2024 STEP / CRA Roundtable

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Unless otherwise stated, all legislative references hereafter are to the *Income Tax Act* R.S.C 1985 (5th Supp.), c.1 (the "Act").

QUESTION 1. Spousal Trust and Contribution

An *inter vivos* trust which meets certain conditions in section 73 (namely subparagraph 73(1.01)(c)(i)) is commonly known as a spousal or common-law partner trust. By virtue of paragraph 104(4)(a), a spousal or common-law partner trust will have its first deemed disposition of certain property at the end of the day on which the death of the beneficiary spouse or common-law partner occurs, and not on the 21st anniversary of the trust's creation.

If the trust initially meets the requirements of a spousal or common-law partner trust and after the spouse or common-law partner beneficiary dies the trust receives a contribution of capital property from a person other than the individual who created the trust, what are the implications? More specifically:

A. Does the trust cease to be a spousal or common-law partner trust for purposes of the Act?

B. When does the deemed disposition under subsection 104(4) arise in respect of the property added to the trust?

CRA Response

Part A

Subparagraphs 104(4)(a)(ii) and 104(4)(a)(iii) together describe a spousal or common-law partner trust as a trust created after June 17, 1971 by a taxpayer during the taxpayer's lifetime that, at any time after 1971, was a trust under which the taxpayer's spouse or common-law partner was entitled to receive all of the income of the trust that arose before the spouse's or common-law partner's death and no person except the spouse or common-law partner could, before the spouse's or common-law partner's death, receive or otherwise obtain the use of any of the income or capital of the trust.

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Subparagraph 73(1.01)(c)(i) and subparagraph 104(4)(a)(iii) are identical in respect of who must create the trust and the conditions relating to the income and capital of the trust.

After the death of the beneficiary spouse or common-law partner, where a spousal or common-law partner trust receives a contribution from a person other than the spouse or common-law partner that created the trust, the trust will continue to be a spousal or common-law partner trust for purposes of the Act. However, the transfer of capital property will not occur on a tax-deferred basis under subsection 73(1). The transfer will occur at fair market value and, as such, will generally result in a capital gain (or capital loss) to the transferor.

Part B

By virtue of paragraph 104(4)(a), the spousal or common-law partner trust will have already had its first deemed disposition at the end of the day on which the death of the beneficiary spouse or common-law partner occurred.[2]

Where the trust continues beyond the death of the beneficiary spouse or common-law partner, pursuant to subparagraph 104(4)(b)(iii) the trust will have its next deemed disposition on the day that is 21 years after the day of death for which the first deemed disposition was previously determined under paragraph 104(4)(a). Any further deemed dispositions would occur every 21 years, pursuant to paragraph 104(4)(c).

The deemed disposition dates as determined in subsection 104(4) apply to each property of the trust. The dates are not tied to specific properties.

Although paragraph (g) of the definition of "trust" in subsection 108(1) generally provides that subsection 104(4) does not apply to a trust all interests in which, at that time, have vested indefeasibly, certain types of trusts are carved out of that treatment by virtue of subparagraphs (i) to (vi). Since the trust would be a "post-1971 spousal or common-law partner trust", the carve out in subparagraph (i) applies. As a result, the deemed disposition rule in subsection 104(4) will continue to apply.

QUESTION 2. <u>Salary to Family Members</u>

Scenario A

If a corporation ("Payor") pays wages ("Wages") to an individual employee ("Recipient") who is not dealing at arm's length with a shareholder of the Payor ("Shareholder") and a portion of the Wages is subsequently determined to be unreasonable pursuant to section 67 ("Overpayment"), can the CRA confirm that:

A. subsection 15(1) will not apply to include the amount of the Overpayment in computing the income of the Recipient because he/she is not a shareholder (or a contemplated shareholder) of the Payor?, and

B. for the purposes of subsection 15(1), paragraph 15(1.4)(c) will not apply to include the amount of the Overpayment in computing the income of the Shareholder because it was included in the Recipient's income?

[2] Further, as a result of this death, the trust's taxation year in which the death occurs will be deemed to have ended on the same day, in accordance with paragraph 104(13.4)(a). In addition, a new taxation year of the trust is deemed to begin immediately after that day.

Scenario B

If the amount of the Overpayment was paid to an individual shareholder of the Payor holding employment with the Payor ("Shareholder-Employee") who is not dealing at arm's length with a Shareholder, can the CRA confirm that:

A. in accordance with subsection 248(28), subsection 15(1) will not apply to include the amount of the Overpayment in computing the income of the Shareholder-Employee to prevent the same amount from being included twice in the income of the Shareholder-Employee?, and

B. for the purposes of subsection 15(1), paragraph 15(1.4)(c) will not apply to include the amount of the Overpayment in computing the income of the Shareholder because it was included in the Shareholder-Employee's income?

CRA response

Although the application of subsection 15(1) in a specific situation is a question of fact, we may provide the following general comments based on our understanding of the limited facts provided in the question.

Scenario A

Assuming that the Recipient does not own shares in the capital stock of the Payor or does not qualify as a contemplated shareholder of the Payor, and the Overpayment qualifies as a benefit for the purposes of subsection 15(1), the amount of the Overpayment will not be included in computing the income of the Recipient pursuant to subsection 15(1) because such a benefit is not conferred on the Recipient in his/her capacity of shareholder of the Payor.

Moreover, the rule provided in paragraph 15(1.4)(c) will not apply to include the amount or value of that benefit in computing the Shareholder's income pursuant to subsection 15(1) because the amount of the Overpayment is included in computing the income from employment of the Recipient.

Scenario B

The amount of the Wages that is received by the Shareholder-Employee will be included in computing his/her income from employment pursuant to section 5. If the Overpayment qualifies as a benefit conferred on the Shareholder-Employee in his/her capacity of shareholder of the Payor, the amount of the Overpayment could also be included in computing his/her income pursuant to subsection 15(1) ("Shareholder Benefit"). However, subsection 248(28) will apply to prevent the amount of the Overpayment from being included twice in computing the income of the Shareholder-Employee such that subsection 15(1) would not apply to tax the amount of the Overpayment as a Shareholder Benefit.

Moreover, the rule provided in paragraph 15(1.4)(c) will not apply to include the amount or value of that benefit in computing the Shareholder's income pursuant to subsection 15(1) because the amount of the Overpayment is included in computing the income from employment of the Shareholder-Employee.

QUESTION 3. <u>Acquisition of Control</u>

If a controlling shareholder of a corporation becomes incapable and an unrelated person (or persons) starts acting on the shareholder's behalf under a power of attorney, does that constitute a loss restriction event for the corporation?

If there is a change of attorney in the future, will there be another loss restriction event?

Further, can a loss restriction event be prevented if the unrelated attorney is one of three attorneys, two of which are related to the incapable shareholder?

CRA Response

Paragraph 251.2(2)(a) states in part:

> For the purposes of this Act, a taxpayer is at any time subject to a loss restriction event if
>
> > (a) the taxpayer is a corporation and at that time control of the corporation is acquired by a person or group of persons;

In *Buckerfield's Ltd et al v MNR*, [1964] CTC 504, the central question before the Exchequer Court of Canada was the meaning of "control" of a corporation as the term is used in the Act. In concluding that control contemplates the ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors (i.e., *de jure* or effective control), Jackett, P. stated at page 507:

> Many approaches might conceivably be adopted in applying the word "control" in a statute such as the *Income Tax Act* to a corporation. It might, for example, refer to control by "management", where management and the Board of Directors are separate, or it might refer to control by the Board of Directors. The kind of control exercised by management officials of the Board of Directors is, however, clearly not intended by section 39 when it contemplates control of one corporation by another as well as control of a corporation by individuals (see subsection (6) of section 39). The word "control" might conceivably refer to *de facto* control by one or more shareholders whether or not they hold a majority of shares. I am of the view, however, that in section 39 of the *Income Tax Act*, the word "controlled" contemplates the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors. See *British American Tobacco Co. v. I.R.C.*, [1943] 1 A. E. R. 13, where Viscount Simon L. C., at page 15, says:
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> > The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes.

In *Duha Printers (Western) Ltd. v. Canada*, [1998] S.C.R. 795 (SCC), Iacobucci, J., speaking for the Supreme Court of Canada, provided the following guidance on the approach to determining control:

> [40] The general approach to the determination of control, as I have already noted, has been to examine the share register of the corporation to ascertain which shareholder, if any, possesses the ability to elect a majority of the board of directors and, therefore, has the type of power contemplated by the *Buckerfield's* test, *supra*. The case law seems to point only to limited circumstances in which other documents may be examined, and then only to a narrow range of documents which may be considered.

Iacobucci, J. later summarized, at paragraph 85, which documents or agreements are relevant to determining *de jure* or effective control of a corporation:

> (1) ...
>
> (2) The general test for *de jure* control is that enunciated in Buckerfield's, supra : whether the majority shareholder enjoys "effective control" over the "affairs and fortunes" of the corporation, as manifested in "ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors".
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> (3) To determine whether such "effective control" exists, one must consider:

(a) the corporation's governing statute;
(b) the share register of the corporation; and
(c) any specific or unique limitation on either the majority shareholder's power to control the election of the board or the board's power to manage the business and affairs of the company, as manifested in either:

(i) the constating documents of the corporation; or
(ii) any unanimous shareholder agreement.

(4) Documents other than the share register, the constating documents, and any unanimous shareholder agreement are not generally to be considered for this purpose.

(5) …

Thus, an agreement that is not an unanimous shareholder agreement would not generally be considered in determining *de jure* control of the corporation. One exception is where the shares of a corporation are held by a trust. At paragraphs 48 - 49 of *Duha Printers*, Iacobucci, J. made the following comments with respect to trusts:

> Equally distinguishable, in my view, are *Consolidated Holding*, *supra*, and *The Queen v. Lusita Holdings Ltd.*, 84 D.T.C. 6346 (F.C.A.), two cases in which the courts considered documents other than the constating documents only because the majority of the shares in the companies in question were held by trustees. It was therefore necessary to examine the trust instruments in order to determine what, if any, limitations existed on the trustees' powers to vote the shares. As it happened, in both cases, the trustees could be constrained in their voting of the shares by the actions of their co-trustees: in *Consolidated Holding*, the will of the deceased shareholder provided that "the views, discretion or direction of any two of my trustees shall be binding upon the other of my trustees" (p. 422), while in *Lusita Holdings* it was found as a fact by Stone J.A. that "[t]he right to control the voting rights resided in the co-trustees and not in either of them" (p. 6348)
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> These factors, in my view, clearly demonstrate the distinction between a trust instrument and other external documents for the purposes of assessing *de jure* control. A trust imposes upon the trustee a fiduciary obligation to act within the terms of the trust instrument and for the benefit of the beneficiary. That is, the trustee is not free to act other than in accordance with the trust document, and if the trust document imposes limitations upon the capacity of the trustee to vote the shares then these must accordingly be taken into account in the *de jure* control analysis. By contrast, any limitations which might be imposed by an outside agreement are limitations freely agreed to by the shareholders, and not at all inconsistent with their *de jure* power to control the company. In other words, limitations on the voting powers of trustees must be seen as limitations on their capacity as free actors in the circumstances. No such limitations encumber the ordinary shareholder in his or her exercise of *de jure* control, even if an outside agreement exists to limit actual or *de facto* control.

In our view, a power of attorney under which a designated attorney exercises the voting rights of the controlling shareholder of a corporation as a consequence of the incapacity of the shareholder (who continues to be the legal and beneficial owner of the shares), would not constitute an external document that is to be taken into consideration in determining *de jure* control of the corporation. Our views in this respect confirm our response to question 17 at the 2012 APFF Conference - Federal Roundtable (CRA document 2012-0454111C6).

It is worth noting that a power of attorney may be relevant in applying paragraph 251(5)(b), which sets out rules that apply in determining whether persons are related and for the purposes of the definition "Canadian-controlled private corporation", and in applying subsection 256(1.4), which

sets out rules for determining whether a corporation is associated with another corporation. In this respect, see CRA documents 2000-000825, 9814370 and 9726535.

QUESTION 4. Acquisition of Control of a Corporation

In archived document IT-302R3, the CRA adopted the administrative position that a change of executor, administrator or trustee of an estate does not result in an acquisition of control of a corporation controlled by the estate, if the replacement results from a death or inability to fulfill the function of an executor, administrator or trustee.

A. Can the CRA comment on whether this continues to be their position?

B. Would the position apply to a replacement trustee that is an independent trust company?

CRA Response

A. It remains our administrative position that where the executor, administrator, or trustee of an estate is replaced as a result of that person's death or inability to fulfill their functions, control of the corporation would not, solely as a result such replacement, be acquired.

B. With respect to the replacement of a person as a consequence of their death or inability to fulfill the function of an executor, administrator or trustee of an estate, our administrative position is not conditional on the replacement trustee being related to or otherwise connected to the executor, administrator or trustee being replaced.

QUESTION 5. Post-Mortem Planning and GAAR

To assist estates in managing the potential for double-taxation that can occur when a deceased dies while owning shares of a Canadian private corporation, the CRA has a long history of providing guidance and advanced income tax rulings on post-mortem planning strategies known as pipelines and subsection 164(6) loss carry back plans. New subsection 245(4.1) of the general anti-avoidance rule ("GAAR") provides that if an avoidance transaction is significantly lacking in economic substance it is an important consideration that tends to indicate that the transaction results in a misuse or abuse under subsection 245(4).

Can the CRA provide any updates on its guidance on post-mortem pipelines and subsection 164(6) loss carry back plans in light of this amendment to the GAAR?

CRA Response

In CRA document 2023-0987941I7, dated February 29, 2024, the Income Tax Rulings Directorate made the following comments regarding the potential application of the amended GAAR to post-mortem pipeline transactions:

> The Directorate does not consider the use of a pipeline transaction as a means to preserve the capital gain arising on the death of a shareholder while limiting double taxation on the subsequent distribution of Opco's assets to be a misuse described in paragraph 245(4)(a) or an abuse within the meaning of paragraph 245(4)(b). Accordingly, the Directorate will continue to issue favourable Rulings on the non-application of the amended GAAR in the context of post-mortem pipeline transactions that meet our existing administrative guidelines described in document 2018-0748381C6.

The Income Tax Rulings Directorate is not aware of any specific concerns regarding the potential application of the amended GAAR in circumstances involving the carry back of losses under subsection 164(6) and has not provided any general guidance in this respect.

QUESTION 6. <u>Succession of a Family Business</u>

Section 84.1 is an anti-surplus stripping rule. In general terms, section 84.1 may apply where an individual resident in Canada disposes of shares (the "subject shares") of the capital stock of a Canadian resident corporation (the "subject corporation") to another corporation (the "purchaser corporation") with which the individual does not deal at arm's length, and immediately after the disposition, the subject corporation would be connected (within the meaning of subsection 186(4)) to the purchaser corporation.

The *Fall Economic Statement Implementation Act, 2023* (Bill C-59) includes new provisions, which, if enacted, would deem a taxpayer and a purchaser corporation to deal with each other at arm's length at the time of the disposition of the subject shares if the conditions in proposed subsection 84.1(2.31), which deals with immediate intergenerational business transfers, or proposed subsection 84.1(2.32), which deals with gradual intergenerational business transfers, are met.

One of the conditions that must be met in relation to both types of intergenerational transfers requires that the child(ren) carry on the acquired business. Specifically, the child or at least one member of a group of children who are the indirect purchasers of the subject shares must be actively engaged on a regular, continuous and substantial basis in "a relevant business of the subject corporation or a relevant group entity" for at least 36 months in the case of an immediate intergenerational business transfer (see proposed subparagraph 84.1(2.31)(f)(ii)) or 60 months, in the case of a gradual intergenerational business transfer (see proposed subparagraph 84.1(2.32)(g)(ii)). For this purpose, there is a reference in both proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii) to paragraph 120.4(1.1)(a) which provides that an individual shall be deemed to be actively engaged on a regular, continuous and substantial basis in a business if that individual works in the business on average at least 20 hours per week throughout the portion of the year when the business operates.

We have the following questions in relation to the application of proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii):

A. Assuming that a group of children are the indirect purchasers of the subject shares, must it be the same individual who meets the threshold of being actively engaged on a regular, continuous and substantial basis in a relevant business of the subject corporation or a relevant group entity throughout the relevant period, or can it be different members of the group of children provided there is at least one member from the group of children who meets the threshold at all times throughout the relevant period?

B. Would this condition be met if there is an individual who, prior to the transfer of the subject shares, worked full-time in the relevant business for 5 years?

C. If there are multiple businesses being carried on by several different corporations, would this condition be met if an individual is only considered to be actively engaged on a regular, continuous and substantial basis in one of the businesses?

CRA Response

The purpose of proposed paragraphs 84.1(2.31)(f) and 84.1(2.32)(g), as indicated in the Department of Finance Explanatory Notes, is to ensure that the taxpayer's child (or group of children) continues to control and carry on the acquired business. It is considered to be one of the hallmarks indicative of a genuine intergenerational business transfer.

Proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii) require that "the child, or at least one member of the group of children, as the case may be, is actively engaged on a regular, continuous and substantial basis (within the meaning of paragraph 120.4(1.1)(a)) in a relevant business of the subject corporation or a relevant group entity". This condition (hereinafter referred to as the "activity threshold") must be satisfied from the time of a disposition of subject shares by the parent until 36 months after that time, in the case of an immediate intergenerational business transfer, or until 60 months after that time, in the case of a gradual intergenerational business transfer.

Relieving rules to the application of subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii) are found in proposed subsection 84.1(2.3), but for purposes of these questions, it is assumed that none of these relieving rules are or will be applicable.

Considering the above, the answers to the questions are as follows:

A. Proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii) clearly indicate that it would be sufficient if at least one member of the group of children meets the activity threshold. Accordingly, where proposed subparagraph 84.1(2.31)(f)(ii) or 84.1(2.32)(g)(ii), as the case may be, would apply in relation to a group of children, the CRA would not require that a single member of the group of children meet the activity threshold for the entirety of the relevant period. Provided at least one member from the group of children meets the activity threshold at all times throughout the relevant period, we would consider the condition in proposed subparagraph 84.1(2.31)(f)(ii) or 84.1(2.32)(g)(ii), as the case may be, to be met.

   For the purposes of this question, we have assumed that each member of the group of children is: (i) a "child" pursuant to the extended definition found in proposed paragraph 84.1(2.3)(a), and (ii) 18 years of age or older. We have also assumed that the purchaser corporation is controlled by the group of children.

B. Proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii) expressly require that from the time of disposition of the subject shares until 36 months after that time for immediate intergenerational business transfers and 60 months after that time for gradual intergenerational business transfers, the child or at least one member of the group of children, as the case may be, satisfies the activity threshold. Accordingly, any previous engagement or involvement by an individual prior to the disposition of the subject shares by the parent to the purchaser corporation would not be considered in determining whether the condition in proposed subparagraph 84.1(2.31)(f)(ii) or 84.1(2.32)(g)(ii), as the case may be, is met.
   This would be consistent with the stated purpose of proposed paragraphs 84.1(2.31)(f) and 84.1(2.32)(g), noted above, which is to ensure the continued involvement of the taxpayer's child or group of children, as the case may be, in the acquired business.

C. In order to respond to Question C properly, we are assuming that the corporations referred to are each appropriately considered to be a "relevant group entity" within the meaning of proposed paragraphs 84.1(2.31)(c) and 84.1(2.32)(c) in relation to a single subject corporation whose shares have been disposed of to a purchaser corporation by an individual. We are assuming that each of the corporations referred to in Question 3 are carrying on an active business (referred to as a "relevant business") that is relevant to the determination of whether the subject shares are "qualified small business corporation shares" or "shares of the capital stock of a family farm or fishing corporation" as these terms are defined in subsection 110.6(1).

   As previously noted, proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii) require that the activity threshold be satisfied in relation to a relevant business of the subject corporation or a relevant group entity. Accordingly, if an individual is actively engaged on a regular, continuous and substantial basis within the meaning of paragraph 120.4(1.1)(a) in a relevant business of a subject corporation or a relevant group entity, the CRA would consider the condition in proposed subparagraph 84.1(2.31)(f)(ii) or 84.1(2.32)(g)(ii), as the case may be, to be met.

For greater certainty, in circumstances where an individual disposes of shares of more than one subject corporation to a purchaser corporation, in relation to which there may be one or more relevant group entities (each subject corporation and any corporation appropriately considered to be a relevant group entity in relation to it is hereinafter referred to as a "group of entities"), the conditions in proposed subparagraphs 84.1(2.31)(f)(ii) and 84.1(2.32)(g)(ii), as the case may be, would need to be satisfied in relation to each group of entities.

QUESTION 7. <u>Alter Ego Trusts and Subsection 75(2)</u>

Can the CRA confirm whether subsection 75(2) will apply to an alter ego trust ("AET") that meets all of the conditions of subparagraph 73(1.01)(c)(ii) and subsection 73(1.02) with the following attributes:

- The AET is settled by an individual (the "Settlor").
- There are three trustees of the trust, one of which is the Settlor, and the trust indenture requires that all decisions be made by a majority vote of the three trustees.
- The trust indenture provides that no capital distributions, including any capital gains, can be made from the trust while the Settlor is alive.
- The trust indenture provides for income and capital distributions that are to be made to various beneficiaries after the death of the Settlor, but does not include any provision that grants the Settlor a power to direct these future distributions.

CRA Response

Pursuant to subsection 73(1), an individual (other than a trust) can transfer capital property on a tax-deferred basis, where certain conditions are met. In order for subsection 73(1) to apply, the following conditions must be met:

- at the time of the transfer of property, both the transferor of the property and the transferee must be resident in Canada;
- the transferor must not elect out of the rollover rule; and
- subsection 73(1.01) must apply in respect of the transfer (a "qualifying transfer").

Subsection 73(1.01) provides that, subject to the requirements of subsection 73(1.02), qualifying transfers include, *inter alia*, transfers to a trust, created by the individual transferring the property, that meet the requirements of subparagraph 73(1.01)(c)(ii), such that the individual is entitled to receive all the income of the trust arising before the individual's death and no person except that individual may receive or otherwise obtain the use of any of the income or capital of the trust before that individual's death.

Subsection 73(1.02) imposes additional conditions that must be met in order for a trust to meet the requirements of subparagraph 73(1.01)(c)(ii). Generally, in this situation:

- the trust must be created after 1999;
- the individual must be at least 65 years of age at the time the trust is created; and
- the trust does not make an election under subparagraph 104(4)(a)(ii.1).

A trust described in subparagraph 73(1.01)(c)(ii) that meets all of the relevant conditions outlined above will be an AET as defined in subsection 248(1). You have asked us to confirm whether subsection 75(2) will apply to a particular AET with the above-noted attributes.

Subsection 75(2) is an attribution rule applicable in respect of trusts factually resident in Canada and created since 1934. The rule generally applies where property is held by such a trust on condition that:

a) the property, or property substituted for it, may revert to the person from whom it was directly or indirectly received, or pass to persons determined by that person subsequent to the creation of the trust, or

b) during the existence of the person, the property may be disposed of only with the person's consent or in accordance with the person's direction.

When either of these conditions is met, any income or loss from or taxable capital gain or allowable capital loss in respect of the property, or property substituted for it, is attributable to that person while resident in Canada. Accordingly, any amounts attributable are determined in respect of a particular property, or property substituted for that property. It is a question of fact as to whether property is held by a trust under the conditions described in either paragraph 75(2)(a) or (b).

The fact that a trust will only qualify as an AET if the settlor is entitled to all the income of the trust that arises before his or her death, as required by subparagraph 73(1.01)(c)(ii), does not necessarily mean that the property contributed by the settlor, or property substituted for it, can possibly revert to the settlor.

In this particular case, the trust indenture provides that no capital distributions, including any capital gains, can be made from the trust while the Settlor is alive. For this particular AET, the Settlor does not appear to have a capital interest in the trust. However, where, for example, the settlor of an AET has a capital interest in the trust, subsection 75(2) will generally apply during the period in which the settlor is resident in Canada.

Additionally, in this particular case, there are three trustees, one of which is the Settlor. The trust indenture requires that all decisions be made by a majority vote of the three trustees and the trust indenture does not include any provision that grants the Settlor a power to direct the future distributions. The fact that the Settlor is one of three trustees, acting in their fiduciary capacity to decide issues by majority will not normally, in and by itself, give rise to the application of subsection 75(2).

However, subsection 75(2) could still apply where the terms and conditions of a trust expressly require the settlor's consent or direction with respect to any decision made by the trustees. This could include the situation where decisions are made by a majority of trustees provided that the trustee-settlor is one of that majority.

As noted above, it is a question of fact as to whether property is held by a trust under the conditions described in either paragraph 75(2)(a) or (b). Thus, a determination of whether these conditions are met in respect of any particular property can only be made on a case-by-case basis following a review of all the facts and circumstances surrounding a particular situation, including a review of the complete trust indenture.

QUESTION 8. <u>Disposition of Property Held in a Bare Trust</u>

An express trust arrangement has been established under which the trust can reasonably be considered to act as agent for the sole beneficiary with respect to all dealings with all of the trust's property. This trust is referred to as the "Bare Trust". The Bare Trust is not a trust described in any of

paragraphs (a) to (e.1) of the definition “trust” in subsection 108(1). The sole beneficiary of the Bare Trust is either a natural person or a corporation. Throughout the year, the Bare Trust is resident in Canada and holds only a CDN$10,000 Government of Canada Bond (the “Bond”), which is a debt obligation described in paragraph (a) of the definition “fully exempt interest” in subsection 212(3), and money. The Bond is held by the Bare Trust as capital property.

The Bond matures in the current taxation year and is paid out in cash denominated in Canadian dollars. Thereafter the Bare Trust holds only this cash in Canadian dollars. Thus, throughout the current taxation year the Bare Trust has held no property other than the Bond and money, the fair market value of which did not exceed CDN$50,000, and therefore meets the conditions set out in paragraph 150(1.2)(b). Also, there is no tax payable by the Bare Trust for the current taxation year, as all income and capital gains in respect of the trust property are reported by the sole beneficiary of the Bare Trust, who is the beneficial owner of the trust property.

A. Does the CRA agree that subparagraph 150(1.1)(b)(ii), in itself, would not require the Bare Trust to file a T3 Trust Income Tax and Information Return (“T3 return”) for the current year because the Bare Trust has not disposed of the Bond within the meaning of “disposition” as that term is defined in subsection 248(1)?

B. If, following the maturity of the Bond, the Bare Trust is terminated during the current year and all of the money held by the Bare Trust is thereupon transferred to the beneficiary, would subparagraph (b)(v) of the definition of “disposition” in subsection 248(1) deem the Bare Trust to have had a “disposition” in the year, and if so, would the Bare Trust be required to file a T3 return for the year?

CRA Response

Part A of the question describes a situation in which the Bare Trust continues to hold the proceeds received on the maturity of the Bond throughout the remainder of the taxation year. The question asked is whether subparagraph 150(1.1)(b)(ii) would, in itself, require the Bare Trust to file a T3 return for the current year. The answer to this depends on whether the Bare Trust is considered to dispose of the Bond when the Bond matures and the proceeds are paid to the Bare Trust.

Paragraph 150(1)(c) requires a trust (which for this purpose would include the Bare Trust[3]) to file a T3 return for a taxation year. This requirement is subject to an exception in paragraph 150(1.1)(b) that applies to a taxpayer that is an individual, unless (i) there is Part I tax payable for the year by that individual, (ii) where the individual is resident in Canada, the individual has a taxable capital gain or disposes of capital property in the year, or (iii) certain other circumstances that are not relevant to the Bare Trust are applicable. We understand that the Bare Trust considered herein is resident in Canada, has no Part I tax payable for the year, and has not realized a capital gain in the year.

However, even if an individual meets the foregoing criteria so as to qualify for the filing exception in paragraph 150(1.1)(b), where the taxpayer is a trust, it may be required to meet further criteria in order to so qualify. Subsection 150(1.2) provides that the filing exception in subsection 150(1.1) does not apply to a taxation year of a trust if the trust is resident in Canada and an express trust (which for this purpose would include the Bare Trust), or for civil law purposes a trust other than a trust that is established by law or by judgement, unless the trust is a trust described in any of

[3] Note that effective for taxation years ending on or after December 31, 2023, subsection 104(1) provides that the Bare Trust will be considered to be a trust for the purposes of section 150. However, pursuant to the announcement on March 28, 2024, the CRA will not require bare trusts to file a T3 Return, including Schedule 15, for the 2023 tax year, unless the CRA makes a direct request for these filings.

paragraphs 150(1.2)(a) to (o).[4] We understand that the Bare Trust in this situation would be a trust described in paragraph 150(1.2)(b).

Therefore, provided that the Bare Trust has not disposed of capital property during the year, it would be concluded that the Bare Trust would qualify for the exception in subsection 150(1.1) and would therefore not be required to file a T3 return for the year in question.[5]

Subsection 104(1), in effect, provides that the Bare Trust would be considered to be a trust for the purposes of certain provisions in the Act including section 150, and including for purposes of subparagraph (b)(v) of the definition of "disposition" in subsection 248(1). Subparagraph (b)(v) of the definition of "disposition" would be applicable if the Bare Trust ceased to act as agent for a beneficiary under the trust with respect to any dealing with any of the trust's property. Subparagraph (b)(v) is therefore not relevant to the situation in part A of the question. Subsection 104(1), in effect, provides that the Bare Trust would also be regarded as a trust for purposes of paragraph (k) of the definition of "disposition" (which applies in circumstances that are not relevant to the situation at hand), but does not result in the Bare Trust being regarded as a trust for other purposes of the definition of "disposition". Accordingly, the Bare Trust would be deemed to not exist as a trust for purposes of the remaining parts of the definition of "disposition". Therefore, although a disposition of the Bond may well be considered to have occurred on maturity of the Bond, this is not regarded as a disposition by the Bare Trust.

Accordingly, we conclude that subparagraph 150(1.1)(b)(ii), in itself, would not require the Bare Trust to file a T3 return for the current year.

Part B of the question describes a situation in which, following the maturity of the Bond, the Bare Trust is wound up and the cash proceeds from the Bond are transferred to the beneficiary. The question that has been asked is whether this would amount to a disposition by the Bare Trust because of the application of subparagraph (b)(v) of the definition of "disposition" in subsection 248(1), and if so, whether the Bare Trust would be required to file a T3 return for the taxation year. As noted above, subsection 104(1) provides that the Bare Trust will be treated as a trust for purposes of subparagraph (b)(v) of the definition of "disposition".

However, we conclude that, provided that there is no change in the beneficial ownership of the property held by the Bare Trust when such property is transferred to the sole beneficiary, then notwithstanding the wording of subparagraph (b)(v), paragraph (e) in the definition of "disposition" would be applicable. This is because paragraph (e) excludes from the meaning of "disposition" of a property, any transfer of the property as a consequence of which there is no change in the beneficial ownership of the property. We note that the exclusion in paragraph (e) is subject to certain exceptions set out in subparagraphs (e)(i), (ii) and (iii). Subparagraphs (e)(i) and (iii) refer to transfers to a trust and so are not relevant in this situation. Subparagraph (e)(ii) refers to a transfer from a trust to a beneficiary under the trust and could therefore be relevant. However, since there is nothing in subsection 104(1) that would deem the Bare Trust to be a trust for purpose of subparagraph (e)(ii) in the definition of "disposition", this exception also would not be applicable. The result is that the termination of the Bare Trust would not be considered to result in a disposition of the property held by the Bare Trust.

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[4] Bill C-69, An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024, includes the addition of proposed paragraph 150(1.2)(p), applicable to taxation years that end after December 30, 2023.

[5] Note that a T3 return may be required to be filed for a taxation year as a result of the reporting requirements in section 204 of the *Income Tax Regulations* in certain circumstances. However, such circumstances would not be applicable to the Bare Trust. See the section titled, "Who should file" in the T4013 *T3 Trust Guide* for more information.

QUESTION 9. Paragraph 150(1.2)(b) and Guaranteed Investment Certificates

Pursuant to paragraph 150(1.2)(b), subsection 150(1.1) can apply to a trust for a particular tax year where, the trust holds assets with a fair market value that does not exceed $50,000 throughout the year, if the only assets held by the trust throughout the year are one or more of

(i) money,
(ii) a debt obligation described in paragraph (a) of the definition fully exempt interest in subsection 212(3),
(iii) a share, debt obligation or right listed on a designated stock exchange,
(iv) a share of the capital stock of a mutual fund corporation,
(v) a unit of a mutual fund trust,
(vi) an interest in a related segregated fund trust (within the meaning assigned by paragraph 138.1(1)(a)), and
(vii) an interest as a beneficiary under a trust, all the units of which are listed on a designated stock exchange.

Can the CRA advise whether Guaranteed Investment Certificates ("GICs") issued by a Canadian bank or trust company are assets listed in paragraph 150(1.2)(b)?

CRA Response

The exception in paragraph 150(1.2)(b) applies where a trust holds assets with a total fair market value that does not exceed $50,000 throughout the year, if the only assets held by the trust throughout the year are comprised of one or more of the assets as described in subparagraphs 150(1.2)(b)(i) to (vii). Overall, if a particular trust meets this exception, or one of the other exceptions listed in subsection 150(1.2), subsection 150(1) will not apply to require the trust to file a T3 Income Tax and Information Return where the trust also meets one of the exceptions in subsection 150(1.1).[6] The trust will also not be required to provide the additional information set out in section 204.2 of the *Income Tax Regulations*.

The asset listed in subparagraph 150(1.2)(b)(i) is money. Since the term "money" is not defined in the Act, we must look to the ordinary meaning of the term for guidance. The Black's Law Dictionary, 11th edition, defines money as "the medium of exchange authorized or adopted by a government as part of its currency." The Oxford English Dictionary, 3rd electronic edition, defines money as "any generally accepted medium of exchange which enables a society to trade goods without the need for barter; any objects or tokens regarded as a store of value and used as a medium of exchange."

In *Moss v. Hancock (1899)* 2 Q.B. 116, the court stated that "Money as currency is that which passes freely from hand to hand throughout a community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities".

The Government of Canada webpage "*Guaranteed investment certificates and term deposits: know your rights*"[7], generally describes a GIC as a secured investment where the amount invested is returned at the end of the term. It is our view that a GIC issued by a Canadian bank or trust company would not fit within the ordinary meaning of money. Moreover, it is our general position that a GIC is a similar obligation to bonds, debentures, notes or mortgages.

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[6] Note that a T3 Return may be required as a result of the reporting requirements in section 204 of the *Income Tax Regulations.* See the section titled, Who should file" in the T4013 *T3 Trust Guide* for more information.

[7] See webpage: https://www.canada.ca/en/financial-consumer-agency/services/rights-responsibilities/rights-investing/rights-guaranteed-investment-certificates.html

The asset listed in subparagraph 150(1.2)(b)(ii) refers to a debt obligation described in paragraph (a) of the definition fully exempt interest in subsection 212(3). The debt obligations listed in paragraph (a) of the definition of fully exempt interest in subsection 212(3) refer to certain debt obligations of, or guaranteed by, the Government of Canada (otherwise than by being insured by the Canada Deposit Insurance Corporation), certain debt obligations of the government of a province, among others, but does not include a debt obligation issued by a Canadian bank or trust company.

Furthermore, the assets listed in subparagraphs 150(1.2)(b)(iii) to (vii) also do not include a GIC issued by a Canadian bank or trust company.

Overall, a GIC issued by a Canadian bank or trust company does not meet the description of any of the assets listed in paragraph 150(1.2)(b). Therefore, if a particular trust holds a GIC issued by a Canadian bank or trust company, it would not be a trust described in paragraph 150(1.2)(b).

QUESTION 10. Update on Recent Trust and Estate Issues

Can the CRA provide an update on any recent trust or estate issues that may be of interest to the STEP audience?

CRA Response

There is a recent unreported decision of the Tax Court of Canada which dealt with the question of whether an amount had been made payable for the purpose of paragraph 104(6)(b) which we would like to bring to your attention. The case, which was heard on March 27, 2023, is Tax Court file 2019-4092(IT)G between Maurice Kissel Family Trust (as appellant) and His Majesty the King (as respondent).

Based on the Transcript of the Oral Reasons for Judgment delivered on March 30, 2023, the relevant facts which the Tax Court considered can generally be summarized as follows:

> The trust in question was a personal family trust the beneficiaries of which included two minor children who were under the age of 18.
>
> The declaration of trust specifically provided that no minor beneficiary shall receive or otherwise obtain the use of any of the income or capital of the trust while being a "designated person"[8] under the Act in respect of their father, who was also the trustee of the trust.
>
> In spite of the above-noted specific prohibition in the terms of the trust, when the trust realized a substantial capital gain on the disposition of shares of a small business corporation, it paid $100,000 to each of the two minor beneficiaries that same taxation year, and claimed a deduction pursuant to paragraph 104(6)(b) in respect of those payments when it filed its trust return.
>
> Tax returns were also filed in respect of the two minors purporting to include the payment amounts in their income under subsection 104(13) and claiming the capital gains deduction on their behalf.

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[8] Pursuant to paragraph 74.5(5)(b), a "designated person" in respect of an individual includes a person who is under 18 years of age and does not deal at arm's length with the individual. Pursuant to paragraph 251(1)(a), related persons are deemed not to deal with each other at arm's length. Accordingly, the two minor beneficiaries were designated persons in respect of their father.

> The CRA reassessed the trust to deny the deduction claimed by the trust in respect of the payments to the two minors on the basis that the conditions in paragraph 104(6)(b) were not met. The CRA also considered the amounts which the two minors received as having been included in their respective incomes pursuant to subsection 105(1) rather than subsection 104(13).

The basis on which the CRA denied the deduction to the trust was that, in its view, the amount had not become payable in the year, as is required by paragraph 104(6)(b). This was the issue on which the Tax Court had to rule, while noting that both appellant and respondent had acknowledged that the term "payable" is not defined in the Act.

The appellant's position:

The appellant suggested that the term "payable" is broad enough to include an amount paid to a beneficiary in violation of the trust terms.

In support of its view it raised an argument that as a general principle, parties are subjected to tax on amounts received or earned illegally. However, the Tax Court rejected this argument, noting that proceeds of crime are subjected to tax because the terms "business" and "profit" have been widely construed, both in the common law and under taxing statutes.

The appellant raised five decisions that it argued as support for its view that the word "payable" should not be construed to exclude a payment to a beneficiary that is prohibited under the terms of a trust. However, in rendering his decision, Justice Hogan concluded that none of the cases cited by the appellant were relevant to the determination of the meaning of the word "payable" in paragraph 104(6)(b).

The appellant also argued that the scheme of the Act allows a trust to be treated as a flow-through in respect of income that becomes payable to a beneficiary each year. The Tax Court agreed with this general proposition, but noted that flow-through status requires that the conditions in paragraph 104(6)(b) and subsections 104(13) and 104(24) are satisfied.

The decision in the case:

In rendering its decision, the Tax Court concluded that if an amount cannot be paid under the terms of a trust, it cannot be considered to be payable. The timeframe in which an appeal of the decision could be filed for this case has passed and it is our understanding that the taxpayer did not seek an appeal.

The CRA is of the view that the Tax Court conclusion in this case is consistent with our longstanding views as to how the word "payable" is to be interpreted in the context of the provisions of the Act in respect of trusts. For example, internal technical interpretation 2005-0159081I7 provides a thorough discussion as to whether an amount has become payable for the purposes of subsections 104(6) and 104(13) and the views expressed therein are, in our view, supported by the conclusion of the Tax Court in this case.

The important point to take from this decision is that trustees, in deciding on allocations of income to beneficiaries where a deduction pursuant to paragraph 104(6)(b) is desired in computing the trust's income, should consider the analytical framework for determining whether the amount will be considered to be payable to the beneficiary as noted in document 2005-0159081I7.

QUESTION 11. <u>Foreign Tax Credit for U.S. Estate Tax</u>

Paragraph (6)(a) of Article XXIX-B ("Article XXIX-B(6)(a)") of the Canada-U.S. Tax Treaty ("Treaty") allows a deduction in the terminal return of an individual who immediately before death was a resident of Canada of the amount of any U.S. Federal or state estate or inheritance taxes paid in

respect of property situated within the U.S. Articles XXIX-B(6)(a)(i) and (a)(ii) provide that the deduction may be applied to reduce the amount of Canadian tax otherwise payable on the total of the following income earned by the individual in the taxation year in which the individual died:

> (a)(i): any income, profits or gains arising in the U.S. within the meaning of Article XXIV(3) of the Treaty, and
>
> (a)(ii): where, at the time of death, the individual's entire gross estate (wherever situated) exceeded U.S. $1.2 million, any income, profits or gains of the individual from property situated in the U.S. at that time.

The post-amble of Article XXIX-B(6) further states that for purposes of that determination, property is situated within the U.S. if it is so treated for U.S. estate tax purposes.

A Canadian resident who is not a U.S. citizen dies while holding real property situated in the U.S. ("U.S. Realty") and shares of a U.S. public corporation ("U.S. Shares"). The U.S. Shares did not form part of the deceased's Registered Retirement Savings Plan and they are not classified as a "U.S. real property interest" for the purpose of subparagraph 3(a) of Article XIII of the Treaty. The U.S. Realty and the U.S. Shares are both subject to U.S. estate tax under the Internal Revenue Code on the basis that they are U.S. situs property. As a result of the disposition deemed to occur on death under subsection 70(5), a capital gain is realized on the U.S. Realty and on the U.S. Shares. Will the executor be permitted to claim a credit in Canada in respect of the U.S. estate tax paid where:

A. the value of the deceased's entire gross estate is equal to, or lower than, U.S. $1.2 million, or

B. the value of the deceased's entire gross estate exceeds U.S. $1.2 million?

CRA Response

In order to qualify for a foreign tax credit under subsection 126(1), an amount paid to a foreign jurisdiction must be an "income or profits tax". The U.S. estate tax paid is not eligible for a foreign tax credit under subsection 126(1) because an estate tax is not an "income or profits tax".

However, paragraph 6 of Article XXIX-B of the Treaty provides that a Canadian tax credit shall be allowed in respect of estate taxes paid in the U.S. where the conditions specified in that paragraph are met. Where the estate tax is imposed upon an individual's death, the credit that Canada shall allow is limited to the Canadian federal tax otherwise payable calculated in accordance with Article XXIX-B(6)(a) .

In the present case, where the value of the deceased's entire gross estate is equal to, or lower than, U.S.$1.2 million, subparagraph 6(a)(i) of Article XXIX-B ("Article XXIX-B(6)(a)(i)") of the Treaty would apply to allow a Canadian tax credit, which would be limited to the Canadian federal tax otherwise payable on income, profits or gains arising in the U.S.

Pursuant to the combined operation of Article XIII and paragraph 3 of Article XXIV of the Treaty, the gain resulting from the deemed disposition of the U.S. Realty under subsection 70(5) is deemed to arise in the U.S., while the gain from the U.S. Shares is deemed to arise in Canada. Accordingly, the gain from the deemed disposition of the U.S. Shares will not be included in calculating the credit allowed under Article XXIX-B(6)(a)(i). This is a corollary of the U.S. Shares being carved out of the U.S. estate tax base by Article XXIX-B(8). As a result, the executor may claim a tax credit in accordance with Article XXIX-B(6)(a)(i) of the Treaty for the U.S. estate tax paid on the U.S. Realty against the Canadian federal tax otherwise payable on the gain from the deemed disposition of the U.S. Realty plus other U.S. source income as defined under the Treaty.

U.S. income taxes payable for the year of death are also creditable and are included in calculating the aggregate foreign tax credit allowable in Canada. The post-amble of Article XXIX-B(6) provides an

ordering rule, such that Canadian federal tax otherwise payable is reduced by the foreign tax credit allowed under Article XXIV before the calculation of the additional foreign tax credit allowed under Article XXIX-B(6).

On the other hand, where the value of the deceased's entire gross estate exceeds U.S.$1.2 million, subparagraph 6(a)(ii) of Article XXIX-B ("Article XXIX-B(6)(a)(ii)") would apply to permit the calculation of the Canadian federal tax otherwise payable to also include the tax levied on income, profits, or gains from property situated in the U.S. In these circumstances, it includes the gain from the deemed disposition of the U.S. Shares as they are property situated in the U.S. Therefore, in this case, the executor may claim a tax credit in accordance with Article XXIX-B(6)(a)(ii) for the U.S. estate tax paid against the Canadian federal tax otherwise payable on the gains from the deemed disposition of the U.S. Realty and the U.S. Shares plus other U.S. source income as defined under the Treaty. The ordering rule in the post-amble of Article XXIX-B(6) also applies in this case.

As outlined in Document 2010-0379381E5, U.S. estate taxes are eligible for a provincial foreign tax credit only if allowed under provincial income tax legislation. Article XXIX-B(6) does not have the force of law in the Provinces and Territories of Canada.

QUESTION 12. Acquisition from Non-Resident Relative

A non-resident relative (the "non-resident") makes a gift in kind of a rental property situated in a foreign country to a Canadian resident individual (the "Canadian"). Assume for illustration the cost and fair market value ("FMV") (in Canadian dollars) is:

	Cost	FMV
Land	$ 400,000	$ 600,000
Building	$ 1,000,000	$ 1,400,000

Assume depreciation on the building was claimed by the non-resident in the foreign country but not in Canada, since the relative was a non-resident of Canada and the building is not located in Canada.

For the Canadian, what would be the cost amount of the property, and what amount would be included in the undepreciated capital cost ("UCC") in respect of the building?

Would the answer be different if the property were inherited by the Canadian as a consequence of the death of the non-resident? In this situation, assume that the property will form part of the deceased non-resident's estate (the "estate"), and will subsequently be distributed from the estate to the Canadian in complete or partial satisfaction of their capital interest in the estate.

CRA Response

The cost amount of the land and building for the Canadian receiving it from a non-resident relative for the general application of the Act and the part of it included for capital cost allowance purposes depend on whether the properties are gifted or inherited.

The following chart indicates what the cost amount to the Canadian would generally be and what portion would be included in UCC in either circumstance:

	Property gifted		Property inherited	
	Cost amount	Cost amount included in UCC	Cost amount	Cost amount included in UCC
Land	$ 600,000	N/A	$ 600,000	$ N/A
Building	$ 1,400,000	$ 1,200,000	$ 1,400,000	$ 1,400,000

This response assumes that the non-resident trust rules set out in section 94 are not applicable to the estate and that the estate is factually non-resident. We have also assumed that the estate is a personal trust pursuant to the definition in subsection 248(1), and understand that the elections in subsections 107(2.001) and 107(2.002), and subsections 107(4) to 107(5) are not applicable. Further, we have also assumed that the land and building are capital property to the non-resident and the estate pursuant to the definition in section 54.

Since the land and the building were gifted, the Canadian recipient was deemed to acquire them at their respective FMV under paragraph 69(1)(c) for the purposes of applying the provisions of the Act, unless expressly otherwise provided. Accordingly, the cost amount and the undepreciated capital cost of the building to the Canadian would generally be its FMV at the date of their transfer, subject to adjustments.

Because the gift is a non-arm's length transfer, subparagraph 13(7)(e)(ii) would apply on the basis that the building is depreciable property to the Canadian and capital property to the transferor. This reduces the capital cost of the building to the Canadian for the purposes of paragraphs 8(1)(j) and (p), sections 13 and 20, and any regulation relevant to paragraph 20(1)(a).
Based on the information provided, the capital cost of the building to the Canadian would be reduced by one-half the amount by which the transferor's proceeds of disposition of the property (as deemed under paragraph 69(1)(b)) exceeds its cost, resulting in the addition to UCC for the Canadian in respect of the building being $1,200,000 ($1,400,000 – (50% x ($1,400,000 – $1,000,000).

If the land and the building had been inherited as a consequence of the non-resident's death rather than received as a gift, the Canadian would also be deemed to acquire those properties at a cost amount equal to their FMV immediately prior to the non-resident's death, pursuant to the application of subsections 70(5) and 107(2). In these circumstances, subparagraph 13(7)(e)(ii) would not apply since paragraph 13(7)(e) provides that the provision is not applicable where a property is acquired as a consequence of the death of the non-resident.

QUESTION 13. Deemed Resident Trust and Section 216

A non-resident trust deemed to be resident in Canada pursuant to section 94 ("deemed resident trust") owns a Canadian rental property. Is such a trust resident in Canada for purposes of determining rental income? Is such a trust resident in Canada for purposes of non-resident withholding tax on rent paid to the trust?

CRA Response

When subsection 94(3) applies to a non-resident trust in a particular taxation year, the trust is deemed to be resident in Canada for the purposes outlined in paragraph 94(3)(a) throughout that year. Of note are subparagraph 94(3)(a)(i) which deems the trust to be resident in Canada for the purposes of section 2, subparagraph 94(3)(a)(ii) which deems the trust to be resident in Canada for the purposes of computing the trust's income for the particular taxation year, and subparagraph

94(3)(a)(viii) which deems the trust to be resident in Canada for the purposes of determining the liability of the trust for tax under Part I, and under Part XIII on amounts paid or credited to the trust.

As such, a deemed resident trust is generally required to compute its income and losses for the year according to the rules that are applicable to Canadian residents and is liable for Canadian tax under Part I. Therefore, the rental income earned on real or immovable property in Canada would be included in the computation of a deemed resident trust's income under Part I. Note that subsection 104(7.01) restricts the amount that a deemed resident trust can deduct under subsection 104(6) in computing its income in the event that the trust has Canadian-source income, such as income from real or immovable properties in Canada, and makes distributions to beneficiaries not resident in Canada.

As previously mentioned, a deemed resident trust is not subject to Part XIII tax on amounts paid or credited to it, pursuant to subparagraph 94(3)(a)(viii). However, paragraph 94(4)(c) provides that a deemed resident trust is not considered to be resident in Canada for the purposes of determining the liability of a person (other than the trust) to withhold and remit under section 215.

Accordingly, there will be a requirement pursuant to section 215 to withhold and remit Part XIII tax on the rent paid or credited or deemed to be paid or credited to the deemed resident trust. However, to the extent the amount on which the Part XIII tax is paid is included in the deemed resident trust's income, paragraph 94(3)(g) deems the withholding amount to have been paid on account of the trust's tax under Part I for the particular taxation year.

Note that subsection 216(4.1) may provide relief in respect of the withholding tax required to be remitted on rent on real or immovable property or on a timber royalty in respect of a deemed resident trust, wherein the person who is otherwise required by subsection 215(3) to remit the Part XIII tax in the year elects not to remit under that subsection, provided certain conditions are met.

QUESTION 14. <u>T3 Trust Instalments</u>

In response to question 6 in the 2016 STEP/CRA Roundtable[9], the CRA noted that for the 2016 and subsequent taxation years, all *inter vivos* trusts and testamentary trusts (other than graduated rate estates) would be required to make instalment payments. However, the CRA also noted that consistent with the current administrative practice, the CRA would continue to not charge interest and penalties where a trust does not make sufficient instalment payments.

Earlier this year, the CRA released two new forms – the T3 INNS3, Trust Instalment Voucher and the T3AO, Trust Amount Owing Remittance Voucher. Does the release of Form T3 INNS3 mean that the CRA plans to discontinue the administrative practice noted above?

CRA Response

The CRA has been in the process of modernizing its T3 trust return processing systems over the past few years. The new instalment and remittance vouchers will ensure that payments made for a T3 account are correctly credited to the account as an instalment payment or payment of balance due. The current administrative practice will continue such that the CRA will not charge interest or penalties for insufficient instalment payments. Should this administrative practice change in the future, sufficient and timely information will be given to educate trusts on the repercussions if their instalment requirements are not met.

QUESTION 15. <u>Online Access for Trust Compliance</u>

Can the CRA provide comments on whether it will expand online access for trusts such as:

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[9] See CRA document 2016-0641461C6.

A. Viewing a trust's Notice of Assessment or Notice of Reassessment;

B. Uploading elections or other documents related to a T3 Trust Income Tax and Information Return ("T3 return") (e.g., subsection 164(6) election);

C. Requesting a clearance certificate;

D. Requesting remittance vouchers to pay tax payable at a financial institution, or paying an amount payable online; and

E. Providing authorization to a representative.

CRA Response

Online access for trusts is available as follows:

A. A trust's Notice of Assessment or Notice of Reassessment can be viewed in My Trust Account[10] through the mail service.

B. The Submit Documents[11] service exists for trusts within My Trust Account. The following documents are accepted within this service:

- Applications for a Trust Account Number (Form T3APP) and/or supporting legal documents;
- Supporting documentation required to be submitted with the current year T3 return, including a subsection 164(6) election;
- Supporting documentation requested by the CRA to complete the assessment of a T3 return;
- Supporting documentation requested by the CRA in relation to an audit of a T3 return;
- T3 Adjustment Requests (Form T3ADJ) and related supporting documentation; and
- Documents requested by the Collections and Verification Branch.

C. The ability to request a clearance certificate is currently being explored for a future release.

D. The ability to request remittance vouchers to pay tax payable at a financial institution or to pay an amount payable online is now available in My Trust Account. The payment options available are: pre-authorized debit agreement, My Payment, QR Code, or printable remittance vouchers.

E. Since February 2023, a primary trustee can authorize a representative for immediate access to a trust (T3) account within My Trust Account. Representatives can also submit an authorization request to access a T3 account electronically through Represent a Client[12] in the same manner they would for personal and corporate accounts.

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[10] https://www.canada.ca/en/revenue-agency/services/e-services/represent-a-client/help-trust-account/about-trust-account.html

[11] https://www.canada.ca/en/revenue-agency/services/tax/trust-administrators/t3-return/how-file-t3-return.htmll

[12] https://www.canada.ca/en/revenue-agency/services/e-services/represent-a-client.html

Note that the primary trustee needs to be registered for My Trust Account to confirm or deny the request. The steps required for a primary trustee to register for their own online access can be found in About My Trust Account. Details regarding how to provide (or obtain) online access are available on the Authorize a Representative web pages[13].

[13] https://www.canada.ca/en/revenue-agency/services/tax/representative-authorization/overview.html