

Being Commercial; Being Non-Profit

This column's recent topics, the Broadbent Report and the Supreme Court's decision in *Vancouver Society of Minority and Immigrant Women* for example, focus on the considerable problems in the law of charities. A recent Tax Court decision is a useful reminder that equally perplexing questions exist for non-profit organizations. The case deals with a central question for non-profit organizations — whether carrying on a measure of commercial activity makes them for-profit organisations. But before looking at that case, it is useful to review the basic conditions for exemption under the *Income Tax Act* (ITA).

First, it is important to note that the most commonly considered sub-section of the ITA on income tax exemption is the one dealing with non-profit organizations. This provision is just one of many parts to section 149. All give tax exemption on income to qualified entities. There are sub-sections dealing with scientific organizations, agricultural associations, and limited dividend housing corporations, for example. But by far the most common section relied on in claiming tax exemption is sub-section 149(1)(1).

The second point is that the claim for tax exemption under sub-section 149(1)(1) is a question of fact. In contrast, charitable status results from a process of application and registration. While it would be unusual, it could happen that a non-profit organization was tax-exempt this year but not next year, yet again tax-exempt the following year. In contrast, a charity must maintain its charitable status or it may be deregistered.

When sub-section 149(1)(1) is broken down into its essential parts, the following necessary conditions must exist before an organization qualifies for exemption. To claim exemption, an organization

- (a) cannot be a charity, in the opinion of the Minister of Revenue;
- (b) must be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit;
- (c) must be in fact operated exclusively for the same purpose in (b) for which it was organized or for any of the other purposes mentioned in (b); and

(d) cannot pay any part of its income (or make its income payable or otherwise available) for the personal benefit of any proprietor, member, or shareholder of the organization, except in connection with the promotion of amateur athletics in Canada.

In other words, the organization can't be a charity. It must be set up for a specified purpose or for any other purpose, except profit. Next, the organization actually must carry out its activities in the same way. And finally, unless it is involved with the promotion of amateur athletics in Canada, it cannot provide direct financial benefit to the organizations or people who control it.

In the written opinion of the Department (Interpretation Bulletin IT496) an association is not operated exclusively for non-profit purposes when its principal activity is carrying on of a trade or business. Features

that might indicate the existence of a trade or business are

- the organization is operated in a normal commercial manner;
 - its goods or services are not restricted to members and their guests;
 - it is operated on a profit basis rather than a cost recovery basis; or
- it is operated in competition with taxable entities carrying on the same trade or business.

It was the question of what is "normal commercial manner" and "operating on a profit basis" which were the issues in the recent case of *The Canadian Bar Insurance Association v. Her Majesty the Queen*. The company had as its stated purpose: to make available insurance plans and similar plans and benefits to members of the legal community in Canada and such other persons as the Board of Directors may determine from time to time. The Minister of National Revenue issued assessments for four years where the company had made a profit. In the words of the judgment, "[w]hen issuing those four assessments, the Minister assumed that the Appellant was not organized and operated for purposes other than profit." The company appealed the assessments claiming that it was exempt from tax under the provisions of paragraph 149(1)(1).

In examining the applicable tests, the Court relied on an earlier decision which noted that the question was whether the social and welfare activities of the organization are a cloak to avoid payment of taxation on a commercial enterprise or are its real objectives. The case of *The Gull Bay Development Corporation v. The Queen* dealt with a logging company that provided employment to members of a First Nation. In reviewing *Gull Bay*, the judge observed that the situation for the insurance company was quite different. The company did not compete with insurers or brokers, but

acted on behalf of a restricted class of consumers. The judge went on to say that if the competitive logging operation in *Gull Bay* did not cause the corporation to lose its tax-exempt status, then the non-competitive activities in the commercial area of insurance ought not to be regarded as proof of a profit purpose.

Then the Tax Court judge quoted from a Supreme Court of Canada decision which he relied on to set out the main points to consider when looking at non-profit status in a commercial context (*The Regional Assessment Commissioner and the Municipal Clerk of the Corporation of the Town of Hearst v. Caisse populaire de Hearst Limitée*, 1983). It is worth reproducing that quote in full for it clearly sets out the questions. And while each case will still have to be closely examined on its particular facts, the law is clear.

“...Many community and charitable organizations, relying from time to time on what would be termed commercial activity to raise funds for the

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fulfilment of their objectives, could be classed as businesses by such a test. To attach primary importance to the commercial aspect of an operation in question will offer, in my opinion, no sure or helpful guide. In my view, the commercial activity test is too indefinite to allow consistent application. I agree that . . . , all relevant factors regarding an operation must be considered and weighed. However, they must be con-

sidered and weighed in order to determine not whether in some general sense the operation is of a commercial nature or has certain commercial attributes, but whether it has as its preponderant purpose the making of a profit. If it has, it is a business; if it has not, it is not a business.”

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