March 4, 2015

Tax Policy Branch
Department of Finance
90 Elgin Street
Ottawa, ON K1S 0G5

Dear Mesdames and Sirs:

Re: Estate Rules

CAGP is a national non-profit organization whose mission is to champion the growth and development of strategic charitable gift planning in Canada. We do so in partnership with 1200 members in 22 local chapters across the country by developing knowledge and providing education, raising awareness and promoting philanthropy, facilitating partnerships, and engaging in national dialogues and public policy discussions.

The purpose of this letter is to bring to your attention a few serious concerns that CAGP has with the new rules enacted on December 16, 2014 by the Government related to how they might impact charitable giving in Canada. The concern relates to changes which link the rules on charitable giving to the new rules related to graduated rate estates ("GRE"). Much attention has been focused on the effect of the new rules on taxpayers, but not enough on registered charities. CAGP's recommendation focus on ensuring charities are not disadvantaged, and that the full value of intended gifts is available for public benefit.

We have suggested possible amendments. A summary of the concerns and our suggestions are followed by a detailed discussion.

EXECUTIVE SUMMARY

1. Testamentary Charitable Giving

Change

The new rules introduce flexibility in that the donation tax credit related to a testamentary gift can be allocated by the executors of the GRE over a number of tax periods. Charities welcome this because it will assist in providing certainly around tax receipting and it has the potential to promote charitable giving.

The Concern

The flexibility is limited to gifts made within 36 months of the death of the testator. This period is too short in many instances.

CAGP Proposal

Retain the new flexibility for the allocation of a testamentary gift but remove the linkage of that flexibility to a GRE in two ways. First, allow the executors to allocate gifts made by the Estate to the designated years when the gift is made (in other words not be restricted to gifts made within 36 months of death). Second, allow the gift to be made by an estate, GRE or otherwise.

2. Gifts and Publicly Listed Securities, Cultural Property and Ecological Property

Change

The exemption from tax on the gain realized on the above noted gifts is now only available to GRE's.

The Concern

The exemption has been tied to the nature of the property gifted. It should be available to all estates.

CAGP Proposal

Any estate (GRE or otherwise) should remain eligible to claim this capital gains exemption at the time the gift is made.

3. Tax Liability and Life Interest Trusts

New Rule

Proposed 104(13.4) provides that the liability for the tax realized on the deemed disposition of all the assets in a life interest trust at the time of the death of the surviving beneficiary is in the estate of the surviving beneficiary. Previously the liability was in the life interest trust.

The Concern

A charity is often the residual beneficiary of a life interest trust. If the liability is transferred to the estate of the surviving spouse, the beneficiaries of that estate could be left with the tax bill while not receiving the assets. The joint and several liability clause does not alter this. Charities are concerned that donors will not consider them as residual beneficiaries because of this mismatch.

CAGP Proposal

Keep the existing rules but deem the residency of such a trust at the time of termination to be based on the residency of the survivor at the time of his or her death (or if non resident) to be the province that the survivor last resided in for Canadian tax purposes.

4. Tax Receipts Generally

Concern

It should be possible to issue charitable tax receipts to a charity named in a will or trust whether the charity is a capital beneficiary or whether the amount of the gift is set out explicitly.

CAGP Proposal

Amend the ITA to permit receipts in both scenarios where a charitable gift is intended by the testator/settlor. This issue does not arise because of the changes but this change would assist to avoid a drafting trap for the unwary.

DETAILED DISCUSSION

It is our concern that there are several provisions in the new legislation which create unintended consequences. These are outlined below:

1. Testamentary Charitable Giving

These rules contain significant changes to the tax treatment of testamentary charitable gifting for deaths occurring after 2015. Under the new rules, gifts by will, donations made by an estate, and designated gifts (of RRSPs, RRIFs, TFSAs and Life Insurance proceeds) will be deemed to have been made by the estate at the time at which property subject to the donation is actually transferred to a registered charity or other qualified donees. Flexibility has been introduced by this new legislation in that the donation tax credit can be allocated by the executors of a GRE among a number of tax periods, namely, the terminal or last taxation year of the deceased donor, the tax year preceding the year of death, the taxation year of the GRE in which the donation is made and prior taxation years of the GRE. CAGP strongly supports the increased flexibility to allocate the donation tax credit across a number of tax periods.

However, the conditions for an estate donation to qualify for estate donation tax credit treatment include the following:

1. The property must be transferred by a GRE;
2. The transfer must occur within 36 months of the date of death of the testator; and
3. The property that is the subject of the donation must be property acquired by the estate on or as a consequence of death or property substituted for that property.

An estate will continue to be able to claim donation tax credits in respect of other donations in the year in which the donations are made and in each of the following 5 years.

While the new flexibility introduced by the legislation permitting donation tax credits to be claimed by two taxpayers (the deceased and the GRE) and over a number of taxation years is welcome, the conditions that have been introduced may make it challenging to realize the tax benefits which are related to charitable donations made by estates thus reducing the amounts available to charity through testamentary gifts. The most significant issue raised by the new legislation is the timing of the gift. More specifically the concerns are:

1. In order to access the flexibility of allocating the donation tax credit among several years, the transfer of property has to be made by the GRE. That essentially means that the executors of an estate have only 36 months to effect the charitable gift. In estates of any but the most modest of assets, that timeframe is too short. It can take three to six months to probate a will and between 6-12 months to obtain a tax clearance certificate from CRA without which executors would be reluctant to make significant distributions to beneficiaries including charitable beneficiaries. Where more complex assets are involved, such as shares of a family business, it can be challenging to administer the

estate within the 36month framework. Finally, there may be other delays in administering estates such as litigation involving will challenges or family law claims by beneficiaries that could tie up the estate for well over 36 months;

2. if illiquid assets such as real estate and works of art are involved, the executors may be forced to sell at reduced prices with the consequence of reducing the residual gift for the charities. Monetization of estate assets by an artificial deadline could impair the executors' fiduciary duty to administer the estate with care;

3. there is no mechanism for extension of the 36 month deadline. Even if the possibility of ministerial discretion were added, philanthropically minded Canadians would likely be reluctant to engage in planning where the desired result depends on ministerial discretion; and

4. there is no indication of how charitable gifts on the death of a life tenant under a will are to work and in particular what will be the tax consequences if the plan includes a "charitable remainder trust".

These issues raise grave concerns for the charitable sector. The uncertainties mean many Canadians will be less likely to include a charity in their estate plan.

We therefore request that the Income Tax Act be amended to allow estate trustees to allocate the donation tax credit among a number of tax periods but remove the requirement that the gift must be made by the GRE. This would mean that the gift could be made after the 36 month period and could be allocated by the executors of an estate among a number of tax periods, namely, the last taxation year of the deceased donor, the tax year preceding the year of death, the taxation year of the estate in which the donation is made or in any one of the first three years of the estate.

We suggest that this approach removes any harm which could be caused by the new rules due to the fact that an estate cannot be administered within the three year period. It will give the same flexibility to the executors as proposed without putting a limit on the timing of the gift to which the flexibility relates.

In addition, we recommend that the testamentary gift allocated need not be made by the GRE. Again this linkage creates a concern that planning for testamentary gifts would be limited.

2. Gifts of Publicly Listed Securities, Cultural Property and Ecological Property

The exemption from tax on the capital gain realized on gifts of publicly listed securities (para 38(a. 1)), ecological gifts (para 38(a.2)) and cultural property (para 39 (1)(a.1)) will only be available to GREs in the future. It is unclear why such gifts made by an estate that is not a GRE would be ineligible for this exemption.

We request that the exemption from tax on the capital gains realized on gifts of publicly listed securities, ecological property and cultural property be available on gifts from an estate, whether or not a GRE.

3. Proposed Subsection 104(13.4)

Newly proposed subsection 104(13.4) operates, beginning in 2016, on the death of a life tenant or the death of the surviving beneficiary of a trust which is either a:

(a) Spousal and common-law partner trust;
(b) Alter ego trust; or
(c) Joint spousal and common-law partner trust.

The subsection creates a year-end of the trust at the date of death and then deems the income of the trust in that year to be deemed payable to the deceased. The income would include income realized on the deemed disposition of assets within the trust. Thus the taxation of the income is moved from the trust to the deceased's terminal return. There is no grandfathering.

The stated reason for the new legislation is to negate tax planning attempting to move trust income to lower tax-rate provincial jurisdictions. Unfortunately, the legislation as presently proposed unintentionally creates tax liabilities where none before existed.

Consider Mr. A, who leaves property in his will to a spousal trust. Mrs. A is the sole income and capital beneficiary for her lifetime. The residual beneficiary at Mrs. A's death is Charity C.

Subsection 104(13.4) will now tax the deemed disposition income within Mrs. A's terminal return. Charity C receives the property outright while the estate pays the tax on those assets. Further, Mrs. A's estate will not benefit from a tax credit. This is a mismatch. Effectively Mrs. A's estate will be paying a new tax – one which is not exigible currently.

We often calculate the after-tax cost of donations in Canada. For example a receipted cash donation could be said to cost $.54 on the dollar. For a marketable security donation, the after-tax cost is perhaps $.45 to the dollar. What is proposed leads us to perhaps a $1.15 cost for a $1 of donation. This is penalizing and will lead to fewer donations and unfortunately, as there is no grandfathering, will catch existing spouse trusts "stuck" in the new paradigm.

We would therefore suggest that it would be simpler to leave the taxation in the trust, but deem the residence of the trust to be the residence of the deceased beneficiary for the year of death. This would avoid the mismatch of location of tax and assets and also avoid, in essence, a penalty tax on donations.

4. Tax Receipts for Charitable Gifts

Another issue which creates a trap for the unwary is the CRA's position with respect to the naming of a registered charity as a beneficiary in a will or in inter vivos trusts, such as alter ego trusts, which are frequently used in estate planning.

In wills or trusts where there is an intervening life interest, a spouse trust in a will being the most typical example, and the ultimate capital beneficiaries after the death of the person with the life interest are registered charities and the charities are simply named as the capital beneficiaries in the will or trust, the CRA takes the view that no donation tax credit is available.

It is the CRA's position that a charity which is simply named as a beneficiary upon the death of life tenant takes as a beneficiary of the trust rather than as a donee of a charitable gift pursuant to a power in the executors/trustees to make a charitable gift. At present it is necessary to draft the will or trust such that the amount to be given to charities is set either explicitly in the instrument or by way of a formula but the executor/trustee must be given the discretion to decide which charities are to receive the gift. This is artificial and unnecessary. Potential donors provided with this advice are often uncertain if their gifts to charities they wish to benefit will ultimately be paid and as such this policy leads to hesitancy in granting to registered charities in Canada.

We recommend that if a registered charity is named as a beneficiary in a will or a trust where there is an intervening life interest and the registered charity is to receive a specific dollar amount, an amount determined by a formula or a percentage of the capital, that the manner in which the gift is described and whether the executor has any discretion in the making of the gift should be irrelevant in determining whether a donation tax credit is available. If any amount ultimately is given to a registered charity in a will or a trust, a donation tax credit should be available.

CONCLUSION

CAGP is interested in cultivating dialogue with government representatives to ensure they understand the full implications of these new estate administration rules on Canada's charities. We ask for the opportunity to meet in order that we can fully discuss these submissions with you and respond to any questions you may have and we look forward to hearing from you in regard to a convenient time to do so.

Yours truly,

Susan Manwaring
Chair, Government Relations Committee

Malcolm Berry
Chair, Board of Directors

cc: Mr. Grant Nash, Tax Legislation Division, Tax Policy Branch
Ms. Ruth Mackenzie, Executive Director, CAGP