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May 2011 Testamentary gifts to charities

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It is now almost three months since old Fred died. Fred was one of those colourful characters whose death makes the world seem a smaller place. His wife died some years ago. Fred enjoyed life. He had a keen interest in racing. He owned some horses himself and enjoyed the busy social life that went with it. He was also a successful investor and left a substantial share portfolio at his death. You considered him not only a client but also a friend.

You not only prepared Fred's will but also, with a good mate of his, were appointed as his executors.

After some generous family legacies and gifts of his horses Fred left the residue of his estate to a mix of local, state and national charities.

You could see that some of the shares would have to be sold to prop up the available cash for the legacies but this would still leave a multimillion dollar share portfolio.

Accordingly, now that probate has been granted and after discussions with your co-executor, you instructed Fred's stockbroker to liquidate the portfolio. So that you would know how much to distribute to the charities, after receipt of the cheque into your trust account, you asked Fred's accountant how much should be retained for CGT.

As you did so you reflected on the good that Fred did under his will and how smoothly things had gone. You know this would have pleased Fred.

The sting

The sting is delivered by Fred's accountant Alison who asks why on earth you sold the shares without talking to her first. You tell her there were heaps of shares, all acquired at different times over the years, and it would have been a nightmare transferring equal numbers of shares to each of the different charities because of the different cost bases. And furthermore, you say, you lose the CGT exemption on death if you give assets to a tax-exempt charity, don't you?

Alison says that may well apply in some circumstances, but certainly not always. And when you look at the charities Fred picked out, a transfer of shares to them would have been CGT-free. By selling the shares now the estate will have to pay CGT of about $700,000 unnecessarily.

You reply that common sense would dictate that if we could transfer the shares to them CGT-free then surely those shares that were sold to pay the cash to the charities would be CGT-free too? Surely it isn't a drama, you say (thinking that really Alison is a bit of a drama queen).

Alison breaks the news that, unfortunately, the Tax Office has issued private binding rulings to executors who have done the same thing but has refused any CGT exemptions.

The explanation is that s.104-215, dealing with CGT event K-3, which in effect imposes CGT on testamentary gifts to tax-exempt entities, has a footnote drawing attention to s.118-60 which provides a number of exemptions; in particular ss.(1) which exempts a capital gain made from a testamentary gift of property that would have been deductible under s.30-15 if it had not been a testamentary gift. Section 30-15 applies to gifts to most, if not all, deductible gift recipients. And all the charities referred to in Fred's will are deductible gift recipients.

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