# Donative Intent, Charitable Tax Credit, and Inflated Donation Schemes

### What is Donative Intent - or - When Does Someone Make a Gift for Income Tax Purposes?

*[Please see comments at the end dealing with the analysis of "value" of the fake documents as they differ between the FCA and TCC]*

*Canada v Berg*, 2014 FCA 25

This is an appeal of the TCC decision of Berg v The Queen, 2012 TCC 406. See the summary of that decision for the facts and reasoning. The FCA allowed the Crown's appeal.

In short, the taxpayer participated in a charitable donation program that was designed, through a series of transactions, to result in inflated tax receipts.

The TCC reasoned that the only benefit the taxpayer received was an inflated tax receipts, such that the taxpayer was permitted to claim a tax credit for the donation to the extent actually impoverished in the purchase and transfer involved in the scheme. Thus, the TCC held that the potential to save more tax than actual donation expenditure did not destroy the donative intent of the taxpayer, such that a valid gift was still made.

The FCA stated that section 118.1 of the ITA is intended to provide individual taxpayers with tax credits for gifts they make to registered charities. Since the ITA does not define the term "gift", the meaning must be determined using the applicable law. In this case, the FCA referred to the decision of the FCA in *The Queen v. Friedberg*, 92 D.T.C. 6031(F.C.A.), were it was stated that:

> [...] a gift is a voluntary transfer of property owned by a donor to a done [sic] in return for which no benefit or consideration flows to the donor.

The taxpayer in this case knew that the series of transactions were intended to mislead the tax officials as to the FMV of the property transferred, and that this was done only to allow the taxpayer to receive an inflated tax receipt and claim inflated tax credits. The taxpayer's participation was conditional on receiving the documents supporting an inflated tax credit.

The FCA determined that the "pretence documents" had value to the taxpayer. The taxpayer paid a substantial fee, in excess of the value of the property involved, and the pretence documents were part of the deal. The documents supporting an inflated tax receipt were consideration or value that the taxpayer received, nullifying donative intent such that there was no gift made. The taxpayer did not impoverish himself in engaging in the transactions - he intended to enrich himself by making use of an inflated tax receipt. The FCA stated at paragraph 29:

> [...] Mr. Berg did not intend to impoverish himself by transferring the timeshare units to

> Cheder Chabad. On the contrary, he intended to enrich himself by making use of falsely inflated charitable gift receipts to profit from inflated tax credit claims. He consummated the “deal” solely with that objective, and he acted from beginning to end in a manner intended to achieve that result.

[Mr Robert Kepes highlighted the possible confusion created when the FCA stated that the inflated tax receipt and supporting documents had value, and therefore were a benefit that negates the gift. The TCC had stated that because the documents were nothing but window dressing and without value, therefore not negating the gift.

In my reading of the case and the reasons, the FCA is avoiding the *ex post* valuation question so as not to distract from the relevant determination - was there a gift; i.e. was there donative intent. The FCA relies on the sufficiency of consideration (rather than the adequacy/quantum of the consideration) received and expected in the exchange/transaction.

The question of whether there was a gift or not - whether there was donative intent or not - asks whether the property was given without any consideration or benefit. Here, the taxpayer would not have given the property (donation and fees) unless, and gave the property with expectation and in consideration of, a benefit being received in return. There was no intention of making a gift, but rather an exchange for value. Just as in contract law, it is not the adequacy of the consideration that is of concern but rather the sufficiency of it. Did the person get what he bargained for? Here, the bargain was for the inflated tax receipts, and whether their value is adequate - i.e. the tax savings materializes or not - is irrelevant.

The transaction was a deal not a gift.]



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