Some Problems with RHOSPs

The provisions of the 1974 fall budget creating Registered Home Ownership Savings Plans (RHOSPs) have generated a great deal of interest among taxpayers and financial institutions alike. Yet a close scrutiny of the provisions of s.146.2 of the *Income Tax Act* (as now enacted)[1] reveals a number of disconcerting technical flaws in the requirements for the RHOSPs.

1. Can RHOSPs be used to purchase furnishings?

First, the Government quite clearly has given taxpayers the impression that contributions to RHOSPs may be used for the purchase of furnishings — either for the contributor's or his spouse's home. Indeed, s.146.2(6) provides that receipts by a contributor in a taxation year from the RHOSP will not be included in the contributor's income to the extent that the sums received were used by the taxpayer:

(i) to purchase his owner-occupied home;

(ii) to purchase home furnishings for *his* owner-occupied home; or

(iii) to purchase home furnishings for *his spouse's* owner-occupied home.

Clearly, s.146.2(6) seems to permit a contributor to collapse his RHOSP in order exclusively to purchase home furnishings for his spouse's home.

Yet, equally clearly, s.146.2(2)(a)(i) directs the Minister not to register an RHOSP which provides for any payment from the Plan other than a single payment to the beneficiary to be used by him for the purchase of his owner-occupied home. Therefore, it would appear that a registrable plan *cannot* permit the funds to be used by the contributor to buy home furnishings either for his or his spouse's home. If the RHOSP cannot be registered, then no contributions to it may be deducted by the beneficiary in computing his taxable income: s.146.2(4).

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[1] *Income Tax Act*, R.S.C. 1952, c.148, amended by S.C. 1970-71-72, c.63. The provisions dealing with RHOSPs were enacted by S.C. 1974-75, c.26.

2. Can more than one withdrawal he made from an RHOSP?

Nor does the confusion stop there. Section 146.2(6) excludes from income *all amounts* used for the purposes mentioned above. This use of the plural would seem to contemplate that the contributor may make more than one withdrawal from his RHOSP. Suppose a husband and wife both establish RHOSPs. Later (when each has contributed $7,000 to their respective RHOSPs) the husband buys an owner-occupied home. Suppose the wife at that moment only wishes to buy $1,500 worth of home furnishings. Can she withdraw the $1,500 from her RHOSP, leaving $5,500 for future purchases of home furnishings or for the purchase of her owner-occupied home? Common sense would indicate "yes" — provided the aggregate lifetime contributions to her RHOSP did not exceed the $10,000 limit established by s.146.2(4). But the *single* payment requirement for registration of the RHOSP under s.146.2(2) contradicts common sense.

What, then, is to be made of this illogical juxtaposition of subsections (2) and (6)? Is one to conclude that the trust deed governing the RHOSP must indeed provide for only one single payment, and that only for the purchase of the contributor's own "owner-occupied home"? If so, how — short of a breach of trust by the trustee — is the contributor ever to lay his hands on all or part of the RHOSP funds to buy furnishings for his or his spouse's home? Is he to *Saunders* v. *Vautier* the trust?[2] If so, this brings the entire trust to an end, he receives back all the funds in the RHOSP, and clearly must use it all (and not just part of it) for the purposes prescribed by subsection (6), within 60 days from the end of the taxation year, in order to avoid paying tax on this receipt. Further, the civil law of Quebec does not appear to contain the rule in *Saunders* v. *Vautier*, and the law of Alberta has been amended to abolish it,[3] so that contributors to RHOSPs governed by Quebec or Alberta law may not be able to demand the return of their contributions for the purpose of purchasing home furnishings. This is true even though subsection (6) would exempt these receipts from being income taxable in their hands!

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[2] (1841) 4 Beav. 115; aff'd [1841] Cr. and Ph. 240, 41 E.R. 482. Briefly, the equitable doctrine at common law deriving from *Saunders* v. *Vautier* permits a sole beneficiary (or all the beneficiaries, if they agree) to wind up the trust even in face of the trustees' opposition and contrary to the terms of the trust.

[3] See *The Attorney General Statutes Amendment Act*, S.A. 1973, c.13, s.12, amending *The Trustee Act*, R.S.A. 1970, c.373.

3. Who can contribute?

Still another problem appears when one considers who is entitled to contribute to an RHOSP. Section 146.2(5) prohibits the deduction of any contribution by a taxpayer in a taxation year if the taxpayer "had" an owner-occupied home at any time during the taxation year. What constitutes "having" an owner-occupied home? Is an accepted offer to purchase sufficient to disqualify the contributor? Or must there be a formal conveyance? What if possession predates the conveyance? What if a person contributes to an RHOSP, but later in the same year acquires a house?

On the other hand, assuming that it is possible to use an RHOSP to purchase furnishings, such purchases in the year do not preclude the beneficiary from making further contributions to the RHOSP in the same taxation year.

Finally, it should be noted that no one may contribute to an RHOSP in a year during any part of which he owned (whether jointly with another person or otherwise) real property, any portion of which was used as a dwelling place by *an* individual. Clearly, the intent of the Act is to exclude from the benefits of RHOSPs anyone who owns rental residential property. Yet an RHOSP itself cannot be used to purchase such rental property — only *owner-occupied* homes. One might have expected closer symmetry between the property which disqualifies a taxpayer from contributing to an RHOSP, and the property towards which a qualified contributor can apply the proceeds of his RHOSP.

The scramble by taxpayers last spring to contribute to RHOSPs before the deadline of 31 March 1975 underscored the attractiveness of this new provision in the *Income Tax Act*. Unfortunately, the subsequent budget presented by Mr Turner on June 23, 1975 did nothing to unravel these technical problems.

David Phillip Jones*

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* Of the Bars of Alberta and the Northwest Territories; and of the Faculty of Law, McGill University.