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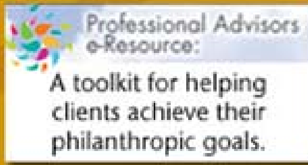

Cross-border Estate Planning: Effect of Fifth Protocol to the Canada-US Income Tax Treaty

By Beth Webel and Nadja Ibrahim
PricewaterhouseCoopers LLP

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– U.S. stock options.

The Timing of a Gift of Shares

By Arthur B.C. Drache, Q.C.
Miller Thomson LLP

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Market Volatility Calls for Long-Term Approach to Donating Securities

Association of Fundraising Professionals (AFP)

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Welcome George Sirois

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THE CALGARY FOUNDATION

December 2008

Focus on Philanthropy

A Guide to Charitable Giving for Professional Advisors

Estate Tax Update

Cross-border Estate Planning: Effect of Fifth Protocol to the Canada-U.S. Income Tax Treaty

By Nadja Ibrahim and Beth Webel, PricewaterhouseCoopers LLP

On September 21, 2007, after nearly ten years of negotiation, the United States and Canada jointly released the fifth Protocol (the Protocol) to the Canada-U.S. Income Tax Convention (Treaty). The Protocol includes important changes that may affect cross-border estate planning in the areas of:

- Charitable deductions; and
- Taxes imposed by reason of death on:
  - Registered Retirement Savings Plans (RRSPs); and
  - U.S. stock options.

These changes will become effective the later of January 1, 2008, and the date the Protocol is ratified.

Charitable Donation Planning

Paragraph 1 of Article XXIX-B (Taxes Imposed by Reason of Death) of the current Treaty will be replaced by new language that restricts the cross-border donation planning opportunities for Canadian residents who are not U.S. citizens.

Under the existing provision, the U.S. provides an estate tax deduction if a Canadian resident donates U.S. property to a U.S. or Canadian charity. However, this tax relief will no longer be available under the new Protocol. As a result, a Canadian decedent who donates U.S. assets can avoid U.S. estate tax only if the U.S. property is donated to a U.S. charity. This restriction does not apply if the Canadian resident is a U.S. citizen.

Under the fifth Protocol, Canadian-resident decedents that choose to make charitable donations to U.S. charities may elect the value of the gift for purposes of determining the proceeds of disposition of the donated property. The elected price cannot be lower than the purchase price or higher than the fair market value of the property. This provides the estate with the opportunity to eliminate Canadian capital gains taxation on the donated property.

Taxes Imposed at Death on RRSPs and RRIFs

Canadian residents: Canadian-resident decedents who die owning U.S. securities in an RRSP or RRIF may be subject to U.S. estate tax. The new Protocol allows Canadian-resident decedents to claim a foreign tax credit on their Canadian terminal income tax return for U.S. estate taxes paid on the fair market value of U.S. investments in their RRSP or RRIF. The foreign tax credit is limited to the amount of Canadian federal income tax. To claim the foreign tax credit, Canadian income tax must be triggered on the date of the decedent's death.

As a result, no foreign tax credit relief is available if the RRSP or RRIF is transferred to a surviving spouse on a rollover basis.

U.S. citizens/residents: U.S.-citizen or U.S.-resident decedents may be subject to both U.S. estate tax and Canadian income tax if they die owning an RRSP or RRIF. The new Protocol allows U.S. decedents to claim a foreign tax credit on their U.S. estate tax return for Canadian income tax paid as a result of the deemed disposition of the RRSP or RRIF.

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The Timing of a Gift of Shares

By Arthur Drache, Q.C., Miller Thomson LLP

Over the years we have taken the position that when a donor makes an inter vivos gift of shares, the timing of the gift is on the day he or she did everything possible to convey the gift. In the case of listed shares, our view has always been that the operative date is when instructions were given to the stock broker to transfer the shares to a charity. On occasion either because the shares are volatile in price or because there was some delay in actually making the transfer by the broker, the charity does not receive the shares for several days or even longer. The question is when a receipt is issued, what date should be used to determine the value to be placed on the shares.

The issue came up in a very complex case involving two brothers named Walsh who donated many millions of dollars worth of a listed company to their own foundation. For various reasons which the tax court judge, Cam Miller, discusses in his reasons, the foundation did not execute a resolution accepting the shares until almost two months after the brothers gave instructions to transfer the shares.

During that time the value of the shares dropped considerably.

Justice Miller allowed the appeal by the brothers on unrelated ground which had more to do with the fact that the CRA seemed to change the grounds for a reassessment of the brother's tax returns than anything else. But Justice Miller did go on to address the timing issue.

I believe the onus is on the Respondent (CRA) to prove, on balance that the shares at the time of the donation were valued at less than $14, the amount claimed by the Appellants. To be clear, the value at the time of donation is readily ascertained as these were publicly traded shares. The fact to be proven by the Respondent is the date on which the donation took place. The Respondent claims the date was December 4, 1996. The Respondent called no witnesses, not the broker who handled the transaction, not the Foundation trustee, no one, but relies entirely on documents entered as exhibits through one of the Appellants. That Appellant's (Walsh) evidence was that he donated the Bresea shares to the charitable foundation on November 21, 1996 when he called his broker to transfer Bresea shares from his brother and from him to the Foundation. At the same time, he instructed Mr. English to sell the balance of the shares held by him and his brother, respectively, to cover their transaction costs. There was evidence in the form of trading slips that such sales commenced November 21, 1996. These facts were not disputed.

What did the Respondent rely upon to prove the donation occurred December 4? The Respondent relied primarily upon the documents in the minute book of the Foundation, specifically: first, resolutions of lawyers of a shelf trust dated as of December 4 appointing the Walshes as directors; second, an undated resolution of the Walshes

establishing themselves as members of the Foundation, resolutions in fact indicating the blank-day of December; third, again undated, consents of the Walshes to act as directors, dated the blank-day of December, 1996. These documents finalize a process the Walshes had started in October. Mr. Brett Walsh was clear that, notwithstanding the resolutions, he believed the shelf trust acquired from the Ottawa law firm was effectively under the Walsh family control in November.

Fourth, the Respondent relied upon a resolution of the Foundation dated December 4, authorizing Mr. English's firm, Montreal Bonds, to establish an account for the Foundation. Again, I am satisfied Mr. Walsh was instructing Mr. English verbally, well before this corporate housekeeping resolution. In any event, what is the significance of the paperwork to transfer the shelf Foundation to the Walsh family? The Foundation certainly existed long before December 1996, and the Walshes were treating it as theirs as early as October or November. I am not swayed by the dating of these resolutions. The issue is the timing of the donation to the Foundation, not the timing of when the directors or members were put in place in the Foundation.

For various technical reasons, the CRA might not feel bound by this opinion given that the discussion was not strictly speaking necessary to the deciding of the case in favour of the Walshes on other matters. But in at least one other tax case Miller J. has shown that he has a firm grasp of the common law principles dealing with gifts, Benquesus v. The Queen , 2006 TCC 193.

The case is Walsh v. The Queen, 2008 TCC 282. It can be found on the Tax Court's web site at http://decision.tcc-cci.gc.ca/en/2008/2008tcc282/2008tcc282.html

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THE CALGARY FOUNDATION

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A Guide to Charitable Giving for Professional Advisors

Market Volatility Calls for Long-Term Approach to Donating Securities

Association of Fundraising Professionals

Donors waiting for just the right time to donate their stocks to charity will be waiting a long time and instead should focus on a longer-term "investor" approach to giving, according to a recent press release from TD Waterhouse.

"If you're trying to wait out current volatile conditions in order to maximize the value of your stock donation, I would say that your heart is in the right place, but your strategy is wrong," says Jo-Anne Ryan, vice president, Philanthropic Advisory Services, TD Waterhouse Canada Inc.

"Timing the market is a feat that virtually all investment professionals and experts agree is impossible to accomplish."

Instead, Ryan recommends adopting a personal giving strategy as part of a long-term plan that should include contingencies for market volatility. Rather than trying to time the market, donors should take a 'dollar cost averaging' approach where they spread donations over a period of time in an organized and disciplined manner.

"This means applying the same disciplined approach to giving as you would to investing," continues Ryan. "Not only does this reduce the risks and pitfalls of making poor market timing decisions, but it also addresses charities' fundamental need for stable funding."

The guidance concerning gifts of stock is directed at Canadian donors who are taking advantage of the elimination of the capital gains tax on gifts of appreciated securities to charity, which was first instituted in 2006. Since that time, giving of securities has increased significantly, but with recent market fluctuations, many donors are unsure as to when to make their gifts of stock. The general strategy contained in the guidance may also applicable to American donors as well.

In addition to dollar cost averaging, Ryan offers the following tips to donors seeking to maximize the impact of their donated securities:

If you are holding an investment because you believe it still has upside potential and do not want to sell it, consider donating the security and then re-purchasing it. By doing so you avoid paying capital gains tax on profits to-date and get a tax credit for the donation. You will also have "stepped up" the adjusted cost base of your investment, reducing capital gains and associated tax when you sell the investment.

If you own securities that have depreciated since purchase, consider triggering a capital loss by selling one or more 'underperformers' and donating the cash proceeds to charity. With this strategy, you get a tax credit for the donation and you also generate a capital loss.

This, in turn, can be used to offset other capital gains in the current year or in the past three years, or may be carried forward indefinitely.

If you are still feeling uneasy about donating stock in light of current market conditions, consider a cash donation instead. You will receive a charitable tax receipt resulting in a tax credit of approximately 46% (subject to certain limits), which may reduce your taxes.

"You can donate both your winners and losers with substantial benefits," concludes Ryan. "The bottom line is that neither your investments nor your charitable endeavors need to be held hostage by the market. By taking a strategic approach to charitable giving, you'll maximize your tax savings and the value of your donations over the long-term. You'll also contribute to the stable, long-term funding that is vital to Canada's philanthropic community."

The Toronto-Dominion Bank and its subsidiaries are collectively known as TD Bank Financial Group. TD Bank Financial Group is the seventh largest bank in North America by branches and serves approximately 17 million customers.

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A Guide to Charitable Giving for Professional Advisors

Welcome George Sirois

Senior Officer, Gifts and Estate Planning

George Sirois is a lawyer with a wide variety of experience pertaining to estates and trusts. He began his career in a private practice with a strong emphasis on estate planning, eventually acquiring significant experience in estate-related litigation, probate and trust matters.

Subsequently, George left the private bar and joined Scotiabank's Wealth Management Group, where he was employed as manager of Scotiatrust offices in southern Alberta and Saskatchewan. After a number of years devoted to the administration of estates, private foundations & trusts, George moved to Scotia's Planning Services Group, where his role involved the integration of complex estate and tax planning strategies for individuals, as well as work with First Nations and the trust requirements associated with land claim settlements.

George is a member of the Canadian Bar Association, the Law Society of Alberta and the Law Society of New Brunswick. A graduate of the University of New Brunswick and The University of Western Ontario, he is also a member of the Society of Trust and Estate Practitioners and received the STI diploma from the Trust Institute.

His voluntary activities include Calgary Legal Guidance, as well as the Foundation's Health & Wellness Grants Advisory Committee.

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