

TAXTimes

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COMMENTARY

BILL C-48 FOREIGN AFFILIATE ELECTIONS: FILING DEADLINE IMMINENT

The following article was written by Ryan Keey (MAcc, CPA, CA), Senior Tax Writer at Carswell, a Thomson Reuters Business, dated May 8, 2014.

Bill C-48 (*Technical Tax Amendments Act, 2012*) enacted extensive and long-outstanding amendments to the rules in the ITA and ITR regarding the taxation of foreign affiliates (FAs). The application date of several of the amendments depends upon whether a taxpayer (referred to herein as “Canco”) files certain elections. The available elections are taxpayer-friendly in that they give Canco the option of applying certain relieving amendments to earlier periods and/or of applying certain abandoned proposals to prior periods which may have been relied upon at the time a transaction was implemented. Where an available election is not filed, most of the Bill C-48 FA amendments apply after August 19, 2011. Below, a high-level description of the more significant Bill C-48 FA elections is provided.¹ If Canco

chooses to file an election, to be valid, the election must be made in writing under the applicable clause of Bill C-48 and filed with the CRA by the later of Canco's filing-due date for Canco's taxation year that includes June 26, 2013 and June 26, 2014. For example, the election due-date for a corporation with a December 31, 2013 year-end is June 30, 2014. Where an applicable election is filed, Bill C-48 permits any assessment of Canco's tax, interest and penalties payable under the ITA for any taxation year to be made “to the extent necessary” to take into account the election.²

Liquidation and Dissolution of an FA (ITA 88(3))

ITA 88(3) provides for rollover rules applicable where shares of a second-tier FA are distributed upstream to Canco by a first-tier FA upon its dissolution. ITA 88(3) was significantly amended by Bill C-48 generally to: broaden its application to all properties received by Canco on a liquidation and dissolution of an FA; allow rollovers of all properties, rather than just shares of another FA, in the case of a qualifying liquidation and dissolution (“QLAD”);³ limit the automatic non-QLAD rollover of shares of another FA to shares that are “excluded property”;⁴ deny a loss on the disposition of the shares of the dissolving affiliate in the case of a QLAD; and

¹ This article is an arbitrage version of the April 2014 *General Corporate Tax Newsletter* available in the *Corporate Tax Centre on Taxnet Pro*; certain additional FA elections available under Bill C-48 are discussed in that Newsletter.

² See for example section 53 of Bill C-48.

³ ITA 88(3.1).

⁴ ITA 95(1).

provide three special elections that allow Canco to choose, in certain circumstances, the amount for which distributed property is deemed to be disposed of and acquired for, including a “relevant cost base”⁵ election, a proceeds of disposition suppression election,⁶ and an election related to the disposition of taxable Canadian property.⁷ Variable B in the FAPI definition was also amended generally to ensure that any gains created under a relevant cost base election made for the purposes of ITA 88(3) are included in FAPI. A QLAD generally exists where Canco elects, in accordance

with ITR 5911(1) and (2), for the dissolution to be a QLAD and either: 1) Canco owns at least 90% of the shares of the affiliate throughout the liquidation and dissolution, or 2) Canco, during the course of the liquidation and distribution, receives at least 90% of the net assets of the affiliate and has at least 90% of the voting power in the affiliate’s shares.

ITA 88(3) was amended by Bill C-48 applicable in respect of liquidations and dissolutions of FAs of Canco that begin after February 27, 2004; however, if Canco elects under subsection 65(2) of Bill C-48 in respect of all of its FAs, ITA 88(3) as amended also applies to property received by Canco after February 27, 2004 and before August 19, 2011 on a redemption, acquisition or cancellation of shares of the capital stock of, on a payment of a dividend by, or on a reduction of the paid-up capital of, an FA of Canco. Where the election is filed, a special transitional reading of ITA 88(3) applies that is generally broader in scope than the current rule. Thus, filing this election may allow for access to rollover treatment not otherwise available under the more narrow former rules (i.e., in respect of a dissolution that arose during the period covered by the election).

Subsection 88(2) of Bill C-48 provides that any listed election referred to in ITR 5911(1) (i.e., a QLAD election, a suppression election, or a taxable Canadian property election) that would otherwise be required to be filed with the CRA by October 23, 2013 is deemed to have been filed with the CRA on a timely basis if it is filed by June 26, 2014. Also, a relevant cost base election under ITR 5911(5) can be filed up to June 26, 2014 by virtue of subsection 88(3) of Bill C-48.

Foreign Mergers (ITA 87(8.2), 95(2)(d.1))

ITA 95(2)(d.1) provides rollover rules that apply to a shareholding FA and merging FAs where one or more of the predecessor foreign corporations is, immediately before the merger, an FA of Canco and the new foreign corporation is, immediately after the merger, an FA of Canco. The scope of the rollover available under ITA 95(2)(d.1) was expanded by Bill C-48. Unlike under the amended rules, former ITA 95(2)(d.1) only applied to capital property of the FA predecessors, and such property was deemed to have been disposed of for its “cost amount” rather than its “relevant cost base”. Furthermore, former ITA 95(2)(d.1) only applied where the surplus entitlement percentage of Canco in respect of each predecessor foreign corporation was at least 90% immediately before the merger, where Canco’s surplus entitlement percentage in respect of the successor foreign corporation was at least 90%, and where no gain or loss was recognized in respect of any capital property of a predecessor foreign corporation that became capital property of the successor foreign corporation under the income tax law of the country in which the predecessor foreign corporations were resident immediately before the merger. There were also no equivalent

5 ITA 95(4).

6 ITA 88(3.3).

7 ITA 88(3.5).



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rules to those provided in current ITA 95(2)(d.1)(B) and (C) or 95(2)(d.1)(iii).

ITA 95(2)(d.1) was amended by subsection 70(10) of Bill C-48 applicable in respect of mergers or combinations in respect of an FA of Canco that occur after August 19, 2011; however, if Canco elects under subsection 70(31) of Bill C-48 in respect of all of its FAs, paragraph 95(2)(d.1) applies to mergers or combinations in respect of all FAs of Canco that occur after December 20, 2002 (in respect of such mergers or combinations that occur before August 19, 2011, the portion of ITA 95(2)(d.1) after subparagraph (i) has a special reading). Where a foreign merger was undertaken during the taxation years in respect of which the retroactive election applies, Canco may consider filing such an election to either qualify for rollover treatment under the broader rules or as a protective measure.

Windup of an FA (ITA 95(2)(e))

As amended by Bill C-48, ITA 95(2)(e) applies if at any time an FA (the shareholder affiliate) of a taxpayer receives a property (the “distributed property”) from another FA (the disposing affiliate) of Canco on a liquidation and dissolution of the disposing affiliate and the distributed property is received in respect of shares of the disposing affiliate. If either the liquidation and dissolution is a “designated liquidation and dissolution”⁸ (DLAD) or the distributed property is a share of another FA of Canco that is excluded property of the disposing affiliate, the distributed property is deemed to have been disposed of by the disposing affiliate for proceeds equal to the relevant cost base of the distributed property. In any other case (i.e., in respect of a liquidation of a non-substantially-wholly-owned FA), the distributed property is deemed to have been disposed of for proceeds of disposition equal to the distributed property’s fair market value. A DLAD is generally intended to identify the circumstances in which an FA of a taxpayer is considered to be substantially wholly-owned such that a rollover of all assets upon the liquidation and dissolution of such an FA is considered appropriate.⁹

In respect of the shareholder affiliate, in the case of a DLAD, a rollover is available in respect of the disposition of the disposing affiliate’s shares. However, if the liquidation and dissolution is a DLAD, the shares are excluded property, and the shares have an inherent loss, the shares are deemed to be disposed of for proceeds equal to the cost of the distributed property.¹⁰ In other words, the loss on the shares in such a case is realized, which results in a reduction of the shareholder affiliate’s hybrid surplus balance (or creates a hybrid deficit).

If the liquidation is a non-DLAD and ITA 95(2)(e)(ii) applies, any gains realized on the disposition of distributed assets other than excluded property constitute FAPI. Gains on excluded property would not be included in FAPI by virtue of paragraph (a) of variable B in the FAPI definition. The latter provision includes in FAPI a CFA’s taxable capital gain for the year that can reasonably be considered to have accrued after its 1975 taxation year from a disposition of property that is, at the time of disposition, excluded property of the affiliate if any of ITA 95(2)(c), (d), (d.1), (e)(i), or 88(3)(a) applies to the disposition.¹¹

Bill C-48 significantly expanded the scope of the rollover under former ITA 95(2)(e.1) generally by extending the rollover to all property of the liquidating corporation, not just capital property.¹² Furthermore, a former requirement that the liquidation and dissolution be afforded non-recognition treatment under the tax laws of the country of residence of the liquidating corporation was removed, as was a requirement that the liquidating corporation and the foreign parent corporation be residents of the same country. For the former provision to apply, it was also required that Canco’s surplus entitlement percentage in respect of the liquidating corporation be not less than 90% immediately before the liquidation and dissolution.

The DLAD definition was added, ITA 95(2)(e) was amended, and ITA 95(2)(e.1) was repealed by Bill C-48 applicable in respect of liquidations and dissolutions of FAs of Canco that begin after August 19, 2011; however, if Canco elects under subsection 70(28) of Bill C-48 in respect of all of its FAs, ITA 95(2)(e) and the repeal of ITA 95(2)(e.1) apply to liquidations and dissolutions of all FAs of Canco that begin after December 20, 2002. In such a case, in respect of liquidations and dissolutions of all FAs of Canco that begin on or before August 19, 2011, special transitional readings of ITA 95(2)(e) (iv) and (v) apply. Under the transitional reading, unlike under the post-August 19, 2011 rules discussed above, a loss is not required to be recognized if the liquidation and dissolution is a DLAD, the shares are excluded property, and the shares have an inherent loss. Furthermore, where the election is filed, the DLAD definition also applies applicable to liquidations and dissolutions of all FAs of Canco that begin after December 20, 2002; however, and in respect of liquidations and dissolutions of all FAs of Canco that begin before August 20, 2011, the definition is read without reference to the 90% voting power test in subparagraph (b)(ii). Similar to the election with respect to ITA 95(2)(d.1) discussed above, where an FA was

⁸ ITA 95(1).

⁹ For a DLAD to arise, it is not necessary for the Canco itself to have a substantially-wholly-owned indirect interest in the liquidating affiliate. A DLAD is not elective and applies automatically whenever one of three conditions is met.

¹⁰ In particular, the amount determined under ITA 95(2)(e)(iv)(B) — see ITA 95(2)(e)(iv)(A)(II)2.

¹¹ An earlier draft version of variable B in the FAPI definition was amended to refer specifically to ITA 95(2)(e)(i) rather than to ITA 95(2)(e); this revision was recommended in CBA/CICA Joint Committee on Taxation Submission 2011-10-19 under “9. — Foreign Affiliate Liquidations”. In respect of the shareholder affiliate, the proceeds of disposition of the disposing affiliate’s shares are determined under ITA 95(2)(e)(iv).

¹² Under the amended provision, the rollover is also based on “relevant cost base” rather than “cost amount”.

wound up into another FA during the taxation years in respect of which the retroactive election applies, Canco may consider filing an election under subsection 70(28) of Bill C-48 either to qualify for rollover treatment under the broader rules or as a protective measure.

Elections related to FA Distributions (ITA 90(1)–(5), 93(1.1), ITR 5901(2))

The August 19, 2011 package of FA proposals, including ITA 90(1)–(5), 93(1.1) and ITR 5901(2), which were enacted by Bill C-48 with some modifications, replaced the 2004 proposals dealing with distributions of capital from an FA. ITA 90(2) treats pro-rata distributions in respect of shares of an FA as dividends (including where the distribution would be considered a return of capital under the applicable foreign law) except where the distributions are received: 1) on a liquidation of the FA, 2) on a redemption of its shares, or 3) on a “qualifying return of capital” (QROC) in respect of its shares (the only other way in which a dividend from an FA will arise is if a specific provision of Part I of the ITA deems a dividend to be paid¹³). For surplus, adjusted cost base, and capital gain computation purposes, ITA 5901(2) allows for Canco to elect for a dividend to be treated as having been paid out of pre-acquisition surplus. Pre-acquisition surplus dividends are fully deductible from taxable income and reduce the adjusted cost base of an FA’s shares.¹⁴ Thus, Regulation 5901(2)(b) generally allows Canco to access the adjusted cost base of FA shares as a surrogate for the capital of the FA.

In accordance with ITA 90(3), QROC treatment is available where Canco and certain “connected persons or partnerships”¹⁵ elect for such treatment in accordance with rules in ITR 5911(6) and the following conditions are met: 1) the distribution that is the subject of the QROC election is a “reduction of the paid-up capital” of the FA in respect of the particular share of the FA (this condition is intended to be the same condition that is required of a non-resident corporation that is not an FA as provided for under ITA 53(2)(b)(ii)); and 2) the subject distribution is otherwise a dividend under ITA 90(2) (i.e., it must be a pro-rata distribution in respect of all shares of a particular class of the FA’s capital stock). The QROC election is primarily intended to allow return of capital treatment for non-corporate shareholders of an FA; corporate shareholders are not, however, excluded from making a QROC election.

ITA 93(1.1) provides that, in certain circumstances set forth under ITA 93(1.1), the rules in ITA 93(1) (election re disposition of share of FA) automatically apply in respect of a disposition of a share of an FA of Canco as if Canco had made an actual election under ITA 93(1) based on a prescribed elected amount determined under ITR 5902(6). As amended by Bill

C-48, ITA 93(1.1) now also applies if Canco makes a QROC election under ITA 90(3) or a pre-acquisition surplus election under ITR 5901(2)(b)(i) where those elections cause a capital gain by virtue of the operation of ITA 40(3) (deemed capital gain where ACB becomes negative). Amended ITA 93(1.1) was also expanded to apply to all shares of FAs that are disposed of by another FA; former ITA 93(1.1) was limited to certain types of excluded property (as amended by Bill C-48, former ITA 93(1.1) was restructured into two subsections; the operative rule is now found in ITA 93(1.1) while the conditions for its application are found in ITA 93(1.1)). In particular, former ITA 93(1.1) applied where: the transferor, being an FA of a corporation, disposed of a share of another FA of the corporation; the disposed share was “excluded property” (ITA 95(1)) of the transferor; and none of ITA 95(2)(c), (d) and (e) applied to the disposition.

ITA 90(1)–(5), 93(1.1) and ITR 5901(2) were amended by Bill C-48 applicable to dividends paid after August 19, 2011 by an FA of Canco; however, if Canco and each other corporation (Canco and those other corporations together referred to as the “elector corporations”) if any:

- 1) of which the affiliate would be an FA if paragraph (b) of the “equity percentage” definition in ITA 95(4) were read as if the reference in that paragraph to “any corporation” were a reference to “any corporation other than a corporation resident in Canada” (this special reading is intended to ensure that it is only the bottom company in a chain of Canadian corporations that need be included in the election — the dividend-paying corporation is not considered, for these purposes, to be an FA of a Canadian corporation that has no direct ownership of the dividend-paying corporation but that owns the shares of another Canadian corporation that owns the shares of the dividend-paying corporation), and

- 2) that is related to the corporation,

jointly elect in writing under paragraph 79(2)(a) of Bill C-48 in respect of all of their respective FAs, ITA 90(1)–(5) and ITR 5901(2)–(2.2) apply to dividends paid after December 20, 2002 by all the respective FAs of the elector corporations, except that, for such dividends paid before August 20, 2011, the provisions are subject to a special transitional reading. Essentially, where taxpayers elect to have the pre-acquisition surplus election rules apply to dividends paid after December 20, 2002, the transitional readings of ITR 5901(2)(a) and (b) remove the references to the hybrid surplus and QROC rules. Before August 20, 2011, a special reading of subsections 90(1)–(5) also applies; the transitional rules have the effect of eliminating the QROC rules and replacing them with a reference to the broader concept of a “reduction of paid-up capital” (see subsec. 66(2) of Bill C-48).

Canco may consider filing an election under paragraph 79(2)(a) of Bill C-48 to obtain access to the pre-acquisition

¹³ See ITA 90(5).

¹⁴ ITA 53(2)(b), 92(2)(c), 113(1)(d).

¹⁵ ITA 90(4).

surplus election with respect to a dividend paid during the retroactive taxation years covered by the election. In such a case, in addition to filing an election under Bill C-48, where applicable, Canco must also elect to apply ITR 5901(2)(b) to any particular dividend. Such an election is normally due before Canco's tax filing-due date for the taxation year in which the dividend was paid; however, for prior year dividends related to a Bill C-48 election, the election deadline is deferred by Bill C-48 (specifically, any election referred to in ITR 5901(2)(b)(i) that would otherwise be required to be filed with the CRA by October 23, 2013 is deemed to have been filed with the CRA on a timely basis if it is filed by June 26, 2014). In other words, by electing under paragraph 79(2)(a) of Bill C-48, in respect of FA distributions made after December 20, 2002, the following key consequences will generally arise: 1) ITA 90(2) will apply to treat the distribution as a dividend, even if the distribution was treated as a return of capital under the applicable foreign law; 2) Canco will have the option of electing for the dividend to be treated as having been distributed from the FAs pre-acquisition surplus under ITR 5901(2)(b); and 3) Canco will also have the option of not electing under ITR 5901(2)(b) such that the normal surplus distribution rules apply to the dividend.

ITA 93(1.1) was amended by subsection 68(3) of Bill C-48 applicable to dispositions of shares of an FA of a corporation that occur after August 19, 2011; however, if the corporation:

- 1) has elected under paragraph 79(2)(a) of Bill C-48 (i.e., to have the pre-acquisition surplus rule in ITR 5901(2)(b) discussed below apply retroactively), then the amendment also applies to dispositions of shares of all FAs of the corporation that occur after December 20, 2002 and before August 20, 2011 and a special reading of paragraph 93(1.1) (b) applies; or,
- 2) has not elected under paragraph 79(2)(a) of Bill C-48 but elects under paragraph 68(8)(b) of Bill C-48, then ITA 93(1.1) has a special reading in respect of any disposition of shares of an FA of the corporation that occurs after February 27, 2004 and before August 20, 2011 (the election allows for a previously-proposed version of ITA 93(1.1) to apply).

With respect to (2) above, the CBA/CICA Joint Committee on Taxation (see Submission 2011-10-19) recommends that such a separate election be made available to apply paragraph 93(1.1) (a) (dealing with lower-tier FA share sales) retroactively to dispositions occurring after February 27, 2004 independently of the pre-acquisition surplus election.¹⁶ As noted in the submission, many taxpayers relied on the 2004 proposals to have an automatic deemed election on lower-tier sales of non-excluded property shares (or excluded property shares subject to certain reorganization provisions) and thus did not file an ITA 93(1) election to claim the deemed dividend (as

would have been required under enacted law). In the August 2011 proposals, amended ITA 93(1.1) would have only applied prospectively if Canco made the broader pre-acquisition surplus election. Under the enacted rules, Canco has the option of filing a discrete election under paragraph 68(8)(b) of Bill C-48 for a special reading of ITA 93(1.1) to apply without giving rise to the application of other rules amended by Bill C-48.

Conclusion

With the deadline fast approaching, taxpayers should consider whether any of the Bill C-48 FA one-time elections should be filed. Where an election is not filed, generally, the pre-Bill C-48 rules will apply to the retroactive taxation years in question. In most cases, the Bill C-48 amendments in respect of which retroactive elections are available are relieving in nature and where applicable, may allow for improved tax results.

INCOME TAX LEGISLATION

Bill C-23, *Fair Elections Act*, was reported with amendments (not relevant to the *Income Tax Act*) by the Standing Committee on Procedure and House Affairs on May 5, 2014.

RECENT GOVERNMENT PUBLICATIONS

The CRA released new Income Tax Folio S1-F5-C1, *Related persons and dealing at arm's length*, effective May 2, 2014, that replaces and cancels Interpretation Bulletin IT-419R2, *Meaning of Arm's Length*. Any technical updates from the related interpretation bulletin can be viewed in the Chapter History. To allow for feedback from the tax community, newly published income tax folio chapters have a 3-month comment period where suggestions about the structure or content of this chapter or the folios in general may be emailed to folios@cra-arc.gc.ca. The comment period for this new chapter ends August 5, 2014.

SUPREME COURT APPEALS

The Supreme Court of Canada appeals tables have been updated through the S.C.C. *Bulletin of Proceedings* dated April 25, 2014.

The *Notices of Appeal to Federal Court of Appeal Filed* table has been updated on *TaxPartner* and *Taxnet Pro* for appeals filed through April 30, 2014.

¹⁶ See under "b. — Automatic Election for Lower Tier FA Sales".

RULES OF THE SUPREME COURT OF CANADA

SOR/2014-96, dated April 22, 2014, *Rules Amending the Rules of the Supreme Court of Canada* were published in the *Canada Gazette*, Part II on May 8, 2014.

INCOME TAX REGULATIONS

P.C. 2014-358 (SOR/2014-81), dated April 3, 2014, *Regulations Amending the Income Tax Regulations (Universities Outside Canada)* were published in the *Canada Gazette*, Part II on April 23, 2014.

REMISSION ORDER

The *Donald Doucet Remission Order*, P.C. 2014-363 (SI/2014-40) dated April 3, 2014, was published in the *Canada Gazette*, Part II on April 23, 2014.

NEWS RELEASE

STATEMENT BY THE HONOURABLE KERRY-LYNNE D. FINDLAY ON THE RELEASE OF THE AUDITOR GENERAL'S REPORT

Reproduced below is a news release dated May 6, 2014.

I am pleased to note that, today, the Auditor General of Canada confirmed that the Canada Revenue Agency's (CRA) Aggressive Tax Planning program has the tools to detect, correct, and deter non-compliance.

Our Government is committed to ensuring the fairness and integrity of the tax system and that everyone pays the correct amount of taxes they owe. While taxpayers are entitled to manage their tax affairs to reduce or eliminate the amount of tax owing within the objectives, and spirit of the *Income Tax Act*, the CRA will continue to challenge abusive schemes that are designed to avoid reporting or paying tax on income. Today, the Auditor General confirmed that the Agency has the tools to get the job done and is using them effectively.

I am particularly pleased to note that the aggressive tax plans identified in the report, representing approximately \$16 billion in taxable income and credits, have been resolved through legislative amendments and court decisions.

Further, the CRA has accepted and is acting on all of the audit recommendations to improve administrative aspects of the Aggressive Tax Planning program which will further strengthen its capacity.

Since 2006, and including measures proposed in recent Economic Action Plans, our Government has introduced over 85 measures to improve the integrity of the tax system such as:

- announcing the Offshore Tax Informant Program, which was launched on January 15, 2014, through which the CRA may pay rewards to individuals who provide concrete details of major international tax non-compliance to the CRA that lead to the assessment and collection of additional federal taxes owing;
- the mandatory reporting of international electronic funds transfers over \$10,000 to CRA;
- revising the Foreign Income Verification Statement (Form T1135) to require more detailed information including the names of specific foreign institutions and countries where offshore assets are located and the quantum of foreign income earned on those assets; and
- ensuring that the offshore regulated bank provisions are not inappropriately used to circumvent the foreign accrual property income rules through foreign affiliates that are not part of a Canadian financial institution group.

These measures will increase our Government's ability to protect the integrity of Canada's tax system and CRA's ability to pursue those who place an unfair burden on law-abiding Canadians.

CASE LAW UPDATE

BAKORP MANAGEMENT LTD. v. R.

Federal Court of Appeal

Webb J.A. (Stratas, Gauthier J.J.A. concurring)

April 24, 2014

Citation: 2014 CarswellNat 1207, 2014 FCA 104

Tax — Income tax — Administration and enforcement — Practice and procedure on objections — Notice of objection — Form and content — Practice and procedure on appeals — Notice of appeal Taxpayer, large corporation, included deemed dividend in 1995 income on basis that this portion of proceeds from 1992 share redemption was received in that year — Minister reassessed taxpayer for taxation year 1995, reducing amount of deemed dividend included as taxable income by approximately \$25 million — Taxpayer's notice of objection asserted that it had properly included deemed dividend of almost \$53 million in 1995 — Taxpayer appealed with notice of appeal providing, in part, that deemed dividend received in 1995 should be included in taxable income for 1993 taxation year as it was payable in that year — Minister's motion for dismissal of taxpayer's appeal was granted and appeal dismissed — Trial judge found under large corporation rules set out in ss. 165(1.11), 169(2.1) and 152(4.4), large corporations' rights of appeal were limited to those issues

reasonably described by their notices of objection — Trial judge found taxpayer took 180 degree turn between notice of objection and notice of appeal on what was to be included in income — Trial judge found while dispute at most general level was over amount to be included in 1995 as deemed dividend, such generality would render large corporation rules' requirement of specific and reasonable identification of issues meaningless — Trial judge found issue could not be construed as continuing examination of proper tax treatment of full amount of proceeds, and change in relief sought was not merely quantum but rather went to what large corporation rules were designed to counter — Trial judge found in attempting to appeal issue not raised by notice of objection, taxpayer had not fulfilled condition precedent to institute valid appeal — Taxpayer appealed — APPEAL DISMISSED — Standard of review was correctness — Share redemption proceeds added to income as deemed dividend was inadequate description of issue for purposes of s. 165(1.11) of Act, as it did not identify any question to be adjudicated but was cursory statement of what had transpired — Nothing provided any hint of element of computation of dividends received by taxpayer in relevant year for purposes of Part IV of Act that would require determination, or any indication of whether taxpayer was disputing adjustment to deemed dividend for 1995 — Only issue described in objection was issue of whether taxpayer was correct in concluding that it had received \$52,912,264 in dividends in 1995 for purposes of Part IV, which was not at issue in current proceedings — Simply listing subsection 84(3) of Act as relevant provision in notice of appeal and stating that amount Minister had determined was subject to Part IV tax in 1995 was payable in 1993 and therefore should have been included in taxpayer's taxable income in 1993, did not identify legal argument based on provisions of s. 84(3) of Act relating to when deemed dividend received for purposes of Act.

CHAMANDY, G. v. R.

Federal Court
Mactavish J.
April 11, 2014

Citation: 2014 CarswellNat 1136, 2014 FC 354

Tax — Income tax — Administration and enforcement — Audits — Compliance order — Taxpayer was director and shareholder of corporate taxpayer (company) — Company's lawyer obtained CRA's confirmation as to tax implications of off-shore currency transactions involving millions of dollars company was planning to undertake — During course of audit conducted prior to confirmation of tax implications, company was required to produce additional information and documentation — CRA advised company's counsel by letter that tax returns were examined and audited and accepted as filed — Following year, CRA identified company as satisfying criteria for special audit project (RPAP) — When auditor requested books, records and information from company, company provided some new information but advised that other material was already submitted to CRA in course of prior audit — Minister issued demand letter under s. 231.1 of *Income Tax Act* (ITA) seeking production of books, records and information allegedly requested in course of audit with respect to numbered

company — When taxpayer allegedly failed to comply, Minister brought application for Compliance Order — APPLICATION DISMISSED — Minister failed to satisfy court that taxpayer was personally required under s. 231.1 to provide books, records and information in question — It was not clear whether demand letter was directed to company or to taxpayer in personal capacity — Court had to be satisfied that person against whom compliance order was sought was required under ss. 231.1 or 231.2 to provide access, assistance, information or document in question — Given potentially serious consequences of failure to obey compliance order, including fines and or imprisonment, discretion to order production of documents should not be exercised unless statutory conditions of s. 231.7 were clearly met — Demand letter with salutation of "Dear taxpayer" which was addressed to company whose tax obligations were at issue did not mention possible imprisonment for non-compliance — Although facts suggested true addressee of demand letter was company and not individual taxpayer, it was not clear whether salutation was addressed to taxpayer in personal capacity, or as representative of company.

HENNESSEY, G. v. R.

Federal Court
Barnes J.
March 24, 2014

Citation: 2014 CarswellNat 1135, 2014 FC 286

Tax — Income tax — Administration and enforcement — Offences — Tax evasion — False or deceptive statements — Miscellaneous — Health authority cared for disabled patients and created arrangement where patients were considered employers of home support workers — Taxpayer was payroll bookkeeper enlisted by patients to make proper tax deductions — Many accounts of patients were in arrears, and Canada Revenue Agency (CRA) sought repayment from health authority and taxpayer — Taxpayer claimed he had been assigned to files after significant arrears had already accumulated — Taxpayer's business went out of business in 2007 with accrued liabilities of its clients to CRA for outstanding payroll remittances exceeding one million dollars — Charges were laid against taxpayer under *Criminal Code* including fraud, making false or deceptive statements in tax return, and tax evasion — Taxpayer brought action for damages for loss of business and personal income, loss of credit, reputational harm, damage to his physical and mental health arising out of CRA's negligence, *Canadian Charter of Rights and Freedoms* breaches and torts of misfeasance in public office, defamation and malicious prosecution on grounds that CRA's officials conspired to pursue him for recovery of payroll remittances that were owed by his clients and for wrongdoing by CRA in initiation of criminal charges against him — ACTION DISMISSED — Taxpayer failed to establish any of causes of action pleaded — Because prosecution of taxpayer had not been concluded, no cause of action for malicious prosecution was available to him — No evidence was presented and no argument was advanced to support pleading of defamation — Taxpayer was not credible witness — He unfairly blamed CRA for matters for which he was responsible and continued to take on self-administered clients even after he became aware of at least

one client who had accumulated payroll arrears of approximately \$300,000 — He also would have been aware that growth of his business was immediate result of failure of clients to stay current with CRA — Despite that, he continued to take on clients without taking steps to quantify and isolate their pre-existing balances or to obtain assurances from health authority or CRA that he would be held harmless for those pre-existing amounts — Taxpayer's cash flow problems were exacerbated by his co-mingling of funds he received from health authority which had effect of benefitting certain client payroll accounts and prejudice others — CRA's conduct was fair, responsible, reasonable and lawful — CRA was sensitive to concern that its actions not disrupt provision of respite care to those who needed it — CRA had no obligation to make taxpayer whole — CRA attempted to accommodate taxpayer's various concerns it had no legal obligation to protect him financially from consequences of his conduct or that of Health Authority; its only duty was to collect remittance shortfall — It was in no position to forego lawful collection action because taxpayer felt some personal need to hold his clients harmless for shortages he had either inherited or was largely responsible for creating.

MCCARTHY TÉTRAULT COMMENTARY UPDATE TO CANADA TAX SERVICE, RELEASE 1550

The commentary to the following provisions has been updated for the noted reasons:

- **Current:** updated for CRA Prescribed Interest Rates for leasing rules;
- **54:** updated to reflect the amendment of Income Tax Folio S1-F3-C2: *Principal Residence* by the CRA's update of April 9, 2014;
- **110.1(1)(a):** updated to reflect the amendment of 110.1(1)(a) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(1)(a.1):** updated to reflect the amendment of 110.1(1)(a.1) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(1)(b):** updated to reflect the amendment of 110.1(1)(b) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(1)(c):** updated to reflect the amendment of 110.1(1)(c) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(1)(d):** updated to reflect the amendment of 110.1(1)(d) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(2):** updated to reflect the amendment of 110.1(2) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(2.1), (3):** updated to reflect the addition and amendment of 110.1(2.1) and the amendment of 110.1(3) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(4):** updated to reflect the amendment of 110.1(4) by S.C. 2013, c. 34 (Bill C-48);
- **110.1(5):** updated to reflect the amendment of 110.1(5) by S.C. 2013, c. 34 (Bill C-48);
- **110.2:** updated to reflect the amendment of 110.2(1) "qualifying amount" by S.C. 2013, c. 34 (Bill C-48);

- **110.6:** updated to reflect the amendment of 110.6(1) "qualified farm property" and "qualified fishing property", 110.6(1.3), (6), (12) and (14) by S.C. 2013, c. 34 (Bill C-48), the amendment of 110.6(2), (31) and (32), by S.C. 2013, c. 40 (Bill C-4), and to reflect recent CRA Views Documents;
- **127(5)–(36):** updated to reflect the amendment of 127(9) "investment tax credit", "non-government assistance", "pre-production mining expenditure", "specified percentage", (9.1) and (9.2) and Regulation 4600 by S.C. 2013, c. 40 (Bill C-4); and
- **127.1:** updated to reflect the amendment of 127.1(2) "qualifying corporation" by S.C. 2013, c. 40 (Bill C-4).

TaxPartner Release Notes 2014-4 — April 2014

Income Tax Legislation

The legislation in this release of *TaxPartner* is current to April 8, 2014. All proposed changes to the *Income Tax Act* and related tax legislation have been incorporated up to that date. For a complete list of proposed amendments, see Tables L-2 and L-3.

Bill C-31 — Economic Action Plan 2014 Act, No. 1

A Notice of Ways and Means Motion to implement certain income tax provisions of Budget 2014 and other measures was tabled on March 24, 2014, along with explanatory (technical) notes (see 2014-03-24). The Motion received First Reading as part of Bill C-31 (*Economic Action Plan 2014 Act, No. 1*) on March 28, 2014, and Second Reading on April 8, 2014. Also included in the Bill is draft legislation first released on Nov. 27, 2013 (phase-out of LSVCC tax credit), Jan. 9, 2014 (international electronic funds transfers) and Feb. 5, 2014 (*Canada-United States Enhanced Tax Information Exchange Agreement*), along with other measures.

The proposed amendments are integrated within the Act and Regulations, along with the Technical Notes.

See news releases 2014-03-24 and 2014-03-28 for more details.

Draft Legislation — Canadian Film or Video Production Tax Credit

Measures formerly included in Bill C-10 (2007) pertaining to the Canadian Film or Video Production Tax Credit were re-introduced as part of a package of draft technical legislation on April 8, 2014. The proposed amendments and Technical Notes are integrated at ITA 125.4(1) (various), (2), (4), (6), (7), 241(3.3), (4)(d).

See news release 2014-04-08 for more details.

Income Tax Regulations

Bill C-31 – Economic Action Plan 2014 Act, No. 1

As mentioned above, Bill C-31 includes proposed amendments to the Regulations. See Reg. 103(9), 108(1.1)(a), (b), (1.11)(a), (b), (1.2)(a), 202(2)(m), 6708, 8517(3.001), (3.01), 9000.

Draft Legislation – Canadian Film or Video Production Tax Credit

The April 8, 2014 draft legislation (mentioned above) includes a proposed amendment to Reg. 1106(3).

Remission Orders

One new order has been added: P.C. 2014-182 (SI/2014-20), *Christian Legault Remission Order* (published in the *Canada Gazette*, Part II on March 12, 2014).

Related Legislation

S.C. 2014, c. 2 (Bill C-15, Royal Assent March 25, 2014) amended the following, proclaimed in force on April 1, 2014 by P.C. 2014-305 (SI/2014-34):

- *Federal-Provincial Fiscal Arrangements Act*: s. 4.7; and
- *Interpretation Act*: various definitions in subsec. 35(1).

The *Financial Administration Act* (Sch. I.1, Sch. IV, Sch. VI) was amended by P.C. 2014-280 (SOR/2014-57), to come into force on June 30, 2014.

Treaties & Agreements

Canada-Bahrain TIEA In Force

Canada's Tax Information Exchange Agreement with Bahrain entered into force on April 3, 2014. See release 2014-04-03 for more details.

Income Tax Cases

The full text of income tax cases (higher and lower courts) is current to cases received by April 9, 2014.

Supreme Court Appeals

The Supreme Court of Canada appeals tables (1, 2 and 3) have been updated through the SCC *Bulletin of Proceedings* dated April 17, 2014.

An application for leave to appeal to the SCC was filed on March 7, 2014 in *Kossow v. R.*, [2014] 2 C.T.C. 1 (FCA) (SCC file 35756).

Leave to appeal to the SCC was granted on March 13, 2014 in *Guindon v. R.*, [2013] 5 C.T.C. 13 (FCA) (SCC file 35519).

Federal Court Appeals

Table 4, *Notices of Appeal to Federal Court of Appeal Filed*, has been updated for appeals filed through April 16, 2014. The following new appeals were recently filed:

- *Brown v. R.*, 2014 CarswellNat 767 (TCC) (file A-120-14);
- *Connolly v. R.*, 2014 CarswellNat 393 (TCC) (file A-155-14);
- *D'Ambrosio v. R.*, 2014 CarswellNat 509 (TCC) (file A-187-14);
- *Loving Home Care Services Ltd. v. MNR*, 2014 CarswellNat 517 (TCC) (files A-191-14, A-192-14); and
- *Vine Estate v. R.*, 2014 CarswellNat 512 (TCC) (file A-166-14).

Government Documents

The infobase reflects all documents released on the Canada Revenue Agency's Electronic Document Distribution site as of March 21, 2014.

Income Tax Folios

The following Income Tax Folios have been revised:

- S1-F2-C1, "Education and Textbook Tax Credits" (March 11, 2014);
- S1-F2-C2, "Tuition Tax Credit" (March 11, 2014);
- S1-F2-C3, "Scholarships, Research Grants and Other Education Assistance" (March 11, 2014);
- S1-F3-C1, "Child Care Expense Deduction" (March 12, 2014); and
- S5-F1-C1, "Determining an Individual's Residence Status" (March 28, 2014).

Information Circular

One recently revised Information Circular has been corrected: 97-2R14, "Customized Forms" (March 3, 2014).

CRA Appeals Manual

The CRA's Appeals Manual (2013-09), current to September 2013 and acquired pursuant to the *Access to Information Act*, has been added to the database.

Registered Charities Publications

One Charities Guidance document has been added: CG-022, "Housing and Charitable Registration" (Feb. 7, 2014).

Registered Plans Publications

One document has been added: 2014-02-20, "March 3, 2014, is the Deadline to Make Your RRSP Contribution for 2013" (Feb. 20, 2014).

SR&ED Publications

One document has been added: 2014-02-06, "Canada Revenue Agency Supports Business Innovation with New SR&ED Tools and Services" (Feb. 6, 2014).

Dept. of Finance Publications

The following documents have been added:

- 2014-02-14, "Harper Government Supports Search and Rescue Volunteers" (Feb. 14, 2014);
- 2014-02-27C, "Harper Government Helping and Encouraging Canadians to Accumulate Savings for Retirement" (Feb. 27, 2014);
- 2014-03-18, "Government Supports Families With New Health-Related Tax Relief" (March 18, 2014);
- 2014-03-24, "Minister Oliver Tables Notice of Ways and Means Motion to Implement Tax Provisions in Economic Action Plan 2014 and Other Tax Measures" (March 24, 2014);
- 2014-03-28, "Harper Government Creating Jobs & Growth While Returning to Balanced Budgets With *Economic Action Plan 2014 Act, No. 1*" (March 28, 2014);
- 2014-04-01, "Protocol Signed Between Canada and Belgium" (April 1, 2014);
- 2014-04-03, "Entry Into Force of the Tax Information Exchange Agreement between Canada and Bahrain" (April 3, 2014); and
- 2014-04-08, "Department of Finance Releases Income and Sales Tax Technical Amendments for Public Comment" (April 8, 2014).

Selected CRA Releases

The following documents have been added:

- 2014-02-07, "Government of Canada Launches Consultations on New Measure to Support Small Businesses and Reduce Red Tape" (Feb. 7, 2014);
- 2014-02-17, "File Your Return Now, and Pay Tax Owing Later" (Feb. 17, 2014);
- 2014-02-19D, "Government of Canada Supports Search and Rescue Volunteers with New Tax Credit" (Feb. 19, 2014);
- 2014-02-19E, "Minister Findlay Highlights Economic Action Plan 2014 Measures to Improve Services and Reduce Red Tape for Small Businesses" (Feb. 19, 2014); and
- 2014-02-25, "File Your Taxes Online for Free!" (Feb. 25, 2014).

CRA Pamphlets

The following pamphlets have been revised:

- P105, "Students and Income Tax" (2013); and
- P134, "Using Your Home for Daycare" (2013).

CRA Guides

The following guides have been added or revised:

- 5013-G, "General Income Tax and Benefit Guide for Non-Residents and Deemed Residents of Canada — 2013" (2013);
- RC4004, "Seasonal Agricultural Workers Program" (2014);
- RC4018, "Electronic Filers Manual for 2013 Income Tax Returns" (2013);
- RC4177, "Death of an RRSP Annuitant" (2012);
- RC4460, "Registered Disability Savings Plan" (2013);
- RC4466, "Tax-Free Savings Account (TFSA), Guide for Individuals" (Nov. 2013);
- RC4477, "Tax-Free Savings Account (TFSA) — Guide for Issuers" (2013);
- T4001, "Employers' Guide — Payroll Deductions and Remittances" (2013);
- T4013, "T3 Trust Guide" (2013);
- T4015, "T5 Guide — Return of Investment Income" (2013);
- T4040, "RRSPs and Other Registered Plans for Retirement" (2013);
- T4041, "Retirement Compensation Arrangements Guide" (2013); and
- T4079, "T4RSP and T4RIF Guide" (2013).

CRA Views

Batches of *CRA Views* released on March 12, March 19, March 26, April 2 and April 9, 2014 have been added to the database. Related summaries are included under the "Views Summaries" heading, and at the beginning of each new English Views document.

CRA Views is a collection of correspondence from the Canada Revenue Agency to private individuals who have written asking for clarification or interpretation or for a ruling on various tax issues. The letters, which also include roundtable discussions from the APFF and CTF conferences, are therefore a valuable source of information that can be searched for very specific issues.

CRA Forms

Both static and fillable income tax forms are included in *TaxPartner* in PDF, Word or Excel formats.

Analysis/Commentary

Canada Tax Service — McCarthy Tétrault Analysis

The following commentary has recently been updated for amendments made by S.C. 2013, c. 40 (Bill C-4):

- 10: amendment of (10), (11);
- 11: amendment of (1);
- 13: amendment of (7)(f), (18.1), (21.2)(e), (24), (25);

- 14: amendment of (12)(f);
- 18.1: amendment of (10)(b); also updated for replacement of (15) with (15)–(17) by S.C. 2013, c. 34 (Bill C-48);
- 20.01: amendment of (2)(b)(i)(A)(II);
- 31: amendment of (1), (2);
- 37: amendment of (1)(h), (6.1), (9.5)(b);
- 44: amendment of (7)(c);
- 50(1)–(2): amendment of (1)(b)(i);
- 53: amendment of (1)(e), (2)(b.2), addition of (1)(r)–(t), (1.2), (2)(w), (x);
- 110.6: amendment of (2), (31), (32); also updated for amendment of (1), (1.3), (6), (12), (14) by S.C. 2013, c. 34 and to reflect recent CRA Views;
- 127.1: amendment of (2)“qualifying corporation”;
- 127(5)–(36): amendment of (9), (9.1), (9.2), Reg. 4600;
- 152: amendment of (4), (4.01), (4.1); and
- 156: addition of (4).

The following commentary has been updated for amendments made by S.C. 2013, c. 34 (Bill C-48):

- 91: amendment of (4), s. 95 and Reg. 5904 and addition of 91(4.1)–(4.7); also updated for recent CRA Views and proposed amendments;
- 95: various amendments to s. 95 and Reg. 5903, 5903.1; also updated for recent cases, CRA Views and proposed amendments;
- 110.1(1)(a), 110.1(1)(a.1), 110.1(1)(b), 110.1(1)(c), 110.1(1)(d), 110.1(2), 110.1(2.1)–(3), 110.1(4), 110.1(5); and
- 110.2: amendment of (1)“qualifying amount”.

Pound’s Tax Case Notes

Releases 2014-7, 2014-8 of *Pound’s Tax Case Notes* have been added.

Tax Times

For detailed information on recent developments in income tax, consult *Tax Times*. Added in this release are issues 2014-5 and 2014-6.

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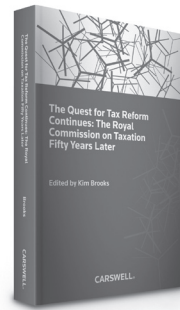
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