

## TAXADVISOR

## Gimme Shelter

## COURT REPORT

BY JAMIE GOLOMBEK



Just over a year after the release of the Federal Court of Appeal's now-infamous trio of decisions involving donation tax shelters, *Nash, Tolley and Quinn* (see Advisor's Edge Report, "Gift Low No-No," December 2005), the Canada Revenue Agency has attacked and won yet another case (*McPherson v The Queen*, 2006 TCC

648) involving a donation scheme with a 75% "kickback" feature.

Grant McPherson, an investment adviser in B.C., invested in a tax shelter called the Association for the Betterment of Literacy and Education ("A.B.L.E."). The shelter operated for several years before being deregistered as a charity in 1999. In 1996, the year in question for McPherson, the shelter was promoted as the "Charitable Donation Program."

According to the CRA's description of the program, a taxpayer

McPherson said that "he never thought he might get cash back," despite this being articulated clearly in the promotional material.

would decide the amount of charitable receipt he or she wanted and then contribute that amount (100%) to the program.

He or she would then receive an "educational gift" from the Publishers' Philanthropic Fund of Bermuda (PPF) equal to 75% of the amount contributed. The fund was described as a group of "pub-

lishers, royalty rights holders and producers of intellectual properties [that] have over many years profited enormously through their individual and collective enterprise" who have decided to anonymously "give some of this wealth back to society" through contributions piggy-backed onto taxpayers' contributions in a ratio of 3:1.

The donor, as a result of the PPF gift, would then receive a charitable receipt from A.B.L.E. for the entire contribution amount, thus realizing a "high overall rate of return" given that his or her cost was only 25% of the amount of the receipt.

McPherson testified that although he knew that there was an "educa-

tional gift," he thought it was the chance of receiving something small, such as "golf clubs, hockey tickets or perhaps a dinner." He denied receiving 75% of his contribution back, despite this being articulated clearly in the promotional material.

In 1996, McPherson contributed \$125,000 to A.B.L.E. and in 1997, a further \$100,000. During the trial, McPherson was unable to explain what A.B.L.E. really did, nor what the acronym "A.B.L.E." even referred to. As the judge wrote, "It is unclear from his evidence whether he actually knew anything about A.B.L.E."

The CRA testified that the activity of A.B.L.E. was to promote "literacy and education" by giving out speed reading kits. These speed reading kits were produced by two local Vancouver companies, for a cost of \$1.30 per package; however, A.B.L.E. was charged \$150 per package. The CRA also demonstrated that McPherson had no history of making any other donations, having claimed none for the prior three years.

In an attempt to unravel the tax shelter, the judge poured through complex global, financial arrangements detailing wire transfers, Swiss bank accounts, and code names such as "Ave Maria" and "Ironman" before concluding that McPherson was, indeed, "on a balance of probabilities," the recipient of a 75% kickback in respect of his "donation." The only question that remained was whether his donation receipt was valid.

For a gift to be valid, it must constitute "a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor." The judge therefore concluded that "it is trite law (and common sense) that the anticipation and receipt of a cash kickback equal to 75% of the donation vitiates the gift."

Finally, the judge also reviewed eight other tax shelter cases, dating as far back as 1989, all of which were linked to the same promoter as the A.B.L.E. shelter and all of which failed. "The overall impression that one derives from the above court decisions is that each of the 'tax schemes' was poorly designed and improperly operated and the various 'investors, partners or donors' were always unsuccessful," wrote the Judge.

This case should serve once again as a warning to all: If it sounds too good to be true, it probably is! **AER**

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