

Date: _____, 2008

Chief of Appeals

Dear Sir/Madam:

Re: Notice of Objection for the _____ Taxation Year

Please find attached my Notice of Objection filed in accordance with section 165 of the *Income Tax Act* (Canada) objecting to the Reassessment issued by the Canada Revenue Agency in respect of the above-noted taxation year.

The Taxpayer respectfully requests that the Minister withdraw, vary or vacate the Reassessment so as to allow the Taxpayer's claim for charitable donations.

Yours truly,

(Signed)

(Date)

Name:

Address:

City:

Postal Code:

Telephone:

Fax:

Email:

Social Ins. Number:

Notice of Objection

Name of Taxpayer: (the "Taxpayer")

Address:

City:

Postal Code:

Telephone:

Fax:

Email:

Social Ins. Number:

Taxation Year Objected to: ("Taxation Year")

Date of Mailing of Reassessment:

Authorized Representative: (if applicable)

Name:

Address:

City:

Postal Code:

Telephone:

FACTS AND REASONS FOR OBJECTION

STATEMENT OF FACTS

1. The Taxpayer is a resident of Canada for the purposes of the Income Tax Act (Canada) (the "Act").
2. In his personal tax return for the Taxation Year, the Taxpayer claimed a deduction in computing tax payable under Part I of the Act on account of his total donations and gifts to registered charities on account of the Courseware Gift (defined below) and the Cash Gift (defined below). The Taxpayer claimed a deduction from tax payable for the Taxation Year under subsection 118.1(3) of the Act, based on the amount of the Taxpayer's "total gifts" for the year as defined in subsection 118.1(1).
3. In 2004, a resident of the Bahamas (the "Settlor") settled the Global Learning Trust (the "Trust") with a gift of US\$100 for the purpose of benefiting charity. At inception, the Canadian Charity Association, a registered Canadian charity, was appointed as the income beneficiary of the Trust. The Canadian Charity Association subsequently changed its name to the International Charity Association Network ("ICAN").
4. In accordance with the Deed of Trust, an individual who is a resident of Canada and who has demonstrated a past history of charitable giving could apply to become a capital beneficiary of the Trust. The trustee of the Trust, Global Learning Trust Services Inc., an Ontario corporation, (the "Trustee"), had the absolute discretion to accept or reject such application.
5. Additional property was contributed to the Trust as follows: InfoSource, Inc., a Florida corporation, (the "Publisher") created various computer software programs (the "Courseware") which provide training solutions for those interested in learning about personal computer software applications, and obtaining advanced technical and business skills. In return for a contribution of a sum of cash to help defray its software development and other costs, the Publisher granted to a Bahamas corporation wholly-owned by the Settlor, Phoenix Learning Corporation ("Phoenix"), a master license for certain popular Courseware titles ("Master Courseware"), under which Phoenix has the right to grant to persons resident in Canada an unlimited number of royalty-free, perpetual licenses for individual titles of the Master Courseware (the "Master License"). Phoenix gratuitously made an absolute gift in favour of the Trust of a number of fully transferable, royalty-free, perpetual licenses of the Master Courseware (the "Licensed Courseware").
6. The Taxpayer chose to participate in the Global Learning Donation Program and his application to become a capital beneficiary of the Trust was accepted by the Trustee. As a capital beneficiary of the Trust, the Taxpayer received a distribution of capital property of the Trust in the Taxation Year from the Trustee in satisfaction of his capital interest in the Trust. This capital property consisted of a number of licenses of the Licensed Courseware, listed in Schedule A to the Assignment of License pursuant to which the trust property was distributed (the "Subject Courseware").
7. The Licensed Courseware was independently appraised by a qualified valuator, Michael Ozerkevich of EMC Partners ("EMC"), and another qualified appraiser, Richard M. Wise of Wise Blackman, Chartered Accountants ("Wise"), independently reviewed and confirmed the foregoing appraisal (the "Appraised Value").
8. The Taxpayer voluntarily chose not to keep but to donate the Subject Courseware in the Taxation Year to a registered charity under the Act, the Canadian Charity Association (the "Charity"), and obtained a donation receipt from the Charity in an amount equal to the Appraised Value of the Subject Courseware (the "Courseware Donation").
9. The Taxpayer did not receive any consideration from the Charity, or any other person, in return for or in connection with, the Courseware Donation. The Taxpayer did not attach any restriction, obligation or other limitation on the use by the Charity of the Courseware Donation.
10. The Charity used the Subject Courseware at its community training centres throughout Canada to educate the underprivileged to obtain practical computer skills which can lead to gainful employment, enhanced business opportunities, and improved performance at school and at work. The Charity was a registered charity within the meaning of subsection 118.1(1).
11. At about the same time, the Taxpayer voluntarily chose to donate a cash donation in the Taxation Year (the "Cash Donation") to the Millennium Foundation (the "Foundation") a registered charity under the Act, and obtained a donation receipt from the Foundation for the Cash Donation. The Foundation was a registered charity within the meaning of subsection 118.1(1).
12. The Taxpayer did not receive any consideration from the Foundation, or any other person, in return for or in connection with, the Cash Donation. The Taxpayer did not attach any restriction, obligation or other limitation on the use by the Foundation of the Cash Donation. The Foundation used such cash donations to make gifts to other registered Canadian charities.
13. In each case of the donation of the Courseware Donation and the Cash Donation, the Taxpayer signed a written direction to Escrowagent Inc. (the "Escrow Agent") which afforded the Taxpayer a period of reflection during which time he/she was free to decide to keep or donate either, neither, or both of the property or cash

to any charity of choice. In the case of the Courseware Donation, the direction provided that the Taxpayer had forty-eight hours from the later of (a) the time the Taxpayer received notice that his/her application to become a beneficiary of the Trust had been accepted, and (b) the Subject Courseware was distributed by the Trustee to the Taxpayer (the "Initial Time"). In the case of the Cash Donation, the Taxpayer had seventy-two hours from the Initial Time.

14. In making the Courseware Donation to the Charity and the Cash Donation to the Foundation, neither the Taxpayer nor any person dealing not at arm's length with the Taxpayer received any property, service, compensation, accretion to wealth or other benefit of any kind whatsoever as consideration for, in gratitude for or as a direct or indirect consequence of making such gift of Licensed Courseware to the Charity or cash to the Foundation.
15. By Notice of Reassessment for the Taxation Year, the Minister of National Revenue (the "Minister") disallowed the claim for charitable donations and gifts in respect of the Courseware Donation and the Cash Donation. As a result, the Taxpayer's taxes payable increased by the amount set forth in the Reassessment. The Minister also assessed arrears interest in respect of such adjustment.

STATEMENT OF REASONS FOR OBJECTION

General Principles

16. In reassessing the Taxpayer, the Minister disallowed the claim for charitable donations and gifts for the Courseware Donation and the Cash Donation. In support of the Reassessment, the Minister assumed that the Taxpayer did not make a gift at law to either the Charity or the Foundation. For the reasons stated below, the Minister erred in disallowing the foregoing claim and the Taxpayer hereby respectfully requests that the Minister withdraw, vary or vacate the Notice of Reassessment forthwith.
17. The Supreme Court of Canada has made it clear that a taxpayer's legal relationships should be respected, unless an anti-avoidance provision of the Act applies or the transaction is a sham. The economic substance or realities of a situation cannot be used to recharacterize a taxpayer's *bona fide* legal relationships. Taxpayers are entitled to structure their affairs in the most tax-effective manner. Moreover, taxpayers are entitled to structure their affairs for the sole purpose of a favourable tax position. Taxpayers' motivations for entering into certain transactions to obtain a tax result have no bearing in Canadian tax law and such tax-motivated transactions cannot be disregarded on the basis that they were tax-motivated.¹

Charitable Donation and Gift

18. At common law, it is generally the view that a gift includes only a property transferred voluntarily, without any contractual obligation and with no advantage of a material character returned to the transferor.
19. The Minister assumes that the Taxpayer lacked the intention to make a donation to charity because, the Minister asserts, the Taxpayer's primary motivation was not to enrich the charity, but rather, through a series of transactions, to make a profit from the tax credits so obtained.
20. The Minister erred in making this assumption of fact, as the Taxpayer was the owner of both the Subject Courseware and the Cash, and was under no compulsion or obligation to donate either to charity. The Taxpayer had the option to keep or donate the Subject Courseware; keep or donate the Cash or, alternatively, keep both the Subject Courseware and the Cash. By choosing not to keep the Subject Courseware or the Cash but to donate them to the Charity and to the Foundation respectively, the Taxpayer impoverished himself by the full amount of the Cash plus the fair market value of the Subject Courseware and, thus, demonstrated the necessary intention to make a charitable gift.
21. The Federal Court of Appeal in an unrelated case rejected the Minister's argument that a taxpayer was engaged in an adventure in the nature of trade, when he acquired certain valuable paintings for the purpose of donating them to charity. The Court held that in order for there to be an adventure in the nature of trade, the taxpayer must have a motivating intention to acquire a property for resale at a profit. A donation to charity by its very nature cannot produce a profit for the donor. Moreover, the Court rejected the notion that the receipt of tax advantages, such as the tax credit for donations, can be determinative of a trading operation.²
22. The Minister also asserts that the Taxpayer received consideration for the Cash Donation in the form of a benefit or advantage that was linked to and flowed from certain pre-arranged conditions, thus vitiating the donative intent required for a charitable donation. In particular, the Minister asserts that the Licensed Courseware was distributed by the Trustee to the Taxpayer in consideration for the Cash payment to the Foundation and the Taxpayer's agreement to donate the Subject Courseware to the Charity.
23. The Minister also erred in making this assumption of fact for a number of reasons. Firstly, based on the jurisprudence, the tax credit itself should not be considered a benefit for purposes of determining whether a taxpayer has received an advantage in respect of a gift.³
24. Secondly, the Trustee's appointment of the Taxpayer as a capital beneficiary of the Trust was based solely

upon the Taxpayer's demonstrated *past history* of charitable giving, and was made by the gratuitous exercise of the Trustee's discretion.

25. Thirdly, the Taxpayer did not make a prior agreement to donate to charity any property he would receive from the Trust or cash of his own.
26. Fourthly, it was only after the Subject Courseware was distributed from the Trustee that the Taxpayer made the donation of the Subject Courseware. Moreover, it was only after the Subject Courseware was received by the Taxpayer that he made the Cash Donation.

The Cash Donation

27. The Minister assumes that the Cash Donation the Foundation was not a gift at law, on the basis that his payment was not free and clear, and that the Foundation did not have unfettered use of the Cash Donation, but was required to pay large fundraising fees to other parties and, therefore, did not benefit from this payment.
28. This assumption of fact is erroneous, because the Taxpayer did not impose any restriction on the use of the Cash Donation by the Foundation and had no knowledge of any proposed use of the Cash Donation by the Foundation. Moreover, if the Foundation chose to pay large fundraising fees to other parties in order to receive some portion of the Cash Donation which it would otherwise never have received, it had the contractual right to do so. Whatever amount of cash the Foundation thus received was of benefit to it and to the other registered charities to which it made subsequent gifts of cash.

The Subject Courseware Donation

29. The Minister assumes that the Taxpayer never owned the Subject Courseware and, thus, could not have transferred the Subject Courseware to the Charity. In support of this assumption, the Minister asserts that the Trust is not a valid trust because it lacks certainty of property and certainty of objects. This assumption is erroneous for a number of reasons.
30. Firstly, the Minister acknowledges that the initial cash of US\$100 was made from the Settlor to the Trustee with the evident intent on the part of the Settlor to settle the Trust. Given that the Canadian Charity Association was a beneficiary of the Trust from inception, the three certainties necessary to create a trust at law (namely, the settlor's intent, certainty of property and certainty of objects) are all present, resulting in a valid trust. It is irrelevant that additional beneficiaries would not be determined until the relevant individuals made application to become beneficiaries and that such applications were to be approved by the Trustee. Accordingly, the Trust possesses certainty of objects.
31. Secondly, the legal documents entered into among the Publisher, the Settlor, the Contributor and the Trustee all reflect legally binding arrangements that are not a sham and, thus, must be respected under the Act. In accordance with the Master License the Contributor became a licensee entitled to grant licenses to the Licensed Courseware. The source of the payment to the Publisher of an amount of cash to defray expenses, whether it is from the Contributor or another party, is irrelevant to the legal validity of the Master License.
32. Thirdly, the Contributor made a gift of the Licensed Courseware in favour of the Trust with an evident intent to vest title in the Trustee, a corporation that is resident in Canada and, therefore, a person entitled to become a licensee under the Master License.
33. Fourthly, the Trustee was always in legal possession if not physical possession of the initial cash of US\$100 and the Licensed Courseware, and was legally entitled under the Deed of Trust to delegate some of its administrative responsibilities to third parties. Accordingly, the Trust possesses certainty of property.
34. The Minister also erroneously assumes that the transfer of Licensed Courseware from the Trustee to the Taxpayer was legally ineffective because certain exhibits to be attached to the Assignment of License were alleged to be missing. The Assignment of License was legally effective because Exhibit A to the Assignment of License, listing the assigned licenses, was attached to the Assignment; the Taxpayer was notified that he could view the Master License referred to in Exhibit B electronically; and the Trustee or his agent kept careful record of all Licensed Courseware that was being transferred by way of distribution by the Trustee to the capital beneficiaries and so notified the Taxpayer even though certain exhibits may or may not have been missing.

The Value of the Donated Licensed Courseware

35. The Minister further assumes that the fair market value of the Licensed Courseware is nominal. The Minister supports this assumption by asserting that the Contributor acquired the Master License for a lesser sum of money, and that this is a transaction that represents the last arm's length transaction for the Licensed Courseware, which should be the value accepted by the courts. The Minister rejects the independent appraisal by Michael Ozerkevich of EMC Partners as representing the value at an individual retail market, which value the Minister erroneously assumes is not appropriate for transfers pursuant to the Donation Program.
36. The Minister erred in making the foregoing assumptions for the following reasons. First, in fact the cash payment to the Publisher was clearly stated in the Master License not to represent a purchase price but rather a contribution to the Publisher to help defray its costs of developing the Licensed Courseware. Moreover, the Publisher expressly stated in the Master License its support for the philanthropic purposes of the Donation Program.

37. Second, the appraisal by Michael Ozerkevich of EMC Partners of the Licensed Courseware, which followed all appropriate principles and procedures of the highest professional standard, and was independently confirmed by Wise, represents the value that a court would accept because, among other reasons, arm's length sales of the Courseware were made, in the Taxation Year and otherwise, for prices that are consistent with the Appraised Value.
38. Third, the Trustee, Trust and the Taxpayer are unrelated to, and arm's length with, the Publisher, the Settlor, the Charity and the Foundation. The Act deems the acquisition and disposition of the Subject Courseware to be at its fair market value, and no provision in the Act applies to reduce the eligible amount of the Taxpayer's Courseware Donation to an amount less than its fair market value.
39. The Minister also erred in not recognizing the tens of thousands of trainees who have benefited from the Charity's distribution of the Courseware. Numerous letters of tribute and commendation have been received by the Charity in appreciation for access to the Courseware, by individuals who have upgraded their computer and business skills, obtained enhanced business and employment opportunities, and achieved enhanced school and work performance. This is a testament to the true value of the Licensed Courseware and the Global Learning Program.
40. The Taxpayer may submit such further facts and reasons as the Taxpayer considers appropriate.

(Signed)

(Date)