Kossow v Canada, 2012 TCC 325

Is a Donation Contingent Upon Approval of an Application for an Interest-Free Loan a Gift for Purposes of Caritable Tax Credits (ITA s 118.1)?

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There were three issues in this case, being whether:

- a) the donations made using part cash and part interest free loan from promoter were gifts within the meaning of subsection 118.1(1) of the ITA?
- b) GAAR is applicable to deny the tax credits?
- c) the onus of proving the minister's assumptions, when those assumptions involve third parties, rests with the taxpayer or minister?

However, the TCC felt bound by the FCA decision in Maréchaux v. The Queen, 2010 FCA 287 , to find that the amount was not a 'gift' for purposes of subsection 118.1(1) of the ITA, because there was an expectation of a benefit - being the interest free loan for 25 years (which formed 80% of the 'donation' amount). Thus, there was no need to consider the latter two issues.

FACTS

The taxpayer became involved in the donation program in 2000, 2001 and 2002. Prior to this she had made charitable donations ranging from $201 -$1,360.

The donation program was conceived by a fundraising group, and the donations would consist of an interest free-loan component and a cash component. The group's members had previously been involved in selling tax shelter programs. The donation consisted of a cash portion of 20% of the total, a 10% deposit for the 25 year interest free loan to be invested to equal the remaining donation amount, and an interest free loan covering 80% of the donation amount to be paid after 25 years pursuant to a promissory note.

There were art dealers involved who arranged for works of art to be purchased by the MacLaren Art Centre using funds raised by the donation program. The art program involved a set of "MacLaren Edition" bronzes of Rodin plasters, whose value increased from the original manufacturing contract of $6M to over $108M. Only 10 of 12 sets of bronzes were ever completed, non-landed in Canada, and non one who gave evidence had actually seen these bronzes - the court said "there was no evidence before me which showed that the […] bronzes actually existed" (para 36).

The loan amounts were 'circulated' in that the promoter borrowed money from a Canadian lender to make the loan to the participant, then borrowed money from an offshore lender to repay the Canadian lender, and the offshore lender used the funds from the 'donations' to make loans to the promoter.

The taxpayer made no inquiries about the program, and didn't read the details of the program. She stated that her primary attraction was the ability to make larger donations, and the tax savings was only secondary in her considerations.

ANALYSIS

The Court stated that section 118.1 of the ITA allows for a tax credit for individuals in respect of gifts they make to a registered charity and other organizations, and reads:

> 118.1(1) In this section,
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> "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 five 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 qualified donee, to the extent that the amount was 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;

The FCA in Maréchaux v. The Queen, 2010 FCA 287, agreed with the adoption of the definition of "gift" by the trial judge from *The Queen v. Friedberg*, 92 DTC 6031 (FCA) at 6032, where it was said that for purposes of section 118.1 "[…] 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". Thus a payment to the foundation in expectation of a significant benefit was not a "gift" - the benefit being the interest free loan from a lender.

The Court noted that in the case at Bar, the donations were not separate from the financing, but were rather conditional upon the application for the interest free loan being accepted. The benefit of the interest free loan is sufficient to vitiate the purported gift.

The taxpayer argued on the basis of the OCA decision in *McNamee v. McNamee*, 2011 ONCA 533, that a gift is only vitiated where there is evidence of consideration frlowing from the donee to the donor. In *McNamee* the OCA stated:

> 31. It is helpful to remember that the issue is not whether the donor (or, for that matter, the donee) received some benefit from the estate freeze (Mr. McNamee Sr. accomplished his corporate planning; the boys received their common shares). **The issue is whether the donee has provided any consideration to the donor for the transfer of the shares.** For the reasons outlined above, the appellant provided no consideration in that regard. The fact that Mr. McNamee Sr. accomplished his corporate planning goals - including capping his value in the company at $2 million, with the right to draw out more if he wished; protection from creditors; and relief from possible tax consequences on his death - do not amount to consideration flowing from the appellant

> to him. Nor, we would add, did the appellant's continued employment with McNamee Concrete constitute consideration for the transfer of the shares in the circumstances. The appellant receives a good salary for his services as an employee of the enterprise, and the father's vague hope that his sons would continue with the company does not constitute consideration flowing from the boys. The shares were not transferred in order to ensure the sons' continued involvement in the company; they were transferred to give effect to the estate freeze plan. Motive underlying a donor's conduct is not the same thing as consideration flowing from the donee. (emphasis added)

The TCC here stated that the statements of the OCA were made in the context of a family law matter, and in relation to a question of whether the shares were part of matrimonial property - the statement was not intended to be one of general application. The OCA did not intend to restrict or change the definition of a gift, but identified the definition of a gift as:

> 24 The essential ingredients of a legally valid gift are not in dispute. There must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee, and (3) a sufficient act of delivery or transfer of the property to complete the transaction: Cochrane v. Moore, (1890), 25 Q.B.D. 57 (C.A.), at p. 72-73; Mossman and Flanagan, supra, at p. 441, Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010), at p. 157.

The Court also refused to grant a credit for the cash portion of the 'donation' as there was only one interconnected transaction - "no part of the donation was given as a gift without expectation of return".