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2025 Tax Update

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Kyle B. Lamothe

MODERATOR
Opening Remarks

2025 Thor Tax Update

- What has changed? A lot less than last year!
- Shift in tone?
 - Budget 2025 – Less about “Fairness”, more about “Spending Smarter” or “Canada Strong”?
- Audits: Quantity over quality

2025 Thor Tax Update

- 1) Audit and Litigation Update
- 2) Transfer Pricing
- 3) Updates to VDP
- 4) Commodity Tax Update
- 5) COFFEE BREAK
- 6) Private Company Planning



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E. Rebecca Potter

Presenting: Audit and Litigation
Update



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Florence Sauve

Presenting: Audit and Litigation
Update



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Matthew Williams

Presenting: Audit and Litigation
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Audit and Litigation Update

E. Rebecca Potter
Florence Sauve
Matthew Williams

DAC Investment Holdings Inc.

- Decisive win at the Tax Court
- Crown appealed to the Federal Court of Appeal
- Federal Court of Appeal hearing took place last week
- Court reserved its decision

Update on New Audit Power to Conduct Oral Interviews

- Auditors now routinely requesting oral interviews
- Recent experiences
- Best practices

Judicial Review

- Judicial review applications are being filed more frequently
- Potential uses during:
 - audits
 - collections



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Jamal Hejazi

Presenting: Transfer Pricing



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Thorsteinssons Transfer Pricing Group

Jamal Hejazi, Ph.D.

Transfer Pricing Group

- Jamal Hejazi, Ph.D.
 - PhD in Economics
 - Worked at the Canada Revenue Agency
 - 16 years as the Chief Economist at an international full-service law firm
 - 4 years as Transfer Pricing Director at BDO LLP
 - Engaged in all aspects of transfer pricing – planning, audit defense, dispute resolution
 - Deep economic analyses related to complex transfer pricing matters

What We Do

- Contemporaneous documentation
 - Both private and public companies with related party transactions should put c-doc in place
 - Should be in place six months after company's year end
 - Best audit defense strategy is a good c-doc!
 - Always good to make a good first impression

Audit Defense

- Managing audit defense for clients from proposal to assessment
 - Strategies to reduce proposed adjustments
 - Reducing audit adjustments sets us up for successful avenues of dispute resolution
 - Better outcome in competent authority or appeals branch

Appeals Representation

- Transfer pricing matters often go to CRA Appeals when factual issues are present
- Failure to get 100% of adjustment overturned leads to double taxation
- CRA Appeals has employed more economists who seek to test economic substance of transfers, as opposed to legal ownership
- We have significant experience providing economic analysis as it relates to appeal submissions

Litigation Support

- Have served as an expert at the Tax Court of Canada (don't get excited)
- Ability to provide economic and valuation support to matters related to transfer pricing and non-transfer pricing matters such as thinly traded shares

Competent Authority

- Worked at the CRA Competent Authority Services Division as a senior economist
- Competent Authority works to resolve double taxation (after an adjustment has been made)
- Country-to-country negotiation
- Understand margins/profits acceptable in certain industries

Transfer Pricing Work – June 30th Deadline

- S. 247 of the ITA requires that all Canadian companies transacting with non-arm's length parties, in different jurisdictions, document such transactions
- This includes both private and public companies
- Documentation must be put into place 6 months following company year-end
- Failing to meet this timeline does not mean we cannot go back and document undocumented years
- Failure to do so may lead to penalties if such documentation is not in place and adjustments are raised under audit

Transfer Pricing Work – June 30th Deadline

- Transfer Pricing Teams are often made up of accountants and economists capable of meeting the legislative requirements
- As the June 30th deadline approaches, clients should be made aware of the importance of having their transfer pricing documentation in order
- Failure to have such documentation in place can lead to non-deductible penalties
- Studies necessary to test the arm's length nature of transactions as it relates to more complex flows such as intercompany debt or guarantee fees, or more complex arrangements such as hybrid debt

Transfer Pricing Work – June 30th Deadline

- CRA has been focusing more on transfer pricing
- Audit triggers include, but are not limited to:
 - Persistent losses
 - Restructuring
 - Management fees
 - Royalty payments
 - Intangible migration
- The new OECD initiative on Base Erosion and Profit Shifting has made compliance even more complex

BEPS

- Focus has changed from legal to economic Substance
- Simply owning IP does not mean you reap the benefits
- Who performs functions? Who controls the process? Who has the technical expertise?



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Nicole Lynx

Presenting: Updates to VDP



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Updates to the Voluntary Disclosure Program

Nicole Lynx

“When drafted carefully, voluntary disclosure programmes benefit everyone involved – taxpayers making the disclosure, compliant taxpayers and governments.”

OECD, Update on Voluntary Disclosure Programmes – A Pathway to Tax Compliance (Paris: OECD, August 2015)

History/Principles of the VDP

- The VDP grants penalty/interest relief, on a case-by-case basis, to taxpayers and registrants who come forward to fix errors or omissions in their tax filings
- Provided for in ss. 220(3.1) of the ITA
 - Part of legislative amendments known as the “fairness package” implemented in 1991
- Stated purpose of the VDP has expanded but remains relatively consistent:
 - Encourage taxpayers to correct inaccurate/incomplete information or disclose previously unreported information
 - Provide a greater level of fairness to all taxpayers
 - Not intended to act as a vehicle to intentionally avoid their legal obligations
- March 2018 – introduction of the two-track program (General & Limited) (IC00-1R6)
- October 2025 – introduction of new program (Prompted vs. Unprompted) (IC00-1R7)

Application of the VDP

Previous VDP	New VDP
• income tax • source deductions • excise duties under the <i>Excise Act, 2001</i> • excise tax and GST/HST under the <i>Excise Tax Act</i> • charges under the <i>Air Travellers Security Charge Act</i>; and • charges under <i>Softwood Lumber Products Export Charge Act, 2006</i>	• income tax • the GST/HST • withholding taxes • excise duties under the <i>Excise Act, 2001</i> • excise taxes under the <i>Excise Tax Act</i> • the fuel charge under Part I of the <i>Greenhouse Gas Pollution Pricing Act</i> • the luxury tax under the <i>Select Luxury Items Tax Act</i>, • the underused housing tax under the <i>Underused Housing Tax Act</i> • the digital services tax under the <i>Digital Services Tax Act</i> • tax under the <i>Global Minimum Tax Act</i>; • charges under the <i>Air Travellers Security Charge Act</i>; and • charges under the <i>Softwood Lumber Products Export Charge Act, 2006</i>

Requirements for a Valid Application

Previous VDP	New VDP
• Voluntary • Complete • Application/Potential Application of Penalty • Information One Year Past Due • Payment/Payment Arrangement	• Voluntary (prompted vs. unprompted) • “All Supporting Documents Included” • Application of Interest, Penalties or Both • Information One Year Past Due • Payment/Payment Arrangement

Requirements for a Valid Application

- New VDP – “All Supporting Documents Included” (para. 24 – 31)
 - RC199 – New Form!
 - the taxpayer provides all relevant information for all required tax years and responds comprehensively and promptly to all CRA requests for information
 - disclose all known errors/omissions, including any arm’s length/non-arm’s length transactions or circumstances relating to errors/omissions
 - Supporting Documentation:
 - needed to correct non-compliance for most recent 6 years MUST be included
 - if errors/omissions relate to assets or income located outside of Canada docs for most recent 10 years MUST be included
- So, if non-compliance is for less than 10 years, docs must still be provided for all 10 years?
- A tax year with no errors/omissions does not need to be included in application
- Additional documentation for tax years beyond the above timeframes may be requested by CRA at its discretion
- If the taxpayer received advice re non-compliance, the name must be included on RC199 (para. 30)

Requirements for a Valid Application

New VDP – Voluntary Requirement

- Application must be voluntary to be granted relief
- Concept of “enforcement action” has been removed
- Not voluntary if audit/investigation has been initiated against taxpayer/related taxpayer re info disclosed
- Not limited to audit/investigation by CRA → can also be conducted by law enforcement agency, securities commission or other fed/prov regulated authority

Unprompted Application

- No communication (verbal or written) about an identified compliance issue related to the disclosure
- Following an education letter or notice that offers general guidance and filing information related to a particular topic

Prompted Application

- Following verbal/written communication about an identified compliance issue related to the disclosure. May include letters/notices:
 - which identify a specific error or omission
 - provide a deadline to correct an error or omission, where there is an expectation for the taxpayer to file/comply
- CRA has already received info from 3rd party sources regarding the potential involvement of a specific taxpayer (or a related taxpayer) in tax non-compliance

VDP - Levels of Relief

	Previous VDP*		New VDP*	
	General Program	Limited Program	Unprompted Applications	Prompted Applications
Penalties	100% penalty relief - No referral for criminal prosecution	- Relief from GNP (only) - No referral for criminal prosecution	“are normally eligible for general relief” and will receive 100% penalty relief (including GNP) - No referral for criminal prosecution	“are normally eligible for partial relief” and will receive *up to* 100% penalty relief - Relief from GNP - No referral for criminal prosecution
Interest	100% interest charged for 3 most recent years - Partial (generally 50%) interest relief for years preceding 3 most recent years	No interest relief	75% interest relief	25% interest relief

* Relief to be provided in line with limitation period for relief found under ss. 220(3.1)

Notes and Considerations

- TP Culpability Factors Removed from Previous VDP Program
 - *I.e.*, efforts to avoid detection, \$ involved, years of non-compliance and sophistication of the taxpayer
 - for “prompted” applications, relief offered may be “up to” 100% - will these factors still be considered? (*i.e.*, taxpayer should have known...)
- 2nd VDP Application: may be considered under the new VDP if circumstances are beyond the taxpayer’s control or relate to a different matter
- Pre-disclosure discussions and payment arrangements are still available
- CRA reserves right to audit/verify info provided in application, even if relief granted
 - if fraud/misrepresentation due to neglect, carelessness, or willful default found, an assessment may be issued at any time for any tax year to which the fraud or misrepresentation relates, not just years included in the application.
- Second Review: In previous VDP, CRA will not consider a second review if application denied because info was not submitted during stipulated time frame – this is absent from new VDP
- Objections: New VDP refrains from stating that (re)assessment issued pursuant to VD can be objected to if there is a calculation error



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Noah Sarna

Presenting: Commodity Tax
Update



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Elizabeth Egberts

Presenting: Commodity Tax
Update



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Commodity Tax Update

Elizabeth Egberts and Noah
Sarna

Overview

- The success

MedSleep Inc. v. The King, 2025 TCC 70

- The showdown

The timing condition for the HST purpose-built rental housing rebate

- The scandal

UHT on hotel units

MedSleep

- (1) Did MedSleep and physicians work together to provide integrated medical sleep services to patients (*i.e.*, exempt services); or
- (2) Did MedSleep provide separate administrative and other services to physicians (*i.e.*, taxable services)

Facts

MedSleep hires staff and contracts with sleep physicians to provide sleep study services to patients across the country.

Allocation of Fees

- Fees:
 1. **Technical Fee** - retained by MedSleep.
 2. **Professional Fee** - allocated between MedSleep and the physician pursuant to a fee sharing arrangement.

Analysis

1. What was provided:
 - a) use of MedSleep's premises, facilities, and equipment
 - b) Clerical and support services
 - c) Medical sleep services
2. Single compound or multiple supply:
single compound supply
3. How should the supply be treated:
exempt

Conclusion

Physician and clinic fee sharing agreements work when drafted appropriately.

Purpose-built Rental Housing Rebate

- A maximized version of federal rebate for landlords, from 36% to 100% of GST (and in Ontario, 100% of HST)
- But only applies essentially to a building with at least four full, private suites (but no condos), and at least 90% designated for long-term rentals, where construction began after September 13, 2023
- Effectively cancels the “self-supply” tax on new apartment buildings (historically a major cost)

The Timing Condition

- The CRA's position is that "construction" generally "begins" at the start of excavation work
- But no statutory definition or other bright line test
- No binding caselaw directly on point
 - *Clarke v. Canada (National Revenue)*, 1994 CanLII 7020: adopt the meaning used by the industry, which includes excavation

The Showdown

- The CRA has been disallowing rebate applications because of the timing condition
- Developers with projects that are ineligible under the CRA's test have understandably adopted more favourable interpretations supporting a later point on the continuum of the project

UHT and Hotel Units

- The CRA has been assessing the 1% UHT on owners of hotel units that include a kitchen or kitchenette
- Detected by filings reporting non-resident income

The Scandal

- The tax was intended to apply to “vacant or underused housing” owned by foreigners
- As a policy matter, hotel units aren’t thought of as “housing”, even if structured essentially as condo buildings – just with considerable amenities, staff and a franchise arrangement

The Tax Base

- The CRA takes an arguably aggressive interpretation of the UHT legislation
- The first element is the definition of a “residential property”
- It includes a “residential condominium unit or other similar premises” (*i.e.*, a unit with a private bath, living area and kitchen facilities)
- On a literal read, this might capture certain common types of hotel units, which are often owned by non-Canadian investor/tourists – even though they are arguably “commercial” condominium units and are classed accordingly for property tax purposes

The Unsuitability Exemption

- The second element of the CRA's position is that the exemption for residential units "not suitable for year-round use as a place of residence" doesn't apply (*i.e.*, must be physically unsuitable)
- Hotel units generally have *legal* prohibitions (*e.g.*, caveats on title, contracts among owners or with franchisors, zoning restrictions) and *practical* impediments preventing "suitability" for long-term residential use by the owner
- Due to the low tax and high cost of litigation, this might not get before the TCC



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Milan Vukovic

Presenting: Private Company
Planning



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Jonathan Longcroft

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Private Company Planning

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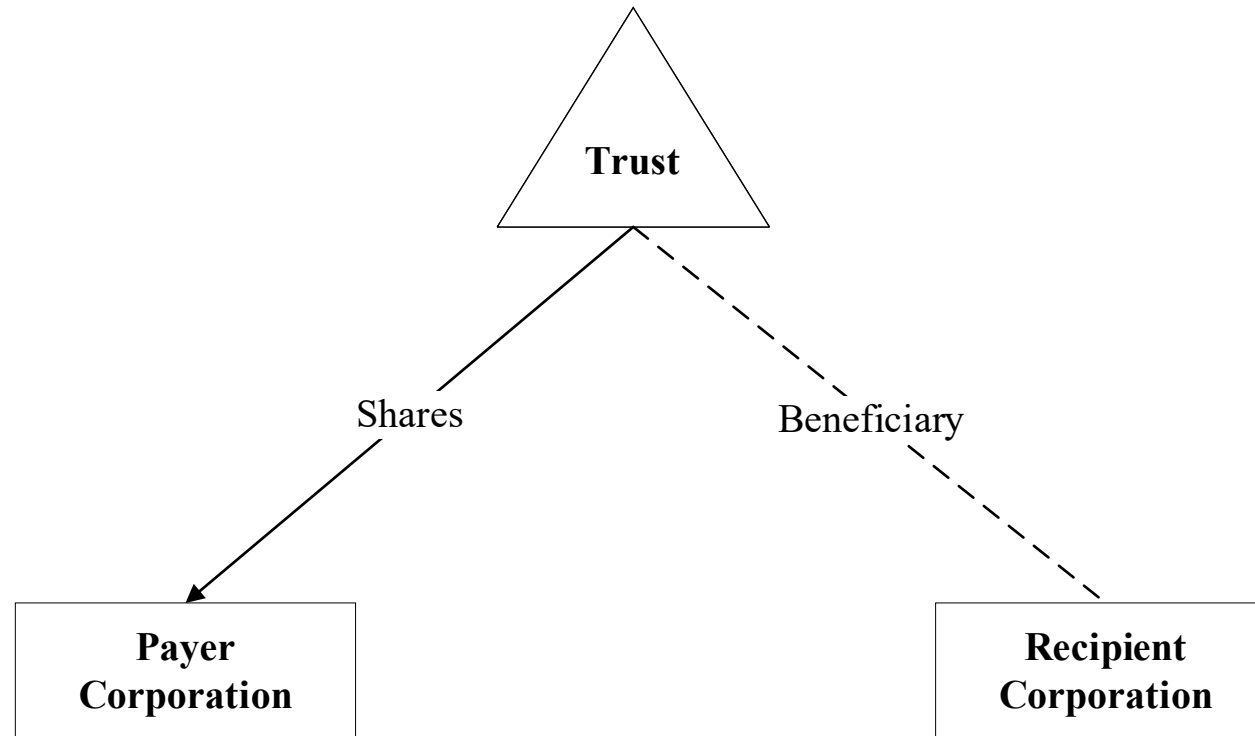
Trust Planning and Compliance Update

Milan Vukovic

Trusts in Tax

- Trusts are useful arrangements for both non-tax and tax reasons
 - Non-tax reasons: separation of ownership interests (legal/beneficial), creditor protection; probate planning; confidentiality; life insurance; wealth preservation, *etc.*
 - Tax reasons: tax deferral (avoidance of deemed disposition on death or emigration); conduit for income allocation and splitting (subject to tax on split income (TOSI)); capital gains exemption multiplication, *etc.*
- Tax law is an accessory system to the general law
- Certain fictions are applied to trusts under tax law
 - *E.g.*, deemed a taxable person under the ITA, but can act as a conduit

Canada v. Vefghi Holding Corp. (2025 FCA 143)

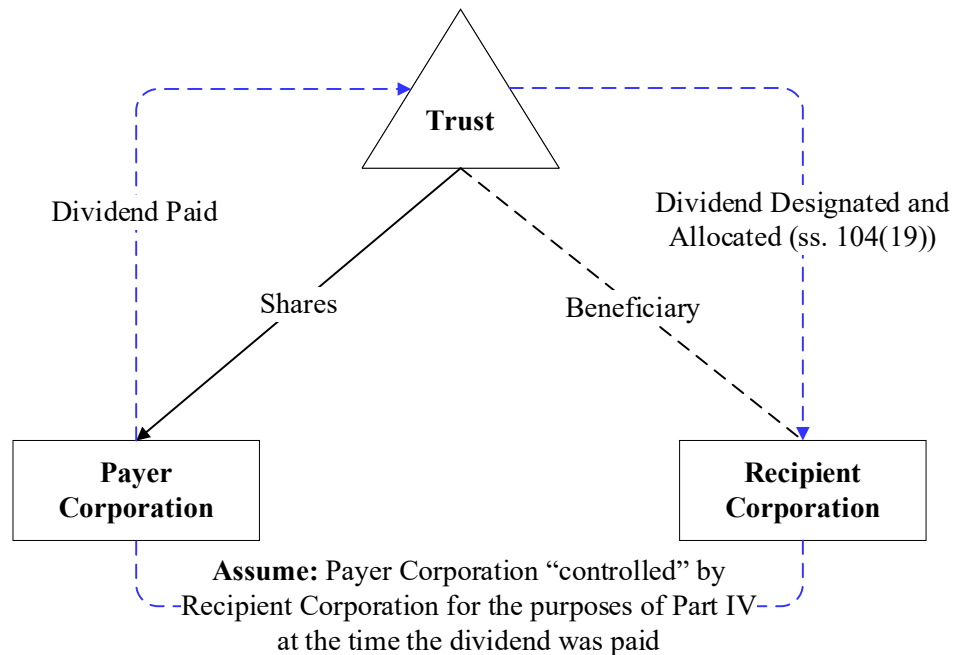


Canada v. Vefghi Holding Corp.

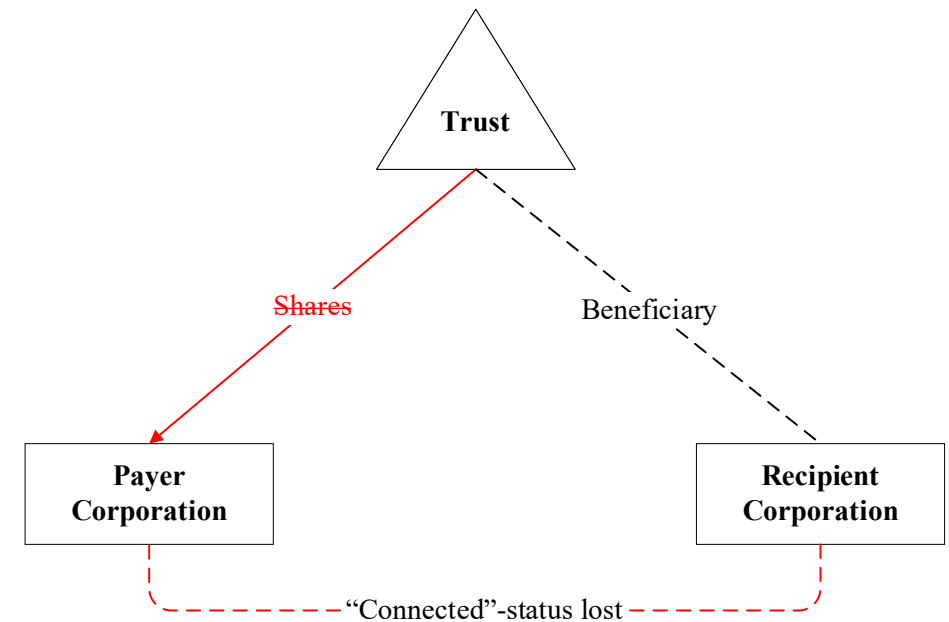
- Part IV tax applies to a private corporation or a subject corporation that receives a dividend from a corporation with which it is not “connected”
- Ss. 104(19) allows a trust to designate a taxable dividend (or a portion thereof) received during its taxation year that became payable to a particular beneficiary
 - Amount designated deemed to be a taxable dividend received by that beneficiary
- Ambiguity: ss. 104(19) does not specify the time at which the beneficiary is deemed to have received the dividend

Canada v. Vefghi Holding Corp.

At the time the dividend was paid



At the end of the year



Canada v. Vefghi Holding Corp.

- Issue: When do you test “connected” status for the purposes of Part IV tax when a taxable dividend is designated by a trust to a corporate beneficiary?
- Tax Court of Canada: The same date that the dividend was received by the trust
- Federal Court of Appeal: The last day of the trust’s taxation year in which the dividend is received
- Takeaway: Ensure dividend payer and corporate beneficiary are “connected” at the end of the recipient-trust’s taxation year
 - M&A context: Pre-closing dividends paid to a trust and allocated to a corporate beneficiary
 - Corporate reorganizations: Liquidations and dissolutions, or horizontal amalgamations
 - If possible, consider deferring events that sever “connected”-status to the taxation year of a trust following the taxation year in which taxable dividends are paid to the trust and allocated to a corporate beneficiary

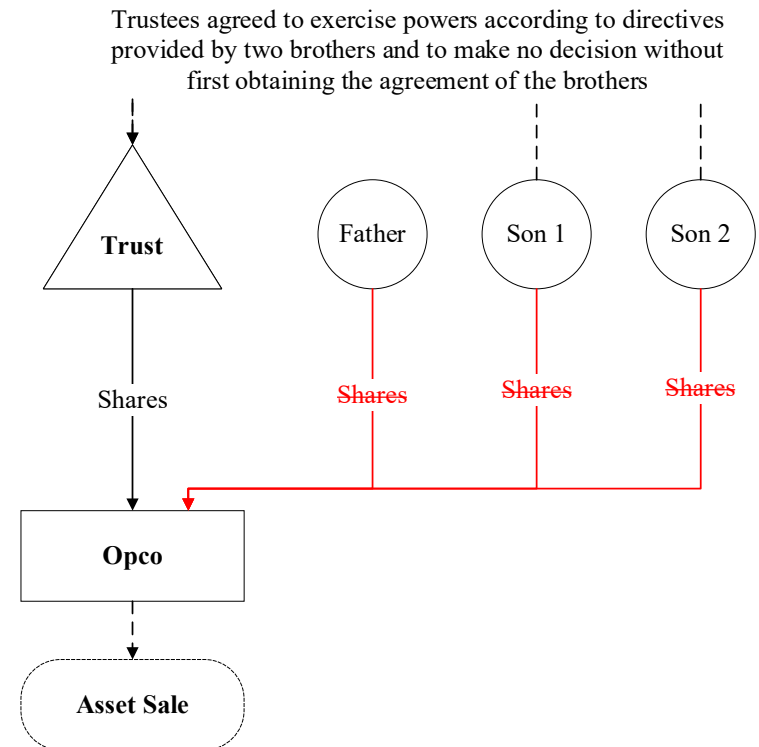
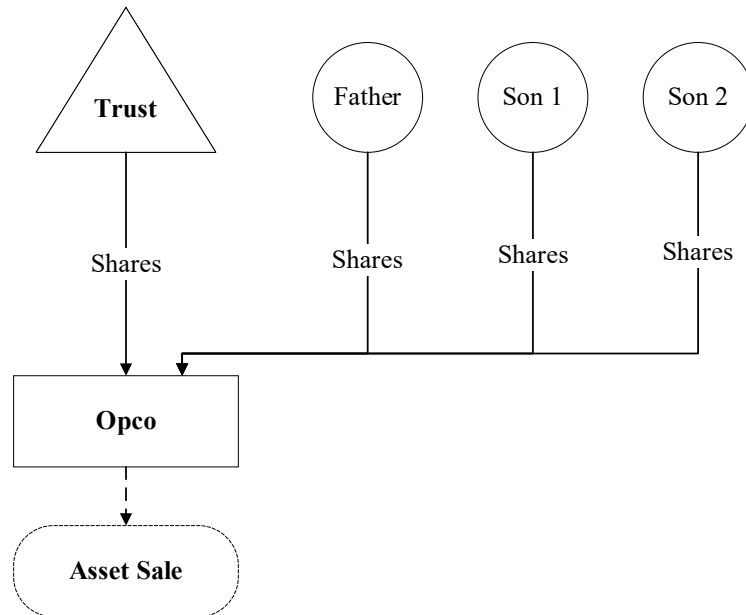
Maurice Kissel Family Trust v. The King **(2019-4092(IT)G)**

- Trust provided that no minor beneficiary could benefit under its terms while being a “designated person” in respect of their father
 - Designed as a “springing trust” to avoid the potential application of the corporate attribution rule (CAR)
- Trust realized a gain, and, despite this restriction, paid \$100,000 to two minor (restricted) beneficiaries
 - Trust subsequently claimed a deduction from its income under para. 104(6)(b)
- CRA reassessed trust to deny the deduction claimed by the trust
 - Amounts had not become payable in the year, as is required by para. 104(6)(b)

Maurice Kissel Family Trust v. The King

- Issue: Is the term “payable” in para. 104(6)(b) sufficiently broad to include an amount paid to a beneficiary in violation of the terms of a trust?
- Tax Court of Canada: If an amount cannot be paid under the terms of a trust, it cannot be payable
 - Conforms with CRA’s administrative position (Views, 2005-0159081I7)
- Takeaway: Read your deed!
 - A trust cannot deduct an amount that is not legally payable under the trust deed, even if that amount is actually paid

The King v. Fiducie Historia (2025 FCA 177)



The King v. Fiducie Historia

- Trust subsequently allocated and designated dividend income to father, as authorized by two sons, claiming a corresponding deduction under para. 104(6)(b)
- CRA's View: Two sons became *de facto* trustees, contrary to the *Civil Code of Québec*
 - Distributions were unlawful and therefore not “payable”
- Issue: Is the term “payable” in para. 104(6)(b) sufficiently broad to include an amount paid to a beneficiary in violation of the *Civil Code of Quebec*?
- FCA: Trustees had not abdicated decision-making authority, so distributions were not unlawful (and were therefore properly “payable”)
 - BUT, TCC had suggested that, where an amount is paid contrary to the applicable legislation, it would not be “payable”
- Takeaway: The four corners of a trust deed may not be the sole restrictions to the trustees' proposed course of conduct

Lang-Newlands v. Newlands (2024 ONSC 6285)

- Involved an estate freeze during marriage, and a discretionary family trust settled for the benefit of the wife and her issue
 - Parties were married without a marriage contract
- Key issue was whether wife's discretionary interest in the trust was "property" for purpose of the *Family Law Act* (Ontario)?
 - Husband asked that full value of the trust (\$670M) be included in wife's "net family property"
- Court determined that interest was property, but was excluded from wife's NFP as it was a gift received during marriage from a third party based on a higher court decision
 - It provided an **alternate (non-binding) analysis** of valuation of the trust interest

Lang-Newlands v. Newlands

- Adopted the “fair value” approach
 - Value of trust assets, less
 - 50% minority and illiquidity discount, less
 - Contingent taxes/liabilities of underlying company, plus
 - Prior distributions to all beneficiaries, multiplied by
 - Wife’s pro rata share of trust (based on a review of settlor’s intent and desire for equal distribution of trust assets among beneficiaries), less
 - Prior distributions to wife
- CRA’s approach: discretionary beneficiary’s interest will “approximate a proportionate share of the fair market value of the total of [trust’s] property at that time” (Views, 2001-0111303)
- Takeaway: Family law implications should be considered as part of an estate freeze
 - best protection is to insist on a marriage contract for the beneficiary(ies)

Trust Reporting – Legislative Overview

- Proposed in 2018 Budget
 - To “...help authorities to effectively counter aggressive tax avoidance, tax evasion, money laundering and other criminal activities”
 - Proposed effective for 2021 taxation year
- Enacted in December 2022 (Bill C-32)
 - Effective for taxation years ending after December 30, 2023 (*i.e.*, 2023 calendar year)
 - Applicable to 2023 T3 returns due in March 2024
- New proposals
 - Released August 15, 2025 (modify and clarify August 12, 2024 proposals)

Old Trust Reporting – Refresher

- For the 2022 and prior tax years, a trust with no tax, no taxable capital gain and no disposition of capital property in the year generally had no obligation to file a T3
- Beginning with the 2023 tax year, new rules expanded and enhanced trust filing and reporting requirements in three key ways
 - Narrowing the filing exception – ss. 150(1.2)
 - Mandatory reporting of specific personal information – Reg. 204.2
 - A failure to file or false statement or omission which occurs knowingly or in circumstances amounting to gross negligence attracts a new penalty – ss. 163(5)

New New Trust Reporting

- Four key changes in draft proposals
 - 1) Expand/add exceptions to filing and reporting obligations for all trusts
 - 2) More targeted definition of “settlor”
 - 3) Bare trusts excluded from 2024 T3 filing
 - 4) New exceptions to filing and reporting obligations specific to bare trusts

New New Trust Reporting – Exceptions

- New/short-lived trust exception – para. 150(1.2)(a)
 - Currently: in existence for less than three months at the end of the year
 - Proposed: in existence for less than three months during the year
- Clarifying amendment (e.g., trust created in May and wound-up in June)
- Applies retroactive to 2024 taxation year, if enacted as proposed

New New Trust Reporting – Exceptions

- Small trust exception – para. 150(1.2)(b)
 - Currently available if trust holds assets the total FMV of which does not exceed \$50K throughout the year provided only assets held fall within a prescribed list
- Property not on prescribed list: (a) private company shares; (b) real property; (c) personal-use property; and (d) silver coin
- Proposal – expand exception to a trust that holds any type of property the total FMV of which does not exceed \$50K throughout the year
 - A trust settled as part of an estate freeze that acquires post-freeze “growth” shares for nominal consideration may now qualify
 - Practical issue – whether \$50K FMV threshold is surpassed where trust holds non-liquid assets
- Applies retroactive to 2024 taxation year, if enacted as proposed

New New Trust Reporting – Exceptions

- Related party exception – new para. 150(1.2)(b.1)
- Available for 2024 taxation year (with modifications for 2025 taxation year) if the following three conditions met:
 - Each trustee is an individual;
 - Each beneficiary is an individual (other than a trust) or a GRE of such an individual in the year of death and is related to each trustee; and
 - FMV of trust property does not exceed \$250K throughout the year provided only assets held fall within a prescribed list (slightly broader)
- Prescribed list includes money, publicly-traded shares, mutual fund trust units, GICs, public company debt obligations and personal-use properties
- New interpretive rule for 2025 and subsequent years: related persons now include an aunt, uncle, niece and nephew, plus a person is related to themselves (new ss. 150(1.32))
- Limited relief: Cannot benefit if there is a corporate beneficiary or if private company shares held by trust

New New Trust Reporting – Exceptions

- Para. 150(1.2)(j)
 - Currently: GREs
 - 2024 and 2025 Rules: GREs and trusts that would be a GRE if they filed a return for that year
- Para. 150(1.2)(n)
 - Currently and 2024 Rules: certain registered plans or funds
 - 2025 Rules: adds supplemental pension plans
- Para. 150(1.2)(q)
 - Currently: does not exist
 - 2024 and 2025 Rules: certain statutorily created trusts
- Para. 150(1.2)(r)
 - Currently and 2024 Rules: does not exist
 - 2025 Rules: Employee ownership trusts (EOTs)

New New Trust Reporting – “Settlor”

- Currently – “Settlor” imports broad definition from ss. 17(15)
 - Any person who transfers or lends property to the trust directly or indirectly
 - Two exceptions:
 - Lenders excluded if made at a “reasonable rate of interest” and at arm’s length from the trust
 - Transferors excluded if sold for FMV consideration and at arm’s length from the trust
- Proposed – New reg. 204.2(3)
 - Any person or partnership that transfers property to the trust directly or indirectly
 - Two exceptions:
 - Transferors excluded if sold for FMV consideration
 - Transferors excluded if transferred pursuant to a legal obligation
- Applies retroactive to 2024 taxation year, if enacted as proposed

New New Trust Reporting – Bare Trusts

- To date, key issue has been identifying when a bare trust exists
 - Can arise inadvertently and oftentimes arrangement not documented
- Two types of ownership recognized at common law – legal and beneficial
 - Legal owner appears on legal documents for the property
 - Beneficial owner has the rights and obligations associated with the property
- Where legal and beneficial owner are not the same, a bare trust may be at issue
 - Key feature – Legal owner (*i.e.*, bare trustee) holds property without any obligation except to transfer it to, or at the instruction of, the beneficial owner upon demand
- Examples
 - Nominee company holding only registered title to (real) property
 - (Grand)parent who establishes a bank account for a minor
 - Adult child added to a parents' joint bank/investment account

New New Trust Reporting – Bare Trusts

- Proposals remove 2024 T3 filing and reporting requirements for bare trusts
 - Distinct from CRA's decision last year to not enforce the requirement for bare trusts to file a T3 for 2024
 - Achieved through proposed repeal of current ss. 150(1.3)
- Next bare trust T3s would be due in March 2026
 - Assumes proposals will be enacted as proposed

New New Trust Reporting – Bare Trusts

- New definition for bare trusts – proposed ss. 150(1.3)
 - Intended to better describe and capture bare trust arrangements
- Considered to include any arrangement under which:
 - one or more persons have legal ownership of property that is held for the use of, or benefit of, one or more person or partnership; and
 - the legal owner can reasonably be considered to act as agent for the persons or partnerships who have the use of, or benefit of, the property
- Applies retroactive to 2025 taxation year, if enacted as proposed

New New Trust Reporting – Bare Trusts

- Proposed exceptions specific to bare trusts – new ss. 150(1.31)
- Exception #1: All beneficiaries are also legal owners of the property and there are no additional legal owners
 - Intended to exclude circumstance where a person holds property both for their own use and benefit and for that of another person (e.g., spouses that have a joint bank account)
- Exception #2: Legal owners are related individuals and property is real property that would be the principal residence of at least one legal owner if designated
 - Intended to exclude circumstance where a parent is on title of a principal residence to allow a child to obtain a mortgage

New New Trust Reporting – Bare Trusts

- Exception #3: Legal owner is an individual and property is real property that is held for the use/benefit of their spouse/CL partner and would be the principal residence of the legal owner if designated
 - Intended to exclude circumstance where spouses/CL partners jointly occupy family home, but only one spouse/CL partner is registered on title
- Exception #4: Each legal owner is a partner holding the property solely for the use or benefit of the partnership, and at least one partner is required to file an information return for the partnership
 - Intended to exclude circumstance where a partner holds assets belonging to a partnership where the partnership is required to file Form T5013

New New Trust Reporting – Bare Trusts

- Additional exceptions for bare trusts
 - The legal owner holds the property pursuant to a court order
 - Canadian resource property is held solely for the use or benefit of one or more publicly listed companies (or in certain cases, subsidiaries or partnership of such companies)
 - Non-profit organization (NPO) holds funds received from the federal or provincial governments for the use or benefit of other NPOs
- Note that if no bare trust-specific exceptions apply, consider exceptions available to all express trusts
 - *E.g., small trust exception, related party trust exception, in existence for < 3 months, etc.*
- Recall – if proposals not enacted, no bare trust-specific exceptions

Trust Reporting – Best Practices

- Take positive steps to obtain the prescribed information and document those efforts
 - Common law due diligence defence accepted in *Home Depot of Canada Inc v R*, 2009 TCC 281
- Going forward, obtain prescribed info from all relevant persons at the time a trust is settled
- Increased compliance = increased scrutiny of trust-related planning



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Foreign Affiliate Updates (FABI)

Jonathan Longcroft

Background

- Beginning with Budget 2022 Proposals
 - The Canadian federal government proposed measures targeting CCPCs (and substantive CCPCs) as well as their shareholders, that earn “highly-mobile” investment income through controlled foreign affiliates (“**CFAs**”)
 - Proposed to eliminate a “perceived” tax-deferral advantage available to CCPCs earning investment income through CFAs by reducing the available deduction in respect of foreign tax paid by the CFA.

“Relevant tax factor”

- Changes to the “relevant tax factor”(“RTF”)
 - For CCPCs and substantive CCPCs, the RTF will decrease from **4** to **1.9**.
 - What is the RTF?
 - Gross up factor that grosses up the amount of the foreign tax paid for the purposes of calculating a credit (the **FAT** deduction) recognized when FAPI is generated in a CFA.
 - Also provides relief in respect of foreign tax paid on earnings of a foreign affiliate that are repatriated to a corporation resident in Canada.
- Under the RTF of 1.9, a deduction in respect of foreign tax paid that fully offsets FAPI inclusions is available only where the foreign tax rate is at least **52.63%** (as opposed to **25%**, under the previous RTF of 4).
 - Applies to taxation years that begin on or after April 7, 2022.

FABI Proposals

- August 2024 Proposals (FABI Introduced)
 - The concept of Foreign Accrual Business Income (“**FABI**”) was introduced to provide some measure of relief to the adjusted RTF for CCPCs and substantive CCPCs.
 - FABI was introduced as an elective relieving regime to allow CCPCs and substantive CCPCs to preserve the high RTF of 4 on certain types of income that are included in FAPI that would generally not have been subject to the high tax rate on investment income had they been earned domestically.

August 2024 Proposals

- The August 2024 FABI categories were narrow
 - (i) 95(2)(b)(i) amounts:
 - Relevant if the deeming rule in subpara. 95(2)(b)(i) applied, relating to services income
 - (ii) Income or loss from an investment business real estate:
 - Relevant if the “more than five full time employee” test in the definition of “investment business” in ss. 95(1) would otherwise be satisfied if that test were broadened to include employees performing services in Canada

August 2025 Proposals

- FABI 2.0: FABI now consists of amounts...
 - FAPI: must be included in the affiliate's FAPI;
 - Hypothetical: that would not be aggregate investment income ("**All**") if the affiliate were (at all times) a CCPC, and all amounts included in its FAPI were from a source in Canada;
 - Base erosion caveat: but does not include amounts that are derived from direct or indirect payments to the affiliate that erode income of a non-arm's length taxpayer that would otherwise have been taxed at a high rate or that reduce FAPI (non-FABI) of a foreign affiliate.

Base Erosion Exception

- A payment received by the affiliate will be treated as FAPI (i.e., not FABI) if:
 - It is made by a payer that is:
 - A **taxpayer** of whom the affiliate is a foreign affiliate, or a person not dealing at arm's length with the affiliate or with any taxpayer of whom the affiliate is a foreign affiliate
 - A **foreign affiliate** of a taxpayer of whom the affiliate is a foreign affiliate or of another taxpayer that does not deal at arm's length with such a taxpayer or with the affiliate, or
 - A **partnership** any member of which is a person or partnership listed above
 - And the payment is **deductible** in computing the income of the payer that would otherwise be taxable at a rate that approximates the highest personal income bracket (All or FAPI (other than FABI)).

FABI Surplus

- A new surplus account (ss. 93.4(1))
 - The amount that would be the affiliate's "taxable surplus" if it was limited to:
 - The affiliate's FABI;
 - Dividends received out of another affiliate's FABI surplus, less dividends paid out of the affiliate's own FABI surplus; and
 - The active business earnings of the affiliate that are not FAPI but are included in its taxable surplus

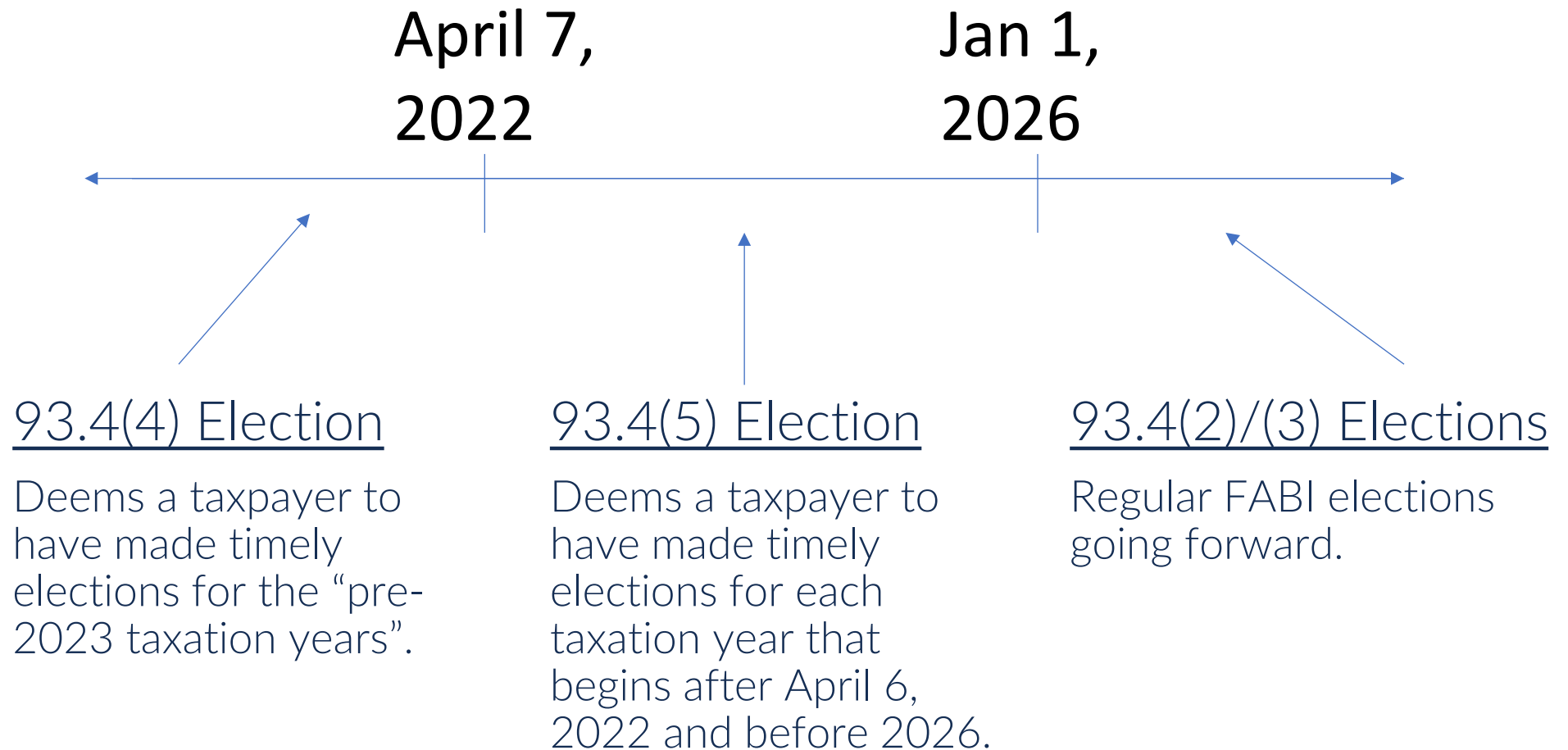
Elections

- New s. 93.4 provides for two new elections:
 - 93.4(2) election: An election under ss. 93.4(2) to use the RTF of 4 in calculating a deduction under ss. 91(4) in respect of FAT that can reasonably be regarded as attributable to the FABI of a CFA
 - 93.4(3) election: An election under ss. 93.4(3) to use the RTF of 4 in calculating a deduction under para. 113(1)(b) and (c) on the portion of any dividend that is considered to be paid out of a foreign affiliate's FABI surplus

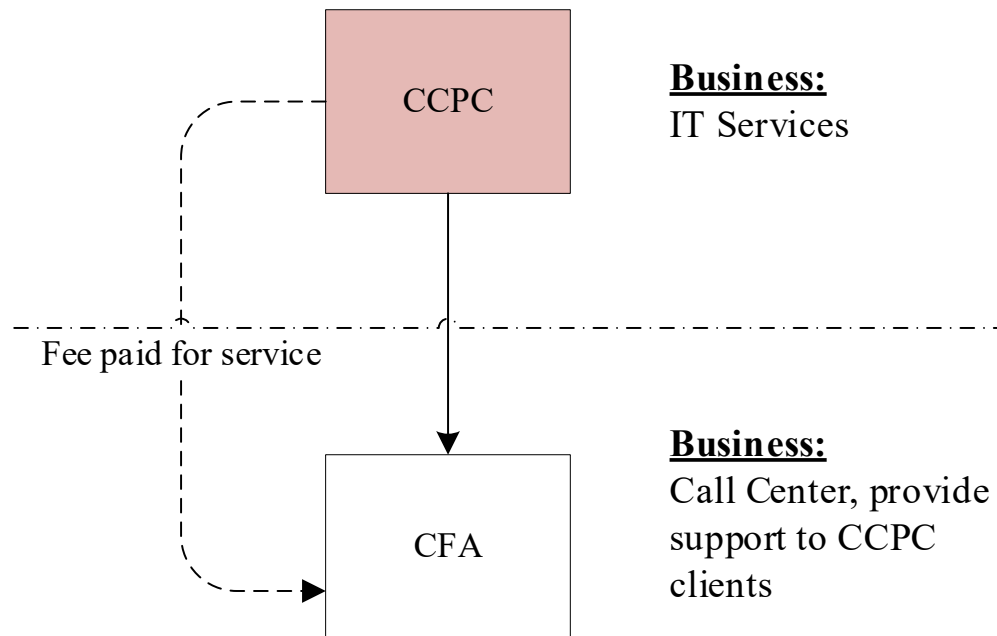
Timing

- RTF Change: Applies to taxation years that begin on or after April 7, 2022
- New s. 93.4: Generally applies to taxation years that begin after 2025
- This creates a possible timing mismatch, but s. 93.4 also applies to earlier taxation years where an election is filed under ss. 93.4(4) or (5)

More Elections



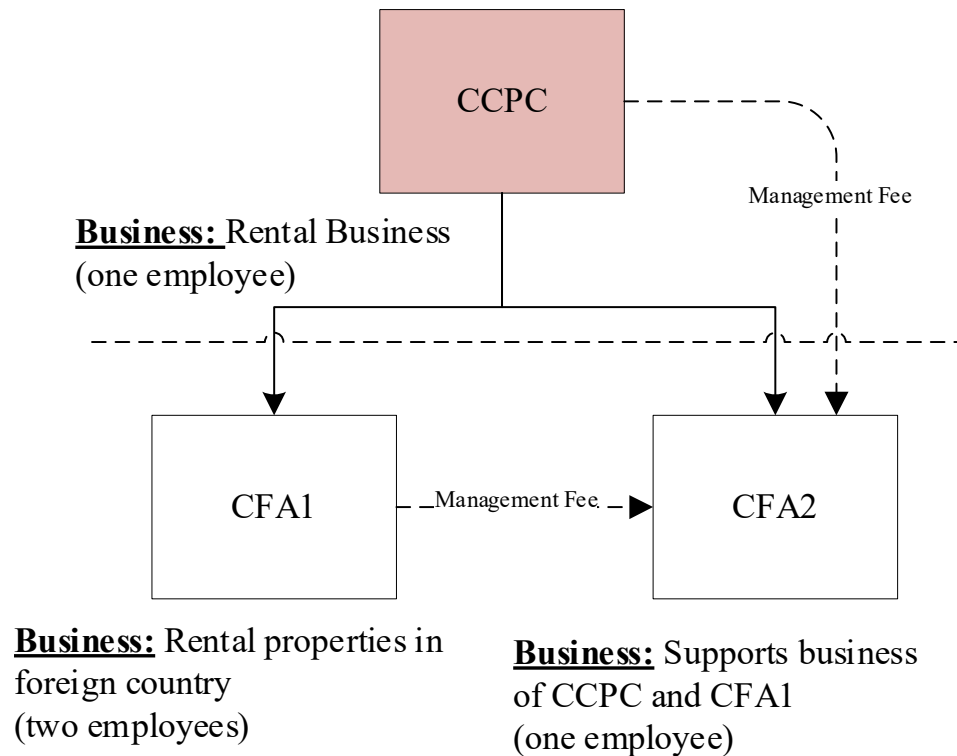
Example 1



Consequences

- Income earned by CFA is FAPI under cl. 95(2)(b)(i)(A).
- The income would not be All if CFA were a CCPC and the income were from a source in Canada.
- The payment does not erode income of the CCPC that was subject to a high rate of tax.
- **Result:** FAPI elections may be filed

Example 2



Consequences

- The CCPC's business is likely a "specified investment business"
- CFA1 likely has an investment business and would be earning FAPI. However, given that it would be All if it were a CCPC, the FAPI is not FAPI.
- CFA2 would be deemed to be operating a separate business other than an active business under cl. 95(2)(b)(i)(A) for the portion
- The management fee would not be included in All if CFA2 was a CCPC.
- However, income of CFA 2 is from amounts paid by NAL CCPC that would erode its All and CFA 1 which is deductible in computing FAPI (other than FAPI). → Base erosion.
- Result: No FAPI for either CFA 1 or CFA 2



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Capital Gain Strips in 2025

Colin Smith

Where we are now:

- A capital gains strip can be done personally or corporately
- The integrated rate on a personal strip is
 - 35.7% (corporate small business rate)
 - 46.18% (general corporate rate)
- The integrated rate on a corporate strip is
 - 37.6% (corporate small business rate)
 - 45.32% (general corporate rate)
- These rates do not consider AMT
- Provided it is implemented correctly, the only concern with the transaction is the potential application of the GAAR

Amended GAAR

- The GAAR continues to require a misuse of the provisions of the ITA or an abuse of the ITA read as a whole
- However, if an avoidance transaction or a series of transactions which includes an avoidance transaction is significantly lacking in economic substance, that tends to indicate there is a misuse or abuse
- If the entire purpose for undertaking a series of transactions is to obtain the tax benefit, this is a factor that establishes that the series of transactions lack economic substance

Amended GAAR

- If the GAAR applies, there is now a penalty equal to 25% of the tax savings to the taxpayer
- This penalty can be avoided if the taxpayer reports under ss. 237.4(12)
- There is also an exception to the penalty if the taxpayer relied on published statements or court decisions in respect of identical or almost identical transactions
- The statute barred period in s. 152 is extended to 6 years unless notice is given under s. 237.4

Application of GAAR

- A capital gains strip may be a transaction that is significantly lacking in economic substance resulting in a presumption of an abuse or misuse
- Despite that presumption, there is a very strong argument that a capital gains strip does not result in an abuse or misuse under the existing GAAR jurisprudence
- However, it is possible that the amended GAAR may be interpreted such that existing jurisprudence is of limited benefit
- Thus, there is a risk that the GAAR applies to a capital gains strip under the amended GAAR
- If the GAAR applies and the taxpayer did not report under ss. 237.4(12), the penalty may apply as there is quite a high threshold for the exception in ss. 245(5.2)
 - While the taxpayer may rely on court decisions and administrative guidance, it is not clear they are “identical or almost identical” to this transaction

Application of GAAR

- The CRA has indicated they will challenge a personal strip
- The CRA has not addressed their position on a corporate strip
- Thus, unless a taxpayer is willing to fund the cost of an (ensuing) litigation battle, the only prospect of success for a reported transaction is a situation where the CRA cannot audit the volume of reported transactions
- At present we continue to implement capital gains strips where the client is properly advised of the risk

Potpourri Update

Gloria Wang

Update on Mandatory Disclosure Rules

- Disclosure obligations by parties in respect of certain transactions:
 - Reportable transactions
 - Notifiable transactions
 - Reportable uncertain tax treatment (RUTT)

Reportable Transactions

- Amended Form RC312 available
- Optional disclosure by filing RC312 prevents GAAR penalty and extension of statute-barred period if the transaction is subject to GAAR

Reportable Transaction - Hallmarks

- Contingent fee arrangement: does not include a service for preparation of tax returns and schedules that give rise to tax refunds – *exclusion now does not apply if it relates to aggressive avoidance such as charitable donation scheme*

Reportable Transaction - Hallmarks

- Contractual protection:
 - Exclusion of tax insurance obtained in relation to the purchase of TCP from a non-resident *now requires Certificate Notices to be sent to the CRA under ss. 116(2), (4) and (5.02) to qualify*
 - Did not arise where insurance and indemnity is based on actions or inactions to achieve a tax result – *now requires it to be reasonable to conclude that the indemnity is intended to ensure that the appropriate purchase price is paid under the agreement*

Notifiable Transactions

- Amended Form RC312 also available
- Carve-out for advisors and promoters: does not apply unless the person knows or should reasonably be expected to know it was a notifiable transaction
 - *New objective standpoint reference to determine what a person should “reasonably be expected to know” in the same position, without reference to the subjective intention of the person*

Notifiable Transactions

- Specifically includes payment of dividend from an old trust to a corporation owned by new trust where it is reasonable to conclude that it is paid to avoid or defer the 21-year rule
- Excludes freezing and refreezing of shares
- Back-to-back arrangements – includes arrangements between NR1 and NR2 where there is both debt and equity financing and is no longer restricted to solely debt financing

Eligible Small Business Corporation ("ESBC") Share Rollover

- Deferral of capital gains on "qualifying dispositions" of ESBC shares under ss. 44.1(1)
 - to the extent that the cost of the new shares exceeds the proceeds of disposition for the old shares
- Three proposed changes in new draft legislation for "qualifying dispositions" occurring on or after January 1, 2025

S. 44.1 – Old vs. New Rules

Condition	Old Rule	New Rule
Period in which the “replacement share” must be acquired within a specified period of time	Year of disposition, plus 120 days of following year	Extended to year of disposition plus the entire calendar year following
Share must not have specified characteristics and be issued by the ESBC	Generally, limited to “generic common share”	Expanded to include both preferred shares and common shares
“carrying value” of assets of corporations involved is limited	Carrying value could not exceed \$50M	Carrying value cannot exceed \$100M (expanded to include \$50M to \$100M of carrying value)

House Flipping Rules

- Legal test in *Happy Valley farms Limited v Minister of National Revenue*, [1986] 2 CTC 259 still applicable
- Audit activity has been consistent
- Change in collection approach and speed in which collections gets involved
- Involve legal counsel earlier!



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Post-Mortem Planning – Tips and Traps

Brent Pidborochynski

Overview of Post-Mortem Issue

- Ss. 70(5) - individuals are subject to a deemed disposition on death of their capital property at FMV
 - This will generally include shares of private corporations
- Assuming an individual holds shares of a private corporation at the time of his/her death, and assuming that the FMV of those shares exceeds the ACB, the individual will realize a capital gain on death that will have to be reported in his/her terminal T1 return

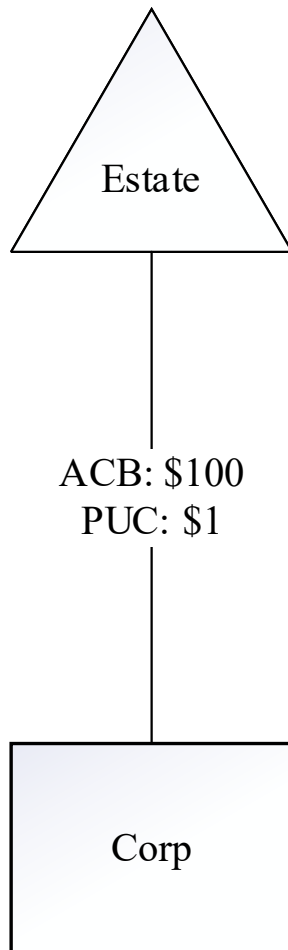
Overview of Post-Mortem Issue

- The taxpayer's estate would be deemed to acquire the private corporation shares with an ACB equal to FMV
 - However, there is no increase to the PUC of the shares
- Any subsequent redemption of the shares from the estate would result in a deemed dividend to the estate, with no credit for the capital gains tax paid by the individual on death
- So, without any planning, the value of the shares is subject to tax twice: first, as a capital gain in the individual's final return, and second, as a dividend to the estate
- Double tax

Post-Mortem Planning

- There are typically three main planning strategies implemented to mitigate against the double-tax on death, being:
 1. 164(6) carryback planning
 2. Pipeline planning
 3. 88(1)(d) bump planning
- These are often used together, and which planning options will be most efficient depends on each case

164(6) Planning



- Corporation redeems the shares from the estate, triggering a deemed dividend to the estate
- Because of the high ACB and low PUC, the redemption should result in a capital loss
- Ss. 164(6) allows the estate to elect to carry back the capital loss realized to offset the capital gain reported in the individual's final tax return

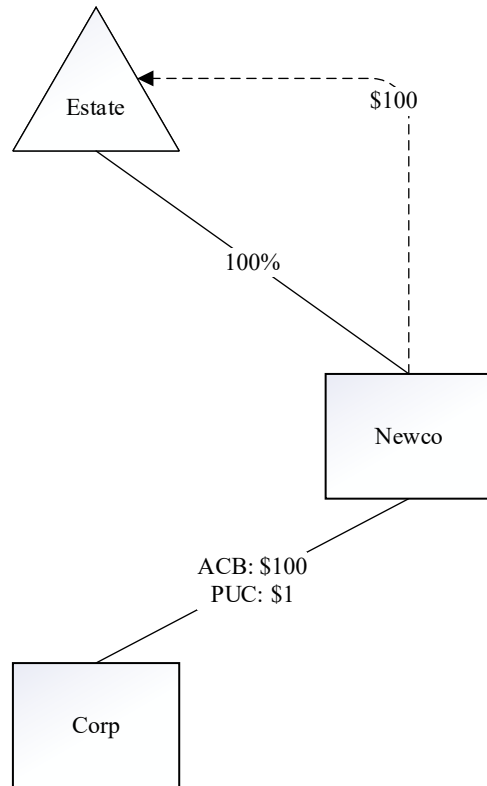
164(6) Planning

- The amount of the capital loss that can be carried back is the net capital loss of the estate, including any gains/losses from the dispositions of other property in that year (including real estate, marketable securities)

164(6) Planning

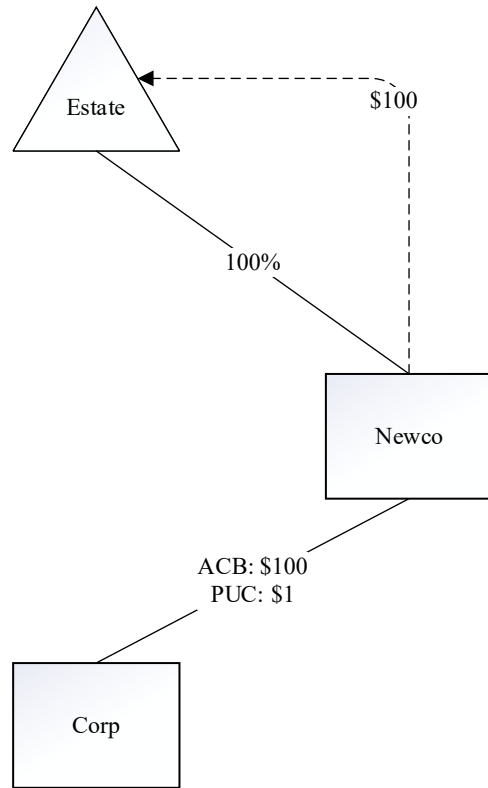
- This carryback option can eliminate double-tax, but the result is that the estate pays tax on the value as a dividend, and dividends are taxed at a higher rate than capital gains
- Therefore, this option is typically desirable where the corporation has certain valuable attributes (CDA and ERD TOH/NERD TOH) that can make a dividend more efficient
- If the corporation does not have meaningful CDA/NERD TOH, may consider triggering a gain on an asset prior to the redemption of shares

Pipeline Planning



- Mechanism to extract funds from the corporation on a tax-free basis, thereby limiting any tax liability other than the capital gains tax paid on death
- Involves selling the corporation's shares to a holding company (Newco) in consideration for a promissory note
- The corporation then redeems the shares held by Newco, triggering a tax-free intercorporate dividend
- Newco could use the dividend proceeds to repay the note to the estate – thereby extracting the corporate funds without triggering any additional tax

Pipeline Planning



- CRA has issued several favourable rulings on pipeline transactions, and generally has taken the position that ss. 84(2) will not apply where:
 - The corporation's business or investment activities will continue for at least one year following implementation of the pipeline structure
 - The corporation continues to hold more than mere cash/near-cash assets
 - The corporation's assets are not distributed to shareholders for at least one year, followed by a gradual distribution over time
- Slow extraction of funds is a downside to pipeline planning

Tips and Traps: #1 CDA

- For ss. 164(6) planning - can designate a portion of the deemed dividend as a capital dividend, but need to consider the stop-loss rule in ss. 112(3.2), which will restrict the amount of the loss realized (and available to carryback) to the extent that the amount of the dividend designated as capital exceeds 50% of the capital gain otherwise realized by the individual on death
- Computation in ss. 112(3.2) is on a “share-by-share” basis
- Be careful not to redeem in tranches to trigger two separate dividends

Tips and Traps: #1 CDA

- Instead, first increase the stated capital of the shares to be redeemed
 - This will result in a deemed dividend, which deemed dividend can be designated as a capital dividend
- Then the shares can be redeemed and the resulting loss can be carried back to offset the individual's gain on death
- Also consider using CDA to “waste” shares prior to death where possible to avoid restrictions

Tips and Traps: #2 GRE Status

- The ss. 164(6) election is available only to a “graduated rate estate”
- Important to review and ensure that the estate you are dealing with is in fact a GRE
 - Need to ensure that the estate is designated as a GRE in the T3 return
 - The estate must be a “testamentary trust”
 - This can be easily tainted by certain non-arm’s length loans

Tips and Traps: #3 Time Limitation

- Requirement in ss. 164(6) requires that the loss being carried back must have been incurred in the first taxation year of the GRE, and the election must be filed no later than the due date for the GRE's first tax return (being 90 days from the end of its taxation year)
- Proposed legislative amendments will extend the period for realizing the loss from one to three years, and will change the deadline for electing to being the filing-due date for the particular taxation year of the GRE

Tips and Traps: #3 Time Limitation

- Relevant amendments to ss. 164(6) were announced on August 12, 2024
- These amendments are not enacted and therefore cannot yet be relied upon
- If/when enacted, the changes will apply to individuals that die on or after August 12, 2024 and GREs of individuals that die on or after that date

Tips and Traps: #4 Filing 164(6) Election

- Para. 164(6)(e) provides that the representative that is administering the GRE shall file “an amended return of income for the deceased” individual taxpayer for the year of death
- 2022-0929381C6 – CRA has said that filing a T1-ADJ, T1 Adjustment Request is insufficient; claiming the loss upfront may also be insufficient
- The proposed legislative amendments introduce that the election will be made on a “prescribed form”, intended to simplify the election process

Tips and Traps: #5 Share Exchanges

- May consider share exchanges in connection with post-mortem planning to isolate value in certain classes of shares in some circumstances (sometimes done when isolating ss. 164(6) carryback value from “pipeline” shares; sometimes done where the decedent is not the sole shareholder of the corporation at the time of death)
- Subpara. 112(3.2)(a)(iii) refers to shares acquired by a GRE as a consequence of an individual’s death; ss. 112(7) provides that where shares are exchanged under s. 51, 85.1, 86 or 87, the new shares are deemed to be the same share as the old share for certain purposes
- Planning is simpler where the shares of the decedent are “frozen” prior to death



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Closing Remarks

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