

STEP TECHNICAL COMMITTEE

Society of Trust and
Estate Practitioners

Please reply to:

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December 1, 2002

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TAX LEGISLATION DIVISION

Department of Finance
140 O'Connor St.
Ottawa, Ontario
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Attention: Mr. Wally Conway

SOCIETY OF TRUST AND ESTATE PRACTITIONERS
COMMENTS AND SUBMISSIONS
Re. October 11, 2002 LEGISLATIVE PROPOSALS (“Draft Legislation”)

First, we would like to commend you and your team for all of your efforts to date with the Draft Legislation. We have now had an opportunity to review the October Draft and have concluded that there is no need for a further technical submission, however, as mentioned in our phone conversation, there are two points that came up during the Committee's meetings that I wanted to bring to your attention. The two issues relate to two new amendments.

Proposed Paragraph 94(2)(k)

According to proposed paragraph 94(2)(k) of the Income Tax Act (Canada) (“Act”), a transfer of property is deemed to have been made jointly by a particular entity and a specified entity if the particular entity transfers property which is made at the direction or with the acquiescence of the specified entity and it is reasonable to conclude that one of the reasons that the transfer is made is to avoid or minimize the liability of any entity that would otherwise result because of proposed subsection 94(3) of the Act. This last requirement seems to be a significant departure from the previous draft of proposed paragraph 94(2)(k) of the Act in that the former

draft required the avoidance or minimization of liability to be directed to the specified entity as opposed to “any entity”.

As a result of this change in wording, it appears that anomalous results may be obtained from applying the October 11th version of proposed paragraph 94(2)(k) of the Act. For example, assume that a non-resident trust (“T1”) that earns only foreign-sourced income is subject to proposed subsection 94(3) of the Act and there is a resident contributor who would be jointly liable for the tax obligations of this trust. Suppose further that one of the beneficiaries of this trust is another non-resident trust (“T2”) (which is not otherwise caught by proposed subsection 94(3) of the Act), which was formed to fund the educational needs of non-resident children of the resident contributor. After considering the relevant tax issues, the Canadian resident tax advisor (“Advisor”) directs that the trustee of T1 pay the income of T1 to T2 to minimize the Canadian tax consequences to T1. Based on the language of the new version of proposed paragraph 94(2)(k) of the Act, it appears that the Advisor will be deemed to have transferred property along with T1 to T2. As a result, the Advisor would be considered a resident contributor to T2 and would be apparently jointly liable for the tax obligations of T2.

This is simply one example, there are many others that may prove quite problematic for professional advisors.

Proposed Subparagraph 94(2)(t)(iv)

We appreciate your efforts in providing an exemption from the definition “contribution” in the case where a non-resident trust has previously disposed of its shares in the capital of a Canadian corporation in accordance with the new provisions set out in subparagraph 94(2)(t)(iv) of the Act. We are concerned, however, that clause 94(2)(t)(iv)(c) as proposed is drafted in a manner that is too narrow. A cash sale would be exempted, however, other types of share dispositions would seem to still lead to the same concerns as detailed in our previous submissions. For example, if the consideration for the share sale was by way of a “share swap” or “earn-out” (both of which are quite common methods to acquire shares) it would seem that the Canadian corporation would still be deemed a “resident contributor” despite the non-resident trust having no further interest in the Canadian corporation.

We would appreciate your review of the above two points. As always, should you have any questions or concerns regarding the above, you may direct them to the undersigned. We appreciate your consideration and attention to this matter.

Yours very truly,

STEP TECHNICAL COMMITTEE

Paul R. LeBreux
Chair