



CANADIAN FEDERAL STATUTORY PROVISIONS

Income Tax Act (Canada)

“Total cultural gifts” is defined in subsection 118.1(1) of the Income Tax Act (Canada) (“ITA”) as follows:

“total cultural 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

- (a) of an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(b) and (c) of the Cultural Property Export and Import Act, and
- (b) that was made by the individual in the year or in any of the 5 immediately preceding taxation years to an institution or a public authority in Canada that was, at the time the gift was made, designated under subsection 32(2) of the Cultural Property Export and Import Act either generally or for a specified purpose related to that object,

to the extent that those amounts were

- (c) not deducted in computing the individual's taxable income for a taxation year ending before 1988, and
- (d) 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;

Bill C-10 (which requires re-introduction in Parliament) contains a proposal to amend the first portion of the above definition as follows: ““total cultural gifts”, in respect of an individual for a taxation year, means the total of all amounts each of which is the eligible amount of a gift”.

“Total cultural gifts” is included in “total gifts” by virtue of paragraph (c) of the definition of “total gifts” in subsection 118.1(1) of the ITA. “Total cultural gifts” are not subject to the 75 percent net annual income limitation applicable to “charitable gifts” generally under paragraph (a) of the definition of “total gifts” in subsection 118.1(1) of the ITA, and can accordingly be applied against 100 percent of net annual income.

By virtue of subsection 118.1(3) of the ITA, a taxpayer may deduct from his or her tax otherwise payable an amount equal to 29 percent of the individuals “total gifts” for the tax year in excess of \$200. The credit is increased to between 40 percent and 50 percent by a parallel provincial tax credit.

By virtue of paragraph (b) of the definition of “total cultural gifts” in subsection 118.1(1) of the ITA, a taxpayer may carry-forward up to 5 years the tax credit associated with a gift of cultural property to a registered charity.

Proposed subsection 248(35) deems the FMV of donated property to a qualified donee to be the donor’s cost of the property where the donor bought the property within 3 years of the donation or within 10 years of the donation and it is reasonable to conclude that one of the main reasons that the donor acquired the property was to donate the property. However, and by virtue of proposed paragraph 248(37)(c), proposed subsection 248(35) does not apply to gifts of cultural property the value of which has been certified by the Review Board.

Subsections 118.1(10) and (10.1) of the ITA provide as follows:

- (10) For the purposes of paragraph 110.1(1)(c) and the definition “total cultural gifts” in subsection (1), the fair market value of an object is deemed to be the fair market value determined by the Canadian Cultural Property Export Review Board.

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(10.1) For the purposes of subparagraph 69(1)(b)(ii), subsection 70(5) and sections 110.1, 207.31 and this section, where at any time the Canadian Cultural Property Export Review Board or the Minister of the Environment determines or redetermines an amount to be the fair market value of a property that is the subject of a gift described in paragraph 110.1(1)(a), or in the definition “total charitable gifts” in subsection (1), made by a taxpayer within the two-year period that begins at that time, an amount equal to the last amount so determined or redetermined within the period is deemed to be the fair market value of the gift at the time the gift was made and, subject to subsections (6), (7), (7.1) and 110.1(3), to be the taxpayer's proceeds of disposition of the gift.

Cultural property that is either sold or donated to a designated institution is exempt from capital gains tax: subparagraph 39(1)(a)(i.1). *Malette*, [2004] 1.C.T.C 2125 (TCC); reversed [2004] 4.C.T.C. 24 (FCA), was an appeal from a Review Board valuation. See also *Marechal*, 2004 CarswellNat 2733 (TCC); aff'd [2006] 4 C.T.C. 198 (FCA).

Cultural Property Export and Import Act (Canada)

Under subsection 32(1) of the Cultural Property Export and Import Act (Canada) (“Cultural Act”), where a person disposes of or proposes to dispose of an object to an institution or a public authority designated by the Minister (appointed under the Cultural Act) under subsection 32(2) of the Cultural Act, the person, institution or public authority may request that the Canadian Cultural Property Export Review Board established under the Cultural Act (“the “Review Board”) determine, (i) whether the object meets the criteria for cultural property set out in paragraphs 29(3)(b) and (c) of the Cultural Act, and (ii) the FMV of the property.

Subsection 32(4) of the Cultural Act provides that, where the Review Board receives such a request, it shall, “unless the circumstances of a particular case require otherwise”, make a determination within 4 months of the receipt of the request.

Subsection 32(5) of the Cultural Act provides that the Review Board, where it has made a determination under subsection 32(4), (a) shall, at the request of the disposing or receiving party made within 12 months of the initial determination by the Review Board, redetermine the FMV of the object (and shall do so within 4 months of the request unless the circumstances require otherwise – s. 32(6)), and (ii) may on its own initiative and at any time redetermine the FMV of the object. Subsection 32(8) provides that the Review Board shall not redetermine the FMV of an object more than once, unless the circumstances require otherwise.

Under section 33.1, a person who has irrevocably disposed of an object to a designated institution or public authority the FMV of which has been redetermined under subsection 32(5) may, within 90 days of the redetermination, appeal the redetermination to the Tax Court of Canada. Such appeal must use the General Procedure: *Marechal*, 2004 CarswellNat 2733 (TCC); aff'd [2006] 4 C.T.C. 198 (FCA). Such an appeal may not be brought if the person only proposes to dispose of the object, and has not actually disposed of it (subsection 32(9)).

Status of Review Board Determination Under the Income Tax Act (Canada)

Under subsection 118.1(10.1), if the FMV of a property is determined by the Review Board, that value will apply to the property for all income tax purposes related to charitable gifts for two years from the determination.

By virtue of subsection 118.1(11) and 165(1.2) of the ITA, there is no appeal from an assessment or reassessment of a taxpayer's tax, interest or penalties where it is based on a Review Board valuation. These subsections provide as follows:

118.1(11) Notwithstanding subsections 152(4) to (5), such assessments or reassessments of a taxpayer's tax, interest or penalties payable under this Act for any taxation year shall be made as are necessary to give effect

(a) to a certificate issued under subsection 33(1) of the Cultural Property Export and Import Act or to a decision of a court resulting from an appeal made pursuant to section 33.1 of that Act; or

(b) to a certificate issued under subsection (10.5) or to a decision of a court resulting from an appeal made pursuant to subsection 169(1.1).

...

165(1.2) Notwithstanding subsections (1) and (1.1), no objection may be made by a taxpayer to an assessment made under subsection 118.1(11), 152(4.2), 169(3) or 220(3.1) nor, for greater certainty, in respect of an issue for which the right of objection has been waived in writing by the taxpayer.

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Intention to Make a Gift

At common law, a gift of property requires a voluntary transfer with an intention to make a gift, and no expectation of benefit in return. Where the transferor receives any form of consideration or benefit the presumption is that no such intention is present. Under proposed subsection 248(30), the ITA supersedes the common law as follows:

248(30) Intention to give – The existence of an amount of an advantage in respect of a transfer of property does not in and by itself disqualify the transfer from being a gift to a qualified donee if

- (a) the amount of the advantage does not exceed 80% of the fair market value of the transferred property; or
- (b) the transferor of the property establishes to the satisfaction of the Minister that the transfer was made with the intention to make a gift.

Eligible Amount of the Gift

Recent amendments require the determination and specific inclusion in a receipt of an amount referred to as the “Eligible Amount of the Gift”. Proposed subsection 248(31) defines the eligible amount of the gift for the determination of the amount of a charitable tax credit as follows:

248(31) Eligible amount of gift or monetary contribution – The eligible amount of a gift or monetary contribution is the amount by which the fair market value of the property that is the subject of the gift or monetary contribution exceeds the amount of the advantage, if any, in respect of the gift or monetary contribution.

In determining the ‘Eligible Amount of the Gift’ as required by proposed subsection 248(31) one must deduct the amount of any advantage as set out in proposed subsection 248(32):

248(32) Amount of advantage – The amount of the advantage in respect of a gift or monetary contribution by a taxpayer is the total of

- (a) the total of all amounts, other than an amount referred to in paragraph (b), each of which is the value, at the time the gift, or monetary contribution is made, of any property, service, compensation, use or other benefit that the taxpayer, or a person or partnership who does not deal at arm’s length with the taxpayer, has received, obtained, or enjoyed, or is entitled, either immediately or in the future and either absolutely or contingently, to receive, obtain, or enjoy
 - (i) that is consideration for the gift or monetary contribution,
 - (ii) that is in gratitude for the gift or monetary contribution, or
 - (iii) that is in any other way related to the gift or monetary contribution, and
- (b) the limited-recourse debt, determined under subsection 143.2(6.1), in respect of the gift or monetary contribution at the time the gift or monetary contribution is made.

Accordingly, upon the issuance of Official Receipts for Income Tax Purposes, there is a requirement to include information to reflect these proposed subsections. Receipts for gifts-in-kind must indicate the FMV of the gifted property (proposed subsection 248(35)); the amount of any ‘advantage’ (proposed subsection 248(32)), and the eligible amount of the gift (proposed subsection 248(31)).

The term “Fair Market Value” is not defined in the ITA. In proposed subsection 248(35) the concept of “Deemed Fair Market Value” is introduced, and which is now the starting point for the determination of the value in proposed subsection 248(31).

248(35) Deemed fair market value [of donated property] – For the purposes of subsection (31), paragraph 69(1)(b) and subsections 110.1(2.1) and (3) and 118.1(5.4) and (6), the fair market value of a property that is the subject of a gift made by a tax payer to a qualified donee is deemed to be the lesser of the fair market value of the property otherwise determined and the cost, or in the case of capital property, the adjusted cost base, of the property to the taxpayer immediately before the gift is made if

- (a) the taxpayer acquired the property under a gifting arrangement that is a tax shelter as defined in subsection 237.1(1); or

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(b) except where the gift is made as a consequence of the taxpayer's death,

- (i) the taxpayer acquired the property less than 3 years before the day that the gift is made, or
- (ii) the taxpayer acquired the property less than 10 years before the day that the gift is made and it is reasonable to conclude that, at the time the taxpayer acquired the property, one of the main reasons for the acquisition was to make a gift of the property to a qualified donee.

For charitable receipt purposes the amount of the valuation of property acquired and donated within 3 years, (or 10 years if acquired specifically to donate) is restricted to an amount equal to the taxpayer's adjusted cost base of the property. This does not apply to Cultural Property Gifts which are exempt from this provision [see proposed subsection 248(37)c, below].

Cultural Property

Proposed subsection 248(35) does not apply to Cultural Property, the exemption is contained in proposed subsection 248(37)(c):

248(37) Non-application of proposed subsection (35) – Subsection (35) does not apply to a gift

- (a) of inventory;
- (b) of real property or an immovable situated in Canada;
- (c) of an object referred to in subparagraph 39(1)(a)(i.1);

Where the reference in proposed subsection 248(37)(c) to subparagraph 39(1)(a)(i.1) refers to:

39 (1)(a)(i.1) an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(b) and (c) of the Cultural Property Export and Import Act...

In other words, in the case of property determined to be cultural property by the Review Board, the determination of FMV by the Review Board is statutory, and shall be the fair market value used in the application of proposed subsection 248(31).