
CORRESPONDENCE

To the Editor:

Re: Comments on the Department of Finance's "Special Assistance for Charitable Donations of Publicly Traded Securities"

This note is written to express my most strenuous objection to the articles by Lisa Philipps, of Osgoode Hall Law School, and David G. Duff, of the Faculty of Law of the University of Toronto, which appeared in (2003) vol. 51, no. 2 *Canadian Tax Journal*, dealing with the special tax assistance for charitable donations of publicly traded securities.¹ Both articles deal with the onus on the federal government to justify retaining or expanding ITA paragraph 38(a.1), which reduces by 50 percent the usual inclusion of taxable capital gains in income when appreciated securities are donated to charitable organizations and public foundations.

Mr. Duff's article is specifically subtitled "A Tax Expenditure Analysis." It accepts, uncritically, Finance's characterization of allowances for donations to charity as a tax expenditure. He briefly mentions the at least equally valid position that a normative definition of income would treat someone who earns, say, \$50,000, out of which he or she donates \$5,000 to charity, as having a taxable capacity equal to someone else who earns \$45,000 and gives nothing to charity. On this basis, a normative income tax would start with treating each of these individuals as starting at the same point. Finance and Mr. Duff prefer to treat any tax measure which takes account of charitable donations as a tax expenditure, and they both consider that they are tax expenditures which the government, in effect, grants out of the goodness of its heart.

Unfortunately, this attitude was reinforced some years ago by the substitution of tax credits for deductions from the income of individuals, in response at that time to a campaign of a non-governmental group, using what I regard as highly dubious reasoning. Tax credits clearly suggest that they are a tax expenditure, rather than a proper deduction in arriving at a normative income. Wayne Thirsk, formerly of the Department of Economics, University of Waterloo, even suggested in an article written some years ago in this journal that the government ought to vary the amount of the allowance in accordance with its view of the desirability of the charitable

1 Lisa Philipps, "Thinking Critically About the Taxation of Capital Gains on Donated Public Securities (or Looking Paragraph 38(a.1) in the Mouth)" (2003) vol. 51, no. 2 *Canadian Tax Journal* 913-24; and David G. Duff, "Special Federal Tax Assistance for Charitable Donations of Publicly Traded Securities: A Tax Expenditure Analysis" (2003) vol. 51, no. 2 *Canadian Tax Journal* 925-36.

donee.² This would deprive all of us of the privilege of choosing the specific bona fide charities we support, without pressure from government, a freedom which I, as a member of a minority group, particularly consider vital.

Both Ms. Philipps and Mr. Duff refuse to accept Finance's conclusions that ITA paragraph 38(a.1) has been effective in increasing charitable donations of publicly traded securities and that these increased donations have been distributed fairly among charities.

It may be true that the total level of charitable contributions has not seen any unusual increase since paragraph 38(a.1) was enacted. However, those of us who deal professionally with large donors can testify that their donations have increased enormously as a result of this measure. This is hardly surprising. If, for example, a gift is made to a public charity of shares with an adjusted cost base of \$1,000,000 and a fair market value of \$10,000,000, this will result in a capital gain of \$9,000,000. In the absence of paragraph 38(a.1), this would lead to inclusion of \$4,500,000 in the donor's income, resulting, at the top marginal rate in Ontario of 46 percent, in a tax of \$2,070,000. Since, for a person in the top tax bracket, the tax credit is substantially the same as a deduction, the tax credit is 46 percent of \$10,000,000, or \$4,600,000. As a result, the net tax benefit of the donor's munificence is \$2,530,000, only 25.3 percent of the total value of the gift. With the benefit of paragraph 38(a.1) the figures change dramatically, since the tax levied on the gift is reduced to \$1,035,000 while the tax credit is still \$4,600,000. The net tax benefit to the donor becomes \$3,565,000, or 35.65 percent of the total value of the gift. This is a considerable incentive; indeed, it has led large donors to make gifts that they would never have otherwise made.

This increase in large donations has offset what appears to have been a significant drop in the total of smaller donations, so that the total level of donations has not increased materially. I totally believe that paragraph 38(a.1) has fulfilled its function of increasing donations from what they would otherwise have been.

The second condition, that this increase has been distributed fairly among charities, is also clearly fulfilled. If these large donations had been directed, for example, mainly to homes for stray cats, objection might properly be taken to the measure. However, they have been almost exclusively directed to educational institutions and medical care, which are generally considered to be areas where sound policy would have encouraged them. Mr. Duff seems to consider that, because they have not been directed to various charities in the same proportions as they were before paragraph 38(a.1) was enacted, this is evidence of an unfair distribution. Coming from someone whose university benefits greatly from this new level of private funding, both as regards higher education in general and medical research in particular, this position is most surprising.

2 Wayne R. Thirsk, "Giving Credit Where Credit Is Due: The Choice Between Credits and Deductions Under the Individual Income Tax in Canada" (1980) vol. 28, no. 1 *Canadian Tax Journal* 32-42, at 41-42.

In summary, I suggest that Finance has made out a good case for retaining paragraph 38(a.1). I hope that in future it will see fit to extend its application to gifts of real property and other appreciated assets and also to treat gifts to private foundations, which have done so much to benefit our society, in the same manner as gifts to charitable organizations and public foundations.

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