $14,052,000 of the Loan funds	*December 31, 2001*
Trinity provided Capital with $592,000 of the Loan funds	*December 31, 2001*
Capital directed the Loan funds to the Foundation (as per the Participant's pledge)	*December 31, 2001*
The Foundation directed the payments, less an amount retained by it, to Cornell and Mackenzie	*December 31, 2001*
Cornell and Mackenzie directed $14,052,000 of the Loan funds from the Foundation to Charterbridge	*December 31, 2001*
Charterbridge directed $14,052,000 of the Loan funds from Cornell and Mackenzie to Capital	*December 31, 2001*
Capital used the funds from Charterbridge to repay the daylight	*December 31, 2001*

loan to Trilon

24. In 2002, most of the Participants assigned their Security Deposits and Insurance Policies to Capital in full satisfaction of their Loans.

25. Pursuant to the loan agreement between Capital and Charterbridge, the funds were repaid over a period of time by Capital assigning to Charterbridge the Security Deposits and Insurance Policies it received from the Participants.

26. All of the above steps, including the disputed Loans to the Participants, the purchase of the Laboratory Equipment and Lifetech Intellectual Property, and the flow of funds in the series of transactions that occurred in the Trinity Program, were pre-determined and interconnected.

27. The Foundation issued 118 tax receipts to Participants for the entire amount of Pledged funds, including the amount funded by the Loans.

28. Most of the Participants claimed charitable donation tax credits for their 2001 taxation year using the receipts issued by the Foundation.

[16] The ASF provides a fairly good description of how the Program operated, as far as it was revealed by the evidence.

[17] When the appellant agreed to participate in the Program, he was not aware of many of the transactions described above. In particular, the appellant did not have detailed information as to what the Donation would be used for after it was paid to the Foundation.

[18] The elements of the Program that directly involved the appellant are described in paragraphs 4 to 10, and 24 of the ASF.

[19] The appellant participated in the Program to the extent of the minimum donation of $100,000, and it was implemented in the following manner.

- Sometime in December 2001, the appellant agreed to make a $100,000 donation to the Foundation, provided that the $80,000 loan was provided to him.

- At the closing on December 31, 2001, $30,000 of the appellant's own funds were paid to the Foundation.

- Also on closing, the appellant received a 20-year interest-free loan in the amount of $80,000. The loan proceeds were directed to be paid to the Foundation, as to $70,000, and to Capital (the lender), as to $10,000.

- On January 16, 2002, the appellant assigned the Security Deposit and the Insurance Policy to Capital in complete satisfaction of the $80,000 loan.

[20] Notwithstanding that the Program, as marketed, envisaged that Participants would be able to fully satisfy the loans shortly after closing by assigning the Security Deposit and the Insurance Policy to Capital (the "Put Option"), the relevant agreements do not clearly provide a commitment to that effect.

[21] The appellant noted in his testimony that the relevant agreements did not require that the Insurance Policy be provided to him. The only requirement was that an application for the Insurance Policy be made. Since the Put Option depended on this, the result was that the Put Option might not be effective.

[22] The appellant also stated, however, that he was fairly satisfied that the Put Option would be effective because this was the intention of all concerned (Transcript, p. 126-128). He also testified that he was willing to take a risk on the Put Option because his primary objective was to make a charitable contribution for medical science and technology.

[23] I accept that the agreements do not clearly provide for an effective Put Option because there was no clear obligation to provide the Insurance Policy.

[24] Turning to the elements of the Program after the funds were paid to the Foundation, it is clear from the ASF that all but a very small portion of the funds were transferred by the charities to Charterbridge and Trinity.

[25] Aside from a small amount of cash that the charities could retain, most of the donated funds were required to be used to acquire property from Charterbridge. The evidence was not sufficient to establish the value of that property at the relevant time. To the extent that Mr. Arnold and Mr. Thompson suggested that the property had significant value, I did not find the testimony to be at all convincing.

Later programs

[26] Programs similar to this were promoted by Trinity in 2002 and 2003. The total amount of purported gifts made in the later years were approximately $106,000,000 and $94,000,000. The Foundation and Mackenzie were both involved in the subsequent programs.

Analysis

[27] Section 118.1 of the *Act* provides a tax credit to individuals for a specified portion of gifts made to registered charities and other listed organizations.

[28] The respondent submits that the $100,000 amount transferred by the appellant to the Foundation is not eligible for this credit because it was not a gift.

[29] The relevant provision is the definition of "total charitable gifts" in s. 118.1(1), which provides:

> **"total charitable gifts"** of an individual for a taxation year means the total of all amounts each of which is the fair market value of a gift (other than a gift the fair market value of which is included in the total Crown gifts, the total cultural gifts or the total ecological gifts of the individual for the year) made by the individual in the year or in any of the 5 immediately preceding taxation years (other than in a year for which a deduction under subsection 110(2) was claimed in computing the individual's taxable income) to

(a) a registered charity,

(b) a registered Canadian amateur athletic association,

(c) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i),

(d) a Canadian municipality,

(e) the United Nations or an agency thereof,

(f) a university outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada,

(g) a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift during the individual's taxation year or the 12 months immediately preceding that taxation year, or

(g.1) Her Majesty in right of Canada or a province,

to the extent that those amounts were

(h) not deducted in computing the individual's taxable income for a

taxation year ending before 1988, and

(i) not included in determining an amount that was deducted under

this section in computing the individual's tax payable under this

Part for a preceding taxation year;

(Emphasis added.)

[30] The term "gift" for purposes of this provision is not defined in the *Act,* and it has been given its general meaning.

[31] Some of the relevant judicial decisions have a tendency to describe what a gift is in slightly different ways. It is not necessary for purposes of this appeal to discuss these nuances. It is sufficient to refer to the description of "gift" that was stated by Linden J.A. in *The Queen v. Friedberg*, 92 DTC 6031 (FCA), at 6032:

> The *Income Tax Act* does not define the word "gift", so that the general principles of law with regard to gifts are utilized by the Courts in these cases. As Mr. Justice Stone explained in *The Queen v. McBurney*, 85 DTC 5433, at p. 5435:
>
> > The word gift is not defined in the statute. I can find nothing in the context to suggest that it is used in a technical rather than its ordinary sense.
>
> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald, J. in *The Queen v. Zandstra* [74 DTC 6416] [1974] 2 F.C. 254, at p. 261.) The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.
>
> (Emphasis added.)

[32] In applying the above definition to the facts of this appeal, it is clear that the appellant did not make a gift to the Foundation because a significant benefit flowed to the appellant in return for the Donation.

[33] The benefit is the financing arrangement. The $80,000 interest-free loan that was received by the appellant, coupled with the expectation of the Put Option, was a significant benefit that was given in return for the Donation. The financing was not provided in isolation to the Donation. The two were inextricably tied together by the relevant agreements.

[34] It is not necessary for purposes of this appeal to place a value on the benefit. However, it does appear to be somewhere in the neighbourhood of $70,000 ($80,000 received less outlays of $10,000), less a slight discount for the risk that the Put Option would not be effective. The benefit is certainly significant.

[35] I would also comment that, even without the Put Option, the financing provided a significant benefit. It is self-evident that an interest-free loan for 20 years provides a considerable economic benefit to the debtor. I would also note that the $8,000 security deposit could not reasonably be expected to accrete to anywhere near $80,000 in 20 years. The evidence of Mr. Johnson clearly showed this, even taking into account differences of opinion regarding some of his assumptions.

[36] I now turn to some of the submissions made by counsel for the appellant.

[37] Reference was made to the decision of *Cooper v. The Queen*, 88 DTC 6525 (FCTD). In that case, Rouleau J. held that the provision of an interest-free loan by a trust to a beneficiary/executor was not a benefit that was required to be included in income under subsection 105(1) of the *Act*.

[38] This decision does not assist the appellant. The basis for the decision in *Cooper* was not the meaning of “benefit” in a general sense, but it was the Court’s interpretation of the particular legislative scheme in reference to taxing benefits.

[39] Regarding whether an interest-free loan generally could be considered a benefit, Rouleau J. thought that it could. At page 6528 of *Cooper*, he stated:

> There is no doubt that in some sense, the loan made to the Plaintiff constituted a substantial benefit to him, as anyone who has attempted to negotiate an interest-free loan may attest. […]

[40] Counsel for the appellant also submits that the appellant made the Donation primarily for charitable reasons, and that the tax savings were a secondary consideration.

[41] This submission was based largely on the self-interested testimony of the appellant, coupled with supporting evidence of the appellant's history of charitable works and charitable giving.

[42] Even if it is accepted that the appellant's participation in the Program was influenced primarily by a charitable motivation, this would not assist the appellant. Once it is determined that the appellant anticipated to receive, and did receive, a benefit in return for the Donation, there is no gift.

[43] Counsel also referred to *Antoine Guertin Ltée v. The Queen*, 81 DTC 5268 (FCTD), aff'd 88 DTC 6126 (FCA). This decision concerned a loan made on favourable terms by a charity. The trial judge concluded that the favourable terms did not make the loan artificial.

[44] The problem with this submission is that the *bona fides* of the financing arrangements provided to the appellant are not in dispute in this appeal. I do not think that the *Antoine Guertin* decision assists the appellant.

[45] This is sufficient to dispose of the appeal, and it is not necessary that I consider the respondent's alternative argument that the tax receipt issued by the Foundation and its associated tax credit constitutes a benefit.

[46] I would comment briefly, though, on whether the appellant made a partial gift, consisting of his own cash outlay.

[47] The appellant did not argue this, and rightly so in my view.

[48] In some circumstances, it may be appropriate to separate a transaction into two parts, such that there is in part a gift, and in part something else.

[49] On the particular facts of this appeal, it is not appropriate to separate the transaction in this manner. There is just one interconnected arrangement here, and no part of it can be considered a gift that the appellant gave in expectation of no return. In this regard, I found assistance from the following decision referred to by counsel for the respondent: *Hudson Bay Mining and Smelting Co. v. The Queen*, 89 DTC 5515 (FCA).

Disposition

[50] I would dismiss the appeal, with costs to the respondent.

Signed at Toronto, Ontario this 12th day of November 2009.

"J. M. Woods"

Woods J.

CITATION:	2009 TCC 587
COURT FILE NO.:	2006-410(IT)G
STYLE OF CAUSE:	F. MAX E. MARÉCHAUX AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	April 28 - May 1, June 17 - 18, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice J. M. Woods
DATE OF JUDGMENT:	November 12, 2009

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