

Correspondence

To the Editor:

Re: Tax Treatment of Employee Stock Options

Daniel Sandler's article, "The Tax Treatment of Employee Stock Options: Generous to a Fault,"* provides a good historical summary of the taxation of employee stock options in both Canada and the United States. Its central theme, however, seems to be that "most newspapers and right-wing think tanks" (at page 301) have hoodwinked the Department of Finance into believing that a massive brain drain to the United States is underway. These same right-wing forces have convinced the department to stop the outflow of knowledge workers by allowing employees to defer the income inclusion from the exercise of their stock options until they sell the shares. And yet, as Sandler says at page 276, "taxation generally . . . is not a primary motivating factor for employees moving south of the border." Further noting that employees in Canada generally hold options until they need cash, at which time they exercise and sell, Sandler questions (at page 275) "exactly what the proposals [that is, the 2000 budget changes that provide the tax deferral] intend to accomplish apart from making the Canadian rules similar to those in the United States." Perhaps the answer is that the hardworking souls in Finance are not as gullible as Sandler would have us believe and that in response to a perceived brain drain they have introduced a perceived tax benefit—one that will seldom be used by employees, will cost the fisc nothing, and will mollify the right-wing think tanks.

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* (2001), vol. 49, no. 2 *Canadian Tax Journal* 259-319.

To the Editor:

Re: Tenant Inducement Payments as Matchable Expenditures?

In a recent article published in this journal,* I concluded that tenant inducement payments (TIPs) made by landlords are often deductible in the year in which they are made. This view was based on the Supreme Court of Canada decisions in the *Canderel* and *Toronto College Park* cases. The Canada Customs and Revenue Agency (“the CCRA”) has been somewhat less liberal in its interpretation of these decisions. The CCRA has stated on several occasions that TIPS will be deductible in the year in which they are made in those cases where the facts are identical to those in *Canderel* or *Toronto College Park*. However, in situations that differ from these cases, such as where the payment was incurred with the specific purpose of producing identifiable future income, the CCRA will apply the matching principle. (See, for example, CCRA document no. 2000-0056045, December 6, 2000.)

On one occasion, when asked for its views in respect of a TIP where the rent under the lease was computed partially by reference to the tenant’s revenues, the CCRA stated that the TIP could be subject to amortization under the matchable expenditure rules of section 18.1 of the Income Tax Act. (See CCRA document no. 1999-0011755, February 15, 2000.) Although these rules are intended to apply to expenditures relating to certain types of tax shelters, there has been concern among some tax advisers that they could apply to a TIP in this type of situation. The CCRA stated that the TIP could be considered a “matchable expenditure” in respect of a “right to receive production” (see subsection 18.1(1)), since the taxpayer (the landlord) had a right under the lease in which it was entitled to an amount all or a portion of which was computed by reference to the use of property, or revenue, and the amount was in respect of another taxpayer’s (the tenant’s) activity.

Even if a TIP were a matchable expenditure, it would not be subject to amortization under section 18.1 if it fell within the exception in subsection 18.1(15). This exception applies where, among other things, the matchable expenditure in respect of the right to receive production was not paid to another taxpayer to acquire the right from the other taxpayer. If, in the context of a TIP, the “right to receive production” means the right to receive rental payments under the lease, the exception could potentially apply to any TIP (even where the rent is computed by reference to the tenant’s revenues) since the right is not acquired from the tenant.

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* Joseph Frankovic, “The Income Tax Treatment of Prepaid Expenses and Similar Costs: A Time Value Analysis” (2000), vol. 48, no. 5 *Canadian Tax Journal* 1371-1443.