CIBC FAMILY OFFICE

CHARITABLE GIFTS AND YOUR PRIVATE CORPORATION

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Kate helps clients consider their social legacy, whether that means giving to charities and non-profits, volunteering or making socially responsible investments.

Kate is a lawyer called to the Bar in Ontario and is a certified financial planner (CFP). Prior to joining CIBC, she spent 15 years practicing charity and non-profit law at a national law firm. Kate has been recognized for her expertise by the Canadian Legal Lexpert Directory and Best Lawyers in Canada. She is an executive member of the Charity and Not-for-Profit Section of the Canadian Bar Association.

Kate is a frequent writer and speaker on charity and non-profit issues.

Executive Summary

Making an impactful donation to a charity that's near and dear to your heart is an altruistic way of leaving a lasting legacy. If the gift you have in mind involves a private corporation, careful planning with your tax and legal advisors will help ensure your estate and heirs don't encounter any unforeseen complications.

Deciding who should make the gift is a prime example. If you have multiple entities, such as a private corporation or family trust, you need to carefully consider which is the best person or entity to make the charitable gift. While spouses and common law partners can share charitable tax credits during their lifetime, other taxpayers cannot.

This article examines this and several other important questions to ask when contemplating a charitable gift, such as what should be given, when should it be given, and what happens if you have more than one will?

Share your intentions and consider these issues with your legal and tax team now to plan a better charitable gift.

Making a gift to charity can be rewarding. If your charitable gift involves a private corporation, then careful planning with tax and legal professionals is needed to take advantage of the tax benefits for charitable gifts. Here are some tips to consider in planning your charitable gift.

A charitable gift from your corporation cannot be claimed by you personally. Similarly, a gift made by your private corporation on death will not reduce taxes payable in your last tax return or in your estate.

Make your gift from the right person or entity

If you have multiple entities, such as a private corporation or family trust, then consider which is the best person or entity to make your charitable gift. Which entity do you want to claim the charitable tax credit or deduction: you, your corporation, your trust or more than one of these entities? While spouses and common law partners can share charitable tax credits during their lifetime, other taxpayers cannot share charitable tax credits. A charitable gift from your corporation cannot be claimed by you personally. Similarly, a gift made by your private corporation on death will not reduce taxes payable in your last tax return or in your estate.

In order to fully use the charitable tax credit or deduction the entity making the gift needs to have sufficient taxable income. For most gifts, the maximum amount of donation an entity can claim is equal to 75% of its taxable income and any unused charitable tax credits can be carried forward and claimed in the next five years.[1]

Consider gifting publicly traded securities

Consider gifting publicly traded securities held by a private corporation. When a person gifts publicly-traded securities directly to charity, then there is no capital gains tax on the gifted shares. The corporation can also claim a charitable tax deduction for the fair market value of the securities gifted. In addition, when a Canadian controlled private corporation makes a gift of publicly listed securities the full amount of the capital gain is added to the corporation's capital dividend account. This may allow the shareholder to receive a non-taxable capital dividend from the corporation. Since other transactions may impact the ability to pay a capital dividend, include your tax professionals in planning the gift and other transactions.

Carefully plan gifts of your private corporation shares

Before gifting private corporation shares to charity, you may want to consult with your corporate lawyer to check whether the corporation's shareholder agreement restricts the transfer of shares to a charity. You should also consider the rights the charity will have if they hold the shares. The charity will usually have a gift acceptance policy that sets out the terms on which they will accept a gift of private corporation shares. Most charities will want to understand the valuation of the shares and have a plan in place for the redemption or sale of the shares before accepting the gift.

While there is no capital gains tax on gifts of publicly traded securities, the same rule does not apply to gifts of private corporation shares. When you gift private corporation shares to charity you will have to pay tax on any capital gains arising when the shares are gifted. However, there can be other tax benefits. Capital gains are taxed at a lower rate than dividends. Thus, gifting your shares should result in lower taxes than taking a dividend from the corporation. You can also claim a charitable tax credit for the value of the shares gifted to charity.

Be careful if you want to gift private corporation shares to your private foundation because the charitable tax receipt could be delayed until the shares are sold or it could even be denied. In a recent case, the court denied a charitable tax receipt for a gift of $17 million because of a strict reading of the rules governing the provisions of tax receipts in these circumstances. This case highlights the need for professional advice before gifting private corporation shares to a private foundation.

Estates should gift property held personally on death

If you make a gift through your will,[2] then the tax rules give your executor the choice to claim the charitable tax credit in your terminal tax return, in the year before death or over several years in the estate. This flexibility is important because many people will owe more taxes in their terminal tax return than in other years. One of the requirements for your executor be able to claim the charitable tax credit in the terminal tax return is that your estate must gift property which you held at the time

[1] This limit can be increased by 25 percent of any taxable capital gain or recaptured depreciation resulting from qualifying donations of capital property. More generous rules apply to gifts of ecologically sensitive property, cultural property and estate gifts.

[2] Alternatively, where permitted by provincial law, you can use a beneficiary designation form or document to name a charity as a beneficiary of your registered accounts, such as an RRSP, RRIF or TFSA, or as beneficiary of a life insurance policy.

of death. This can be an issue if you want to gift corporately owned life insurance proceeds or securities because at the time of death these assets are held by your corporation and not you personally. If your estate receives a corporate dividend after your death and then makes a charitable gift or your estate borrows funds to make the charitable gift, then the executor cannot claim the charitable tax credit against your terminal tax return.

The CRA takes the position that where a shareholder requires their private corporation to make a gift on their death, then the corporation is not making a gift and there is no charitable tax deduction for the transfer.

One way to avoid this issue is for your executor to gift assets you held at the date of death to charity and then use proceeds from a corporate dividend to pay your other beneficiaries. Make sure your executor understands the rules and confirms that your will allows your executor to structure your charitable gifts to be able to claim the charitable tax credits in the years that the credits are most useful.

Do not require a corporation to make a gift on your death

Canadian law requires a gift to be a voluntary transfer of property. If a person is fulfilling an obligation, then they are not making a gift. The CRA takes the position that where a shareholder requires their private corporation to make a gift on their death, then the corporation is not making a gift and there is no charitable tax deduction for the transfer. This rule may also prevent a corporation from claiming a charitable tax deduction from a gift of corporate life insurance because this is requiring a corporation to make a gift on your death. Therefore, instead of naming a charity as the beneficiary of a corporately held insurance policy, consider naming the corporation as the beneficiary of the policy and then the corporation could make a voluntary gift to charity. If you want to gift a corporate asset on death, it is important to seek legal advice on how to structure your gift to be voluntary. You could also consider making the charitable gift during your lifetime.

If you have multiple wills, consider which will should make your gift

The requirement to gift property held on death can also be an issue with multiple wills. In some provinces people use multiple wills to reduce probate taxes. You may have one will for assets that are subject to probate and another will for assets that do not require probate, such as your private corporation shares. If you have multiple wills, then consider which will (or wills) should contain the charitable gift. If your corporate will includes a gift to charity, then your estate may need to gift your private corporation shares in order to be able to claim the charitable tax credit in your terminal return. If this is not desired, then consider whether your charitable gift should be in your other will.

Conclusion

As you can see, tax rules can be complicated. Luckily you don't need to figure these rules out on your own. Engage your tax and legal professionals to plan a gift that takes full advantage of the tax incentives for charitable giving.

CIBC Family Office helps you and your family manage the complexities of multi-generational wealth. Working with our clients to help them organize and understand the intricacies of wealth ownership, we develop a plan that is tailored to each individual family, responsive to the needs of each member and reflects the family's current and future vision.

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