

# TAXING ISSUES

Gwen A. Benjamin, Wilson Vukelich LLP

Co-authored with Jag C. Gandhi, Wilson Vukelich LLP

# Income Tax Act

- Deemed Disposition
  - ▣ General rule is fair market value immediately before death
  - ▣ Purpose of rule, to ensure that all accrued gains on capital property, up to the time of death, are included in computing the income of the deceased for the year of death
- Transfer to Spouse, Common Law Partner, or a Spousal/Common Law Partner Trust
  - ▣ Not an exemption only a deferral

# Income Tax Act

- Beneficial Ownership
  - Can be a confusing concept
  - CRA Technical Interpretation – Capital Property of Deceased Taxpayer (Doc. Number 2010-0377971E5)
    - Legal Title vs Beneficial Owner
  - Practical Point:
    - Have a detailed Planning Form which requires the client to list all capital property which he or she has title to and question the client as to whether there may be other properties in which they have an interest

# Income Tax Act

- Rollovers or Deferrals and Exemptions
  - ▣ Most common rollover or deferral is the transfer to a Spouse or Common Law Partner
  - ▣ Spouse and Common Law Partner Defined
    - ITA vs *Succession Law Reform Act*
  - ▣ Practical Point:
    - A person can have both a spouse and a common law partner under the ITA

# Income Tax Act

- Transfer to Qualifying Spouse or Common Law Partner Trust
  - Conditions:
    - The deceased must have been a resident in Canada immediately before death;
    - The spousal/common law partner trust must have been created by the taxpayer's Will;
    - The spousal/common law partner trust must be a resident in Canada immediately after the time the property vested indefeasibly in the trust;
    - The spouse/common law partner must be entitled to receive all of the income of the spousal/common law partner trust during his or her lifetime;
    - No person except the spouse/common law partner may, before his or her death, receive or otherwise obtain the use of any of the income or capital of the spousal/common law partner trust; and
    - Property must be “vested indefeasibly” in the spousal/common law partner trust within 36 months of the taxpayer's death.

# Income Tax Act

- Transfer to Qualifying Spouse or Common Law Partner Trust
  - Entitlement to Income
    - Must be entitled to receive all of the income that arises during the trust during the spouse's lifetime.
    - CRA Technical Interpretation – Spousal Trust – Entitlement – Payable, Doc Number 2003-0008285
    - CRA Technical Interpretation – Spouse's Discretion to Accumulate Income in the Trust, Doc Number 2003-0014515
  - Entitlement to Capital
    - Power to encroach can only be for the benefit of the spouse/common law partner and cannot be for the benefit of anyone else.

# Income Tax Act

- Transfer to Qualifying Spouse or Common Law Partner Trust
  - Exclusive Use of the Income and Capital
    - Broad interpretation by CRA

# Income Tax Act

- Transfer to Qualifying Spouse or Common Law Partner Trust
  - ▣ Vest Indefeasibly
    - Not defined in the ITA but provides that property will be deemed not to have vested indefeasibly in certain circumstances

# Income Tax Act

- Electing Out of Spousal/Common Law Partner Rollover or Deferral
  - ▣ To have the ordinary deemed disposition rules apply
  - ▣ An election out of the rollover provisions might be desirable where the deceased had unused tax credits, loss carry forwards or capital gains exemption.

# Estate Administration Tax

- Multiple Wills
  - Avoidance of EAT
  - Segregating assets which require probate into a separate will from those that do not require probate
  - Multiple spousal trusts and the impact of subsection 104(2) of the ITA on the spousal/common law partner rollover
  - CRA Interpretation – Spousal Trusts Doc Number 2010-0358461E5

# Testamentary Trust Tax

## □ Benefits:

- Tax rate - *inter vivos* trusts are taxed at the highest marginal rate, testamentary trusts are taxed at the same graduated rates as an individual
- Multiple Taxpayers
- Year end other than a calendar year end
- Avoiding ETA

# Testamentary Trust Tax

- 21 Year Deemed Disposition Rule
  - Exception to general rule – spousal/common law partner trust
  - Purpose of rule – preventing a trust from holding property for an indefinite period of time
  - 2007 STEP Canada National Conference CRA Round Table - where executors of an estate hold property in trust prior to transferring it to the trustees of a testamentary trust, the 21 one year interval should be measured from the death of the testator.

# Testamentary Trust Tax

- Anti-Avoidance and Loss of Testamentary Trust Status
  - Proposed rules in paragraph (d) of the definition of “testamentary trust” in subsection 108(1) of the ITA
  - A trust can lose its testamentary trust status if any of its property has been contributed otherwise than by an individual on or after the individual’s death and as a consequence thereof
  - A loss of testamentary trust status through a variation of the trust

# Charitable Donations

- Annual Donation Limit
  - Donors receive a federal tax credit of 15.0% (or the lowest tax rate in effect) on the first \$200 they donate in the year, and a federal tax credit of 29% (or the highest tax rate in effect) on all donations over \$200 made during the year.
  - Donors also receive provincial tax credits, the amount of which varies from one province to another.
- Increase to the Annual Donation Limit – Taxable Capital Gains

# Charitable Donations

- Increase in Annual Donation Limit – Donations in the Year of Death
  - ▣ Subsection 118.1(1) “total gift” (a)(ii) of the ITA - The annual donation limit is increased to 100% of an individual’s net annual income in the year of death and in the year preceding death.

# Charitable Donations

- Timing of Gift on Death
  - Subsection 118.1(5) of the ITA – A charitable gift made by Will is deemed to have been made by the individual immediately before death.
  - Timing has an impact on the value of the gift made

# Charitable Donations

- What is a Gift?
  - “gift” is not defined under the ITA
  - However, the whole system of charitable tax credits requires that the transfer of property to the charity qualifies as a "gift" at law.
  - Eligible Amount of the Gift

# Charitable Donations

- Drafting the Charitable Gift
  - CRA has issued several technical interpretations over the years regarding the use of discretion in Wills regarding the amount of gift and the naming of the charity.
  - These interpretations are not law, and they are subject to change, but they alert us to issues and positions that we should not ignore.

# When to Call in the Experts

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- US citizens involved in the estate plan
- Private company share issues
- Non resident trust issues
- Non-resident beneficiaries