



Dear Participant

Re: The Canada Revenue Agency's Recent Settlement Offer to Participants in the Canadian Humanitarian Trust Donation Program ("CHT Program")

A large number of CHT Program participants have received a letter of settlement ("CRA's Offer") from the Canada Revenue Agency ("CRA") over the last six weeks. There are also a large number of participants that have not yet received the letter, however, WHI has been informed by CRA that they should expect to receive one in the near future.

For the earliest group of recipients, the deadline for responding to CRA's Offer is October 18th, 2013. We would like to take this opportunity to explain CRA's Offer and help you understand the overall situation, the choices available to you, and to address questions and concerns which may arise from CRA's Offer.

In our earlier communications we informed you that WHI had been soliciting opinions and direction from our legal counsel at Osler, Hoskin and Harcourt, LLP ("Osler") and from Mr. Chief Justice Donald Bowman, the former Chief Justice of the Tax Court of Canada (the "Tax Court"). The main areas of discussion have included:

1. A comprehensive review of all recent and relevant cases heard by both the Tax Court and the Federal Court of Appeal;
2. An effort to determine the tenor and the direction of the Courts in recent years;
3. A consideration of the possible and likely results in the current CHT Program test case appeals to the Tax Court;
4. The options available to CHT Program participants now and going forward; and
5. The length of time it will likely take to complete the test case appeals in the Tax Court.

The fundamental principal guiding this process has been the need to ensure that all parties, and in particular CHT participants, are as well informed as possible given the extremely short time frame placed upon us by CRA. We know that being well informed is crucial to being able to make a decision regarding CRA's Offer. Following this letter is a more extensive memo that aims to address the relevant issues arising from CRA's Offer.¹

Our counsel is quick to point out that the facts in the CHT Program are clearly distinguishable from those in any other donation program or recent case law. As you know, we have always maintained confidence in the structure and facts of the CHT Program.

WHI will continue to lead the appeals in the tax court moving forward even though a number of people have chosen to accept CRA's offer.

¹ **Although we are offering these general comments and the comments that follow, they do not constitute legal advice. We emphasize as always, that all CHT Program participants should consult their own legal and financial advisors to consider their particular circumstances in determining whether to accept CRA's Offer.**

Whether you choose to accept CRA's Offer or not, WHI will continue to support ALL CHT Program participants moving forward.

Notices of Reassessment

All CHT Program participants, whether or not they choose to accept CRA's Offer, will receive a Notice of Reassessment, which adjusts their original reassessment to allow the initial cash portion of their donation that was previously disallowed. The vast majority of CHT Program participants will see a credit to their Statements of Account, effectively reducing their tax owing.

Whatever the impact, WHI will provide substantial support to assist all CHT Program participants in understanding and managing the results of their decision.

Accepting CRA's Offer

For the benefit of those participants who accept CRA's Offer, WHI is currently engaging a team of experienced professionals to assist them in making arrangements on an individual basis with CRA for a reasonable and manageable payment schedule and plan. CHT Program participants who accept CRA's Offer will have a reduced tax bill to pay in comparison to their current Statement of Account. Those that have paid all or most of their tax bill will likely receive a tax refund, including interest.

Not Accepting CRA's Offer

While WHI will support everyone who accepts CRA's Offer and who requests our assistance, we will also continue to support those CHT Program participants who choose NOT to accept CRA's Offer and to continue the litigation process in Tax Court.

Most importantly, ***CHT Program participants who reject CRA's Offer will have to file a Notice of Objection within 90 days of the date of CRA's new reassessment*** (which has not yet been issued) ***in order to continue with and to maintain the Tax Court appeals.*** WHI will assist them in every way possible throughout this process.

For those who choose NOT to accept CRA's Offer and choose to continue the litigation process in Tax Court, the following issues MUST be considered:

1. ***It is counsel's shared view that due to a number of factors, it highly likely that the outcome of Tax Court will be no better than CRA's current offer*** (and there is a possibility that the outcome in Tax Court could be even worse given recent court rulings on other tax shelter programs). A more detailed discussion and analysis of these factors can be found in the Memo that follows this letter. Further, in Osler's experience, the CRA offer of interest relief from the date of the original reassessment to the date of the new reassessment is unique and unprecedented. Given these factors, ***Osler's maintain that CRA's Offer deserves serious consideration.***
2. ***There is no guarantee that CRA will make any subsequent offer, and in particular there is no guarantee that interest relief will be offered again;***

3. Regardless of the outcome of a trial in Tax Court, **individual participants will have to apply to CRA for discretionary interest relief with no guarantee that CRA will grant any such relief;**
4. Due to a number of factors **the current Tax Court appeal process may have to be adjusted or restarted,** and in any case could require another 3-5 years before all avenues of appeal are exhausted and a final determination is made;
5. While WHI will continue to support CHT Program participants in every way it can, **WHI will ask those who choose to continue to fight CRA's new reassessments - as a group - to assist in funding the ongoing litigation process in Tax Court.** To date, WHI has spent well in excess of the amount originally set aside in its defense fund and well in excess of legal counsel's original estimate to carry on the Tax Court litigation to the current stage. Accordingly, all CHT Program participants who file a new Notice of Objection will be asked to make a financial contribution in order to ensure that there are sufficient financial resources to maintain a strong fight. Those who wish to object to CRA's new reassessment will be provided with a summary of the financial costs that have been incurred to date in the various aspects of the Tax Court appeal. But until we know how many participants wish to continue the litigation in Tax Court, we will not be able to identify the contribution that will be requested.

CRA's current Offer has created an exceptionally active and time sensitive period, with a large number of difficult issues to consider. WHI will not waiver throughout this process. For the large number of participants who have not yet received CRA's Offer, there is nothing to be done until you do receive the offer from CRA.

WHI has prepared the following memo in conjunction with our counsel to explain the recent decisions in the Courts that can affect our case and the attitude of the Courts towards tax shelters in general. We also clarify what a CHT Program participant can expect if he or she chooses to accept CRA's Offer, or alternatively, chooses to object to CRA's new reassessment and continue the litigation. **We strongly recommend that everyone take the time to read this memo.**

I find myself very conflicted between the information Counsel is conveying and the facts merits of this program. It has been disheartening to see how little regard there is for what we have accomplished globally. I want to share with you my personal thoughts and feelings about this situation, and so I will record a personal message for all of you and I will post it on the website.

Yours truly,



Stephen Rosen
President,
World Health Initiative

Memo to all CHT Donation Program Participants

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1. The Canadian Humanitarian Trust Donation Program **A Reminder of Program Specifics and the Strengths of the Program**

WHI continues to be proud of the CHT Program and the global humanitarian impact that was made possible through your participation in the CHT Program. It was always the primary goal of WHI to facilitate the gifting of much needed medicines to those in need. Tens of millions of people received life saving medicines in close to 50 countries around the world.

WHI stands behind the structure of the CHT Program that was created. It was structured to be compliant with the *Income Tax Act* (Canada), and its accompanying Regulations.

And while the CRA has not questioned the overall structure of the CHT Program, it has nonetheless challenged the validity of the Trusts, the chain of title of the pharmaceuticals and the valuation of the pharmaceuticals. WHI is confident that these evidentiary and legal issues will be resolved in the CHT Program's favour.

For example, the value of the pharmaceuticals that CHT Program participants donated was based on the Ontario Drug Benefit Formulary prices for the same or for efficaciously similar pharmaceuticals. The Formulary lists the wholesale prices paid by the Province of Ontario when purchasing medicines given to individuals, generally seniors, whose prescriptions are paid for by the Province. Professional opinions support this valuation.

2. CRA's Current Settlement offer

a. What does it mean - what are they really offering?

CRA has changed its position since issuing your original reassessment with respect to your participation in the Program. CRA has chosen to allow the original cash donation you made when participating in the Program. **CRA will issue a new reassessment to every CHT**

Program participant. Again, the new reassessment will allow, and give tax credit for, the initial cash donation made by a CHT Program participant. CHT Program participants then have two choices.

b. What are the two options?

i. Option One – Accepting CRA’s Offer and signing the waiver

If a CHT Program participant wishes to **accept CRA’s Offer to waive all interest that has accrued after the date of the original reassessment to the date of the new reassessment**, he or she must sign the “Waiver of Right of Objection or Appeal” included in CRA’s Offer letter. In doing so, a CHT Program participant waives their right to object or appeal the reassessment, agrees not to seek any further interest relief and accepts the reassessment as a current amount owing. Clearly, the amount of the interest that is being waved depends on both the year in which a participant claimed his or her donation and the amount of the donation claimed, as well as the year in which the claimed donation was first reassessed.

ii. Option Two – Rejecting the Offer

If a CHT Program participant wishes to **reject and object to CRA’s Offer, the participant must file a NEW Notice of Objection within 90 days of receiving CRA’s NEW reassessment**. If you choose to reject CRA’s Offer, **CRA will not waive any interest that has accrued after the date of the original reassessment. Interest will continue to accrue until the participant’s objection is finally settled (potentially several more years).**

If you do not sign and deliver to CRA the “Waiver of Right of Objection or Appeal” within the time that CRA requires it, CRA will assume that you wish to reject the Offer.

If you complete, sign and deliver to CRA the “Waiver of Right of Objection or Appeal” within the time that CRA requires it, then you will be accepting CRA’s Offer to settle your objection for the amount of your cash donation which you claimed, and CRA will waive all interest after the date of the original reassessment to the date of the NEW reassessment.

For the benefit of those participants who accept CRA’s Offer, WHI is currently engaging a team of experienced professionals to assist them in making arrangements with CRA for a reasonable and manageable payment schedule and plan.

3. Considerations

As stated above, it is Osler’s view that, given recent and developing case law on charitable donation programs, Osler’s experience to date with the Tax Court concerning charitable donation programs, and CRA’s and its legal counsel’s position on certain factual and legal issues relating to the CHT Program, ***it is highly likely that the result of a trial in Tax Court by the CHT Program test case participants will be no better than CRA’s Offer, and there is a possibility that the trial result may be worse.***

As we have stated above, WHI is confident that all of CRA's factual and legal issues will be resolved in the CHT Program's favour.

Even so, Counsel has gone to great lengths to explain how a) the recent case law and b) their own recent experience in the Tax Court make it clear that the legal landscape is substantially different from the landscape that existed when the CHT Program was originally structured and marketed.

Our discussions with legal counsel have led us to understand that there are two primary factors that impact on rulings made in the Tax Court or Federal Court of Appeal today.

One is the evolving case law on charitable donation programs, that is, the recent decisions of the Tax Court, the Federal Court of Appeal and the Supreme Court of Canada in cases that have degrees of similarity and relevance to our case.

The other factor is composed of two elements not easily distinguished. The first is the *Court's* attitude in general toward charitable donation programs. The second element is the *personal beliefs and feelings* of the Justice hearing the case, and his or her personal sense of a fair or "correct" judgement regardless of the facts or arguments made in court.

a. Developing Case Law on Charitable Donation Programs (Jurisprudence)

Notwithstanding the previous existing case law which WHI relied upon in creating the CHT Program, (including *Friedberg v The Queen*, a Supreme Court of Canada decision that has been a cornerstone for donation programs), the case law over the past 5 years, and especially in the last 2-3 years, has resulted in CRA becoming increasingly successful in winning Tax Court appeals in a manner unfavourable to our case. The Tax Court, and Federal Court of Appeal, are now routinely limiting the amount of a participant's charitable tax credit obtained through participation in a donation program to the amount of cash initially contributed..

For example, the decisions in *Lockie* (2010 TCC 142), *Berg* (2012 TCC 406, appeal heard before FCA and decision reserved), *Kossow* (2012 TCC 325) and *Bandi* (2013 TCC 230) all indicate that the Courts have moved towards CRA's position to deny any donation tax credits in excess of a participant's cash donation or cash amount used to purchase donated property. There has been no Court decision to the contrary in recent years. And this amounts to a significant change in the legal landscape for litigating the CHT Program in Tax Court.

Another significant recent case, which is both important to consider and particularly disturbing is the decision of the Federal Court of Appeal in *Maréchaux*, 2010 DTC 5174 (the Supreme Court of Canada refused leave to appeal). In this case, even the participant's cash donation was denied, on the basis that the Court held that the cash contributed by the participant was only part of a series of interrelated transactions, and in the Court's view there was no intention by the participant to make a donation. CRA's lawyers have already indicated their intention to rely on this case and they will undoubtedly put forth the argument that CHT Program participants should be treated in the same manner. Although we believe our facts are clearly and substantially different than those in *Maréchaux*, it will not preclude CRA's lawyers from vigorously arguing this position.

In our court hearing the specific details and merits of the CHT Program would have to be considered by a Judge of the Tax Court of Canada. And we are convinced that the merits of our case distinguish us from other donation programs and legal precedent, including *Maréchaux*.

b. Current Moods and Beliefs of Judges and Climate in the Tax Court and Federal Court of Appeal

Recent decisions of the Tax Court and Federal Court of Appeal appear to indicate the existence of a judicial sentiment that is unfavourable to charitable donation programs. The result in both Courts is that donation program participants are being permitted no more than their original cash donation or cash contribution.

Though this is not strictly legal consideration, it is important to remember that the CHT Program participant test case appeals will be heard by a single Tax Court Justice whose personal views and attitudes with respect to donation programs could well play a role in the final determination of the outcome of the case. In counsel's view, the current attitude of the judiciary generally is quite negative. Negative views and attitudes can easily lead to a judgement against us regardless of the facts in our case.

This current negative judicial attitude towards charitable donation programs, which has evolved over recent years, adds another element of risk to our achieving a successful result in the CHT Program participant test case appeals to the Tax Court.

WHI has been advised that counsel will be informing the test case appellants that it is highly likely that the result which can be achieved through a trial in Tax Court will be no better than CRA's Offer. And a trial result is not likely to include the interest relief component included in CRA's current Offer.

c. Outstanding Requests for Information

As you all know from your original reassessment proposal letters, CRA has questioned: a) the validity of the trusts; b) the chain of title to the pharmaceuticals; c) the valuation of the pharmaceuticals, and d) other factual and legal matters, including whether participants had the required intention to donate their cash and pharmaceuticals.

Even though WHI is certain that these factual and legal hurdles can be overcome, they remain currently outstanding, and would have to be fully addressed in any Tax Court trial of the CHT Program participant test case appeals.

d. Ongoing Cost of Litigation

Another factor that must be considered is the ongoing and escalating cost of continuing the appeals in the Tax Court. WHI has spent substantially more than was put aside in the defense fund and substantially more than was estimated by any legal counsel. Counsel is clearly of the position that CRA's Offer is as good as or better than any likely outcome in Tax Court.

WHI does, however, understand that there are CHT Program participants that will want to continue fighting with CRA. ***CHT Program participants who choose to reject CRA's Offer and file a new notice of objection will be asked to assist WHI in funding the ongoing costs of carrying on the appeals in Tax Court.*** The amount of funding each CHT Program participant will need to provide will be dependent on the number of participants who choose to continue fighting. Only once we know how many wish to continue the litigation can we begin to work with participants to assess costs and contributions.

4. Summary

A. The legal landscape and attitudes of the courts have shifted dramatically over the past 2-3 years.

In recent decisions, the Courts have favoured the CRA and have not allowed anything more than a donation program participant's initial cash donation or contribution.

B. Osler has gone to great lengths to explain the new legal landscape and has led WHI to the conclusion that CRA's Offer is at least as good as or better than any likely outcome in Tax Court. And there is a risk that the outcome in Tax Court could be even worse.

Osler is further of the opinion that a trial in Tax Court is highly unlikely to achieve a better result than CRA's Offer, while interest on the outstanding tax owing would continue to grow.

C. WHI will assist all CHT Program participants who wish to reject CRA's Offer with the preparation of new notices of objection in electronic format.

D. WHI will need the financial assistance of those CHT Program participants who wish to reject CRA's Offer and continue the battle with CRA in order continue the appeals.

E. WHI will remain steadfast in its commitment to all CHT Program participants to support them regardless of the decision that they make.

While we are offering these general comments, they do not constitute legal advice. We emphasize as always that all CHT Program participants should consult their own legal and other advisors to consider their particular circumstances in determining whether to accept CRA's Offer