

MILLER THOMSON TAX UPDATE SEMINAR

January 23, 2014

Crystal Taylor
Stephen Rukavina
Greg Shannon
Cheryl Teron



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Straight Talking. Lateral Thinking.

Legal Expertise, Business Sense, Common Sense

Miller Thomson benefits from a unique, no-nonsense business culture. We have always been defined by our people and, as a group, we believe in sticking to the fundamentals. Our lawyers pride themselves on their ability to provide practical, creative and cost-effective advice. That advice is combined with a client service focus based on uniformly held values of responsiveness, transparency and accountability that make Miller Thomson a firm that businesses enjoy working with. Our clients' interests come first, and that starts with understanding your business and objectives. From there, it means "getting the job done right", and handling each of your matters efficiently, transparently and in a timely fashion, regardless of their size or degree of complexity. It is this approach to the practice of law, along with the clients we represent, that have helped us grow to become one of Canada's leading national business law firms.

Canadian Lawyers with Global Perspective

Miller Thomson's professionals are regularly engaged in cross-border and international transactions, and play an active role in a variety of trade organizations. The firm is a proud member of Multilaw – a global network of independent law firms working collectively to support clients' interests internationally. Our long-standing relationships with leading U.S. and other foreign law firms equip us to actively support the expanding reach of Canadian businesses.

Local and Regional Insight

Miller Thomson understands the uniqueness of the local markets we serve. Our growth as a firm has been tied to a commitment to be as accessible as we can to our clients. We offer the advantages of a strong national presence and reputation, but with the all-important local knowledge and perspective that enable us to deliver informed and practical legal services.

Industry and Practice Expertise

Our lawyers collaborate nationally, using a multi-disciplinary approach to identify solutions for clients. Our clients benefit from the experience and expertise that come from the sharing of best practices by our professionals across the country.



Highest Standards of Service

Service excellence is amongst the most important of Miller Thomson's values. We build strong relationships with our clients by listening, and by providing timely, proactive, and strategic advice. These relationships are our most valued assets. A significant part of great service is great communication. We believe in collaboration and teamwork with clients and colleagues. Working individually or in teams, we focus on providing the highest levels of service to our clients.

450+ lawyers focused on your objectives.

ABORIGINAL

AGRICULTURE AND FOOD PRODUCTION

ANTI-CORRUPTION AND INTERNATIONAL GOVERNANCE

BANKING AND FINANCIAL SERVICES

CAPITAL MARKETS AND SECURITIES

CHARITIES AND NOT-FOR-PROFIT

CLEANTECH

COMPETITION / ANTITRUST

CONSTRUCTION AND INFRASTRUCTURE

CORPORATE AND COMMERCIAL

CORPORATE GOVERNANCE

EDUCATION LAW

ENERGY AND NATURAL RESOURCES

ENVIRONMENTAL

HEALTH

IMMIGRATION

INFORMATION TECHNOLOGY

INSOLVENCY AND RESTRUCTURING

INSURANCE

INTELLECTUAL PROPERTY

INTERNATIONAL TRADE, CUSTOMS AND COMMODITY TAX

LABOUR AND EMPLOYMENT

LITIGATION

MARKETING, ADVERTISING AND REGULATORY

MERGERS AND ACQUISITIONS

MUNICIPAL SERVICES

PRIVATE CLIENT SERVICES

REAL ESTATE

REGULATORY

RETAIL

TAX

For more on our wide range of legal services, please visit millerthomson.com

At Miller Thomson, we strive continually to exceed your expectations. With lawyers in more Canadian cities than any other law firm, we can help your business achieve its goals with added experience, clarity and value.

Over 450 lawyers in 11 offices across Canada are dedicated to putting your best interest first.

Connected to your business.

Our Contact Coordinates

ROBSON COURT
840 HOWE STREET, SUITE 1000
VANCOUVER, BC + V6Z 2M1 + CANADA
T 604.687.2242
F 604.643.1200

700 9TH AVENUE SOUTHWEST, SUITE 3000
CALGARY, AB + T2P 3V4 + CANADA
T 403.298.2400
F 403.262.0007

COMMERCE PLACE
10155 102 STREET, SUITE 2700
EDMONTON, AB + T5J 4G8 + CANADA
T 780.429.1751
F 780.424.5866

300-15 23RD STREET EAST
SASKATOON, SK + S7K 0H6 + CANADA
T 306.665.7844
F 306.652.1586

BANK OF MONTREAL BUILDING
2103-11TH AVENUE, SUITE 700
REGINA, SK + S4P 4G1 + CANADA
T 306.347.8300
F 306.347.8350

ONE LONDON PLACE
255 QUEENS AVENUE, SUITE 2010
LONDON, ON + N6A 5R8 + CANADA
T 519.931.3500
F 519.858.8511

ACCELERATOR BUILDING
295 HAGEY BLVD., SUITE 300
WATERLOO, ON + N2L 6R5 + CANADA
T 519.579.3660
F 519.743.2540

ONTARIO AGRICENTRE
100 STONE ROAD WEST, SUITE 301
GUELPH, ON + N1G 5L3 + CANADA
T 519.822.4680
F 519.822.1583

SCOTIA PLAZA
40 KING STREET WEST, SUITE 5800
P.O. BOX 1011 + TORONTO, ON + M5H 3S1 + CANADA
T 416.595.8500
F 416.595.8695

60 COLUMBIA WAY, SUITE 600
MARKHAM, ON + L3R 0C9 + CANADA
T 905.415.6700
F 905.415.6777

1000 DE LA GAUCHETIÈRE STREET WEST, SUITE 3700
MONTRÉAL, QC + H3B 4W5 + CANADA
T 514.875.5210
F 514.875.4308

Miller Thomson LLP
millerthomson.com

TAXATION

OUR GROUP

Our Tax Law Group is an integral part of Miller Thomson, responsible for providing cost-effective solutions and advice to clients on a wide array of tax topics. With a team of approximately 50 lawyers spanning all of our national offices, our Tax Law Group is one of the largest in the country, and is still growing. We are an entrepreneurial, multi-jurisdictional and multidisciplinary group, with an acute sensitivity to our clients' complex business and taxation needs.

Our lawyers come from a diverse background of education and experience, bringing a breadth of knowledge and expertise that is unparalleled. We represent clients in various industry sectors, such as: manufacturing and processing, automotive, computer equipment and software, oil and gas, real estate, banking and finance, among others. We are also positioned at the forefront of rapidly growing technological areas, such as cleantech and greentech.

We are routinely engaged on cross-border and international transactions, which has enabled us to build a broad network of international contacts and relationships.

We are regularly present at major national and international tax conferences and seminars, and are active in speaking and writing on an assortment of tax issues.

Our Tax Law Group is comprised of 5 main specialty areas: (i) Corporate Tax; (ii) Private Client Services; (iii) International Trade, Customs and Commodity Tax; (iv) Tax Litigation and Dispute Resolution; and (v) Charities and Not-for-Profit.

OUR EXPERTISE

Corporate Tax. Our Corporate Tax speciality area has specific expertise in the structuring and implementation of mergers and acquisitions (M&A) transactions and financings, reorganizations of public and private companies, investment funds, real estate investment trusts (REITs), income trusts and other entities, transfer pricing, international tax, cross-border taxation, executive compensation issues including stock option and benefit plans. We also regularly advise clients with respect to tax risks and tax filings.

Private Client Services. Our Private Client Services practice, one of the largest in Canada, specializes in the day-to-day and long-term planning needs of many of Canada's most successful individuals and private family enterprises. We provide our clients with a complete range of services with respect to estate planning, personal tax, succession planning, estate administration, incapacity and elder law, and trust and estate litigation.

International Trade, Customs and Commodity Tax. The International Trade, Customs and Commodity Tax practice, assists clients across all industries and client groups in cross-border trade, import-export issues, trade remedy law (AD / CV), commodity taxes (GST / HST and provincial retail sales taxes) and property tax matters.

Our group members possess decades of experience related to the provision of advice on complex transactions involving GST, HST and PST and have acted as counsel in numerous dispute resolution matters with the Canada Revenue Agency (CRA) or the applicable provincial Ministry. We provide a

practical results-oriented approach to advance planning, resolving disputes, income tax litigation (before the Tax Court of Canada, Ontario Superior Court or the Federal Court of Canada) and assisting in voluntary disclosures. Our Group also possesses extensive experience in relation to international trade/import-export issues by regularly making representations to Canada's trade regulation bodies, including the Canada Border Service Agency (CBSA), the Canadian International Trade Tribunal (CITT), Binational Panels established under Chapter 19 of NAFTA, and the Federal Court of Canada. We also advise our clients on customs compliance matters, including tariff classification, preferential access rules of origin, the calculation of value for duty (for example, the treatment of royalty payments, buying commissions, other fees paid by the importer or post-importation charges), as well as representing clients in customs seizures and AMPs (Administrative Monetary Penalties). In addition, our Property Tax and Municipal Assessment lawyers have expertise in all facets of law relating to real property and tax assessment, including real estate development, leasing, municipal law, and government relations.

Tax Litigation and Dispute Resolution. Our Tax Litigation specialty area has particular expertise in the tax appeal process. This expertise includes representing clients in negotiations with CRA as well as various provincial taxing authorities at the audit and notice of objection stage and, where possible, resolving disputes in a cost effective manner at those levels. We also regularly represent clients before the Tax Court of Canada and the Federal Court of Appeal as well as the Provincial Superior Courts. We also routinely deal with CRA and provincial taxing authorities on Advance Income Tax Rulings and Technical Interpretations.

Charities and Not-For-Profit. Miller Thomson has the most sophisticated charities and not-for-profit tax practice in Canada. We advise Canadian and international organizations on tax regulatory matters, including cross border funding. Our tax lawyers represent charities successfully in contentious CRA audits. We write charity tax books and articles and present at all major Canadian legal and sector conferences on charities and not-for-profit tax issues. Our tax lawyers are active in government relations on behalf of the charities and not-for-profit sector.

RELATED SERVICES

Corporate Tax

Private Client Services

International Trade, Customs and Commodity Tax

Tax Litigation

Charities and Not-for-Profit



Crystal Taylor

Partner
Saskatoon

306.667.5613
cltaylor@millerthomson.com

Industry Expertise

Charities and Not-for-Profit

Key Practice Expertise

Corporate Tax
Estate Planning, Succession Planning &
Personal Tax
Corporate Services

Year of Call

Saskatchewan Bar, 1999

PROFILE

Crystal Taylor is a Partner with the Saskatoon office of Miller Thomson. She has over 14 years experience advising corporations (including professional corporations), partnerships and individuals on tax efficient ownership structures. She has in-depth experience with tax efficient retirement and estate planning, including estate freezes, income splitting techniques, family trusts, alter ego trusts, joint spousal trusts, wills, powers of attorney and creditor-proof structures. Additionally, Crystal has significant experience advising non-residents on how best to structure their Canadian business operations, including whether a branch or subsidiary is most appropriate. Crystal also has experience setting up unlimited liability companies (ULCs), and with other GST and PST considerations for cross-border structures.

EDUCATION

- In-Depth Tax Course, Canadian Institute of Chartered Accountants, 2005
- LL.B. (Great Distinction), University of Saskatchewan, 1998
- B.Comm. (Great Distinction), University of Saskatchewan, 1997

REPRESENTATIVE WORK

- Establishing a structured settlement for a client and obtaining a successful advance tax ruling resulting from a significant law suit (\$13.2 million) against the City of Moose Jaw, Saskatchewan
- Setting up and obtaining charitable status for numerous private foundations for many high net worth families in Saskatchewan
- Structuring of an inbound junior oil and gas company owned by non-residents of Canada operating around Jakefish Lake, Saskatchewan and advising regarding various ongoing structural issues, withholding tax issues and non-resident Clearance Certificates
- Reorganization of various retail and professional businesses from an operating company to a stacked limited partnership structure involving drafting complex limited partnership agreements, rollover agreements, consulting agreements and employment agreements

- Implementing a significant reorganization transaction for an operating and holding company to simplify a complex share structure effective in 2012
- Structuring and providing tax advice for 5 health and welfare trusts operated by a Saskatchewan crown organization
- Reorganization of Canadian resource properties located in Saskatchewan, Manitoba and Alberta from a trust ownership to a ULC, converting fully taxable business income to ½ taxable capital gains on the disposition of shares

PROFESSIONAL ACHIEVEMENTS

- Selected as one of the *Best Lawyers in Canada* – Trust and Estates
- Member of the Program Committee and Session Chair for the 2010 Prairie Provinces Tax Conference

PUBLICATIONS & PRESENTATIONS

- Federal Budget Review 2012, 2013
- Tax Blog, Carrying on Business in Canada for Non-Residents.
- “A Taxing Matter – legal counsel critical in succession planning”. Saskatoon Star Phoenix, February 23, 2013, and Regina LeaderPost, February 23, 2013.
- Author of “Where have all the Business Trusts Gone?” It’s Personal, Carswell Thomson Reuters, September 2012
- “Have a U.S. Property? The tax man cometh”. Saskatoon Star Phoenix, April 14, 2012, and Regina LeaderPost, April 14, 2012.
- Co-Author, Chapter 12 on “Corporate Restructuring” in **Miller Thomson on Estate Planning**, written by 30 of our lawyers from 9 of our offices across the country.
- “Trust Residency: A Comprehensive Review”, *2010 Prairie Provinces Tax Conference*.
- “Restrictive Covenants in Practice”, *2008 Prairie Provinces Tax Conference*.
- “Bill C-33 – Part 2, Technical Amendments”, *2007 Prairie Provinces Tax Conference*.
- “Purchase and Sale of a Business: The Lifetime Capital Gains Exemption”, Canadian Bar Association, Saskatchewan (2007).
- “The Rules are Changing: Advising Charitable and Not-for-Profit Organizations”, Saskatchewan Legal Education Society Inc. (2006).
- “Checklist of Tax-Preferred Employee Compensation”, *Taxation of Executive Compensation and Retirement* (Federated Press, 2004).
- “Shareholder Agreements – Tips and Traps”, with Alain Gaucher, *2003 Prairie Provinces Tax Conference*.
- Recent Tax Developments 2013, Miller Thomson panel presentation on legislative and case law updates. Regina, May 22, 2013, and Saskatoon, May 23, 2013.
- Professor of Tax I, College of Law, University of Saskatchewan (2013 – 2014).

- Wills & Estates Seminar Law Society of Saskatchewan. Tax Aspects of Trusts, Regina April 17, 2012, Saskatoon April 18, 2012.
- RBC Financial Planners General Meeting, May 24, 2012. “Corporate Tax, Private Client Services and International Tax” presentation.
- Recent Tax Developments 2012, Miller Thomson panel presentation on legislative and case law updates. Saskatoon, October 3, 2012, and Regina, October 4, 2012.
- “Corporate Tax, Private Client Services and International Tax”, presentation to BMO Nesbitt Burns, October 15, 2012
- “Owning U.S. Property” Canadian legal considerations respecting structures used to address U.S. income tax and estate law, presentation for Saint Paul’s Breakfast Seminar Series, March 14, 2012.
- “Legal Considerations with Respect to Owning U.S. Property” presentation at the CGA Saskatchewan Annual Meeting and Conference, October 17, 2012.

COMMUNITY INVOLVEMENT

- Meewasin Corporate Campaign Committee (2013)
- Planned Giving Advisory Committee Member, Royal University Hospital (2009 – 2012)
- Sponsor of Swing and a Wish, Children’s Wish Golf Tournament (2006 – 2012)
- Sponsor of Easter Seals Golf Tournament (2005 – 2013)

MEMBERSHIPS

- Member, Canadian Bar Association
- Member, Saskatoon Women’s Network (since 2005)
- Member, Estate Planning Council of Saskatoon (since 2005)
- Member, Canadian Tax Foundation (since 2004)



Stephen Rukavina

Associate
Vancouver

604.643.1277
srukavina@millerthomson.com

Key Practice Expertise

Tax
Tax Litigation and Dispute Resolution
Corporate Tax
International Trade, Customs and
Commodity Tax
Private Client Services
Estate Planning, Succession Planning and
Personal Tax

Areas of Focus

Corporate Tax Advice and Planning
Personal Tax Advice and Planning
International Tax
Provincial Sales Tax, Goods and Services
Tax, and Harmonized Sales Tax
Taxpayer Representation and Litigation
International Trade and Customs

Year of Call

British Columbia Bar, 2012

PROFILE

Stephen is an associate in the Tax and International Trade, Customs and Commodity Tax Groups in the Vancouver Office. His practice focuses on corporate and personal taxation, as well as international taxation. Stephen regularly advises clients on corporate reorganizations and international tax planning.

Stephen's practice also focuses on commodity tax, including Provincial Sales Tax, Goods and Services Tax, and Harmonized Sales Tax. As well, he assists clients in the areas of international trade and customs.

Stephen also represents clients involved in disputes with the Canada Revenue Agency and Canada Border Services Agency.

EDUCATION

- J.D., University of British Columbia, 2011
- B.A. (Hons), Simon Fraser University, 2008

MEMBERSHIPS

- Member, Canadian Bar Association, BC Branch, Taxation Law Subsection
- Member, Canadian Bar Association, National Commodity Tax, Customs and Trade Section
- Member, Canadian Tax Foundation
- Member, International Fiscal Association
- Member, Law Society of British Columbia

PUBLICATIONS

- A Non-Resident Disposing of Taxable Canadian Property, Carrying on Business in Canada for Non-Residents Blog, 2013
- The Restrictive Covenant Taxation Scheme: Killing a Fly with a Sledgehammer, Carrying on Business in Canada for Non-Residents Blog, 2013
- Think Twice Before Using an LLC in Canada, Carrying on Business in Canada for Non-Residents Blog, 2013

- The Indian Act Tax Exemption & Commercial Fishing Income, Aboriginal Law Update, October 2013
- PST and Real Property Transactions, Wealth Matters, Fall 2013
- Goods and Services Tax: An Overview for Non-Residents, Carrying on Business in Canada for Non-Residents Blog, 2013
- 2013 Provincial Budget Highlights, Tax Notes, August 2013
- PST Exemptions in British Columbia, International Trade, Customs, and Commodity Tax Bulletin, April 3, 2013
- Overview of the New PST, International Trade, Customs, and Commodity Tax Bulletin, March 6, 2013
- PST Registration, International Trade, Customs, and Commodity Tax Bulletin, January 9, 2013
- PST Transitional Rules for Goods, International Trade, Customs, and Commodity Tax Bulletin, December 2012
- Reintroduction of the PST, International Trade, Customs, and Commodity Tax Bulletin, December 2012
- Cross-Border Consequences of Secondment, Carrying on Business in Canada for Non-Residents Blog, 2012
- US Estate Tax on Vacation Homes, Wealth Matters, Fall 2012



Greg Shannon, Q.C., ICD.D, TEP

Partner
Calgary

403.298.2482
gshannon@millerthomson.com

PROFILE

Greg Shannon is a Corporate Finance and Tax partner in the Calgary office of Miller Thomson. Greg is a lawyer in both Canada and in the United States and practices in the areas of taxation, business law, trusts and estates, mergers and acquisitions, corporate finance, franchise and sports & entertainment law.

Greg was born in Vancouver, British Columbia. After completing his legal training both in the United States and in Canada, he practiced with a tax and securities boutique law firm in Southern California. In 1993, Greg returned to Canada and practiced law in British Columbia until moving to Alberta in 1997.

Greg has extensive involvement in contract negotiations including cross-border ventures; structuring financings for both private and public companies, and off-shore tax planning for corporations and professional athletes. Greg has acted as counsel for various non-profit organizations in British Columbia, Alberta and the United States and for various emerging enterprises. Greg also has experience with IPOs and RTOs on both the TSX, TSX-V and the NASD's Over-The-Counter Bulletin Board ("OTCBB"). He has immense experience in professional athlete/club contract negotiations including NHL, NFL, CFL and other professional sporting leagues; musical artist management contracts; off-shore tax planning for professional athletes and artists; commercial endorsement and merchandising contracts; television, and sports casting talent legal matters.

Greg has acted as counsel for many commercial transactions including, but not limited to:

- special committees of public companies in connection with M&A transactions and CCAA matters;
- acquirors in connection with cross-border acquisitions;
- vendors in connection with cross-border acquisitions;
- Canadian private equity firms in connection with acquisitions and divestitures;
- various limited partnerships dealing in U.S. real estate matters;
- dissident shareholders in respect of TSX Venture listed companies in connection with governance, disclosure and other liability issues;
- various IPOs and RTOs, including CPCs and Qualifying Transactions.

Industry Expertise

Securities
Private Equity
Sports and Entertainment

Key Practice Expertise

Corporate and Commercial
Corporate Governance
Franchising
Corporate Tax
Public M&A
Private M&A

Areas of Focus

Equity and Debt Financing
Directors' and Officers' Liability
Sports and Entertainment
Start-ups, IPO's
Tax Shelters
Trusts and Estates

Year of Call

Alberta Bar, 1997
British Columbia Bar, 1991
District of Columbia Bar, 1991
California Bar, 1990

Greg is co-founder of the Calgary Enterprise Forum Society, a non-profit organization that fosters the development, promotion and advancement of high growth and emerging businesses in Calgary and Southern Alberta. He has also lectured at numerous seminars on cross-border tax and estate planning and various corporate finance topics. Finally, he is an accomplished musician and pianist, and competed in the 2005 Honens Amateur Piano Competition.

EDUCATION

- ICD.D., 2008
- TEP, 2005
- Registered Trade-mark Agent (Since 1994)
- LL.M., Boston University, 1990
- J.D., California Western School of Law, San Diego, 1989
- B.B.A., Simon Fraser University, 1985

PROFESSIONAL ACHIEVEMENTS

- Appointed Queen's Counsel, 2009, Alberta
- Recipient of the Queen's Golden Jubilee Medal for outstanding public service in Canada, 2002

DIRECTORSHIPS

- President and Chairman of The Calgary Enterprise Forum Society (CEF)
- Director, BBB of Southern Alberta Inc.
- Director, Association for Corporate Growth (ACG, Calgary Chapter)
- Director, Treasurer, and Audit Committee Chair of Consumer Credit Counselling Services of Alberta
- Director, Debtor's Assistance Board, Alberta

MEMBERSHIPS

- Member, Association for Corporate Growth (ACG)
- Member, Sports Lawyers Association
- Member, Canadian Bar Association
- Member, STEP Canada
- Member, ABA Tax Subsection
- Member, District of Columbia Bar Association
- Member, California Tax Lawyers Association
- Member, Canadian Bar Association, Securities Law Subsection (Calgary) and Tax Law Subsection (Calgary and B.C.)
- Member, California State Bar - Tax Lawyers Subsection

- Member, Institute of Corporate Directors (ICD)
- Member, Canadian American Bar Association

PUBLICATIONS

- Canadian Renewable & Conservation Expense "Green" Energy Tax Incentives, Tax Notes, April 2013
- Canadian Tax Treatment of Mortgage Investment Corporations and Their Shareholders, Tax Notes, April 2013
- Canadian Renewable & Conservation Expense ("CRCE"): "Green" Energy Tax Incentives, Securities Practice Notes, Spring 2013
- Federal Budget Review 2013, 2013
- Canadian Renewable & Conservation Expense ("CRCE") "Green" Energy Tax Incentives, 2013
- Mortgage Investment Corporations, 2012
- Shareholder Limit Issues for Private Companies, Business Law in Canada: Recent Developments, Summer 2011
- RRSP Eligibility and Tax Consequences of Small Business Investment Limited Partnerships ("SBILPs"), 2010
- "Green" Energy Tax Incentives, 2010
- Canadian Renewable & Conservation Expense ("CRCE") "Green" Energy Tax Incentives, Tax Notes, Winter 2007
- RRSP Eligibility and Tax Consequences of Small Business Investment Limited Partnerships ("SBILPs"), 2006
- Mortgage Investment Corporations, 2005
- Update: Amendments to TSX Venture Exchange Policy 2.2 - Sponsorship and Sponsorship Requirements, eSecurities Notes, December 16, 2004
- New Private Placement Capital Raising Exemptions for British Columbia and Alberta, eSecurities Notes, May 3, 2003
- International Tax Update, Tax Notes, Spring 2003
- Mortgage Investment Corporations, Tax Notes, Summer 2002
- Employee Stock Options, Tax Notes, Spring 2000



Cheryl Teron

Partner
Vancouver

604.643.1286
cteron@millerthomson.com

PROFILE

Cheryl Teron is a Partner in the Tax group in the Vancouver office. Her practice covers a full range of tax issues with a focus on corporate reorganizations, personal and corporate tax planning, independent contractor issues, and income tax disclosures in securities offerings. Cheryl has more than a decade of experience in providing legal services to owner-managed businesses, high net worth individuals and small to large private and public corporations.

Cheryl also represents clients in disputes with the Canada Revenue Agency and provides assistance with voluntary disclosures, taxpayer relief and remission orders. As well, Cheryl has assisted private foundations, public foundations and charitable organizations in obtaining registered charities status. She also advises charities and non-profit organizations on various matters.

Cheryl finds solutions to her client's tax and other legal issues, after considering their goals and objectives and the legal issues involved. She is business-minded and maintains a balance between providing legal advice as needed and practical solutions for completing transactions and finalizing settlements.

EDUCATION

- Canadian Institute of Chartered Accountants (In-Depth Tax Course), 1998
- LL.B., University of Victoria, 1994
- B.F.A., University of Windsor, 1986

MEMBERSHIPS

- Member, Canadian Bar Association
- Member, Canadian Tax Foundation
- Member, International Fiscal Association
- Member and Presenter, Senior Tax Practitioners Study Group

Industry Expertise

Charities and Not-for-Profit

Key Practice Expertise

Tax
Corporate Tax
Tax Litigation and Dispute Resolution
Private Client Services
Estate Planning, Succession Planning and Personal Tax

Areas of Focus

Tax Disclosure for Securities Offerings
Flow-Through Shares
Unlimited Liability Companies and Treaty Issues
HST Transition
Corporate Reorganizations
Taxpayer Representation

Year of Call

British Columbia Bar, 1995

PRESENTATIONS

- Recent Tax Developments, Miller Thomson Tax Seminar, Regina and Saskatoon, 2013
- Update on CRA's Non-Profit Risk Identification Project: Business Activities, Miller Thomson Charities Law Update Seminar, 2013
- Commercial Real Estate in BC: Selected Issues, British Columbia Tax Conference, 2010
- HST - Are You Ready? Harmonized Sales Tax Implications for Charities & Not-For-Profits, Miller Thomson Seminar, 2010
- Canadian Tax, Customs and Export Considerations, IE Canada Vancouver Chapter Seminar: "Doing Business in Brazil", 2009
- Alter Ego and Joint Spousal/Partner Trusts - The Trust and Tax Issues, Miller Thomson Private Client Services Seminar, 2009
- ULC Problems and Solutions, Miller Thomson Tax Seminar, 2009

PUBLISHED WORKS

- Author and Editor of chapter "Tax Deferred Plans", Miller Thomson on Estate Planning, Carswell, 2012

PUBLICATIONS

- A Non-Resident Disposing of Taxable Canadian Property, Carrying on Business in Canada for Non-Residents Blog, 2013
- Think Twice Before Using an LLC in Canada, Carrying on Business in Canada for Non-Residents Blog, 2013
- Goods and Services Tax: An Overview for Non-Residents, Carrying on Business in Canada for Non-Residents Blog, 2013
- PST Exemptions in British Columbia, International Trade, Customs, and Commodity Tax Bulletin, April 3, 2013
- Federal Budget Review, 2013
- B.C. allows personal real estate corporations, REM Online (Real Estate Magazine), 2012
- Summary of Proposed Anti-Deferral Rules for Corporate Partners and Partnerships, Business Law in Canada: Recent Developments, Summer 2011
- Tax Alert: Canadian Tax Refunds for U.S. Limited Liability Companies, Tax Alert, July 9, 2010
- 2010-2011 British Columbia Budget Highlights, Tax Notes, July 2010

TAX UPDATE

Breakfast Seminar

January 23, 2014

Added experience. Added clarity. Added value.



VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO MARKHAM MONTRÉAL

AGENDA

1. 2014 Tax Case Law Update
2. Income Splitting Opportunities
3. Cross-border Estate Planning Tips & Traps
4. Tax Issues and Planning Today



2014 TAX CASE LAW UPDATE

Crystal Taylor

Partner, Saskatoon
ctaylor@millerthomson.com
306.667.5613

Miller
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CASES BEING DISCUSSED

- ***Swirsky v. The Queen*** [2013 D.T.C. 1078]
(interest deductibility)
- ***Kanji v. Attorney General of Canada*** [2013 ONSC 781]
(rectification)
- ***Quebec v. Services Environnementaux AES Inc.*** [2013
SCC 65]
(rectification)
- ***Ollenberger v. The Queen*** [2013 FCA 74]
(meaning of active business)
- ***Envision Credit Union v. Canada*** [2013 SCC 48]
(broken amalgamation)

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***Swirsky v. The Queen* [2013 D.T.C. 1078]**

Facts:

- Issue was whether interest expense was deductible by Mr. Swirsky
- Ms. Swirsky borrowed \$2.5 million from Mutual Trust
- Ms. Swirsky used the loan proceeds to purchase shares of OpCo from Mr. Swirsky
- Mr. Swirsky used sale proceeds to repay shareholder advances from OpCo which would otherwise have been included in his income
- No history of dividend payments from OpCo
- Mr. Swirsky claimed loss (interest expense) under attribution rules

Swirsky v. The Queen

CRA's Views:

- CRA disallowed losses deducted by Mr. Swirsky on the basis no losses were realized by wife, so there was nothing to attribute back to him
- No issue about first two conditions for interest deduction – legal obligation to pay and reasonable rate were established
- However, CRA claimed Ms. Swirsky had no expectation of income, so the “purpose of earning income” test was not satisfied

TCC

Did Ms. Swirsky use the proceeds of the Mutual Trust loans for the purpose of earning income?

- Evidence supported conclusion that Ms. Swirsky was not concerned with the income earning potential of the shares:
 - (1) Mr. Swirsky reimbursed her for interest and carrying costs on the loans;
 - (2) no history of dividends paid on common shares; and
 - (3) family income derived as shareholder advances either converted to income and as bonuses/15(2)
- Therefore, Ms. Swirsky had no reasonable expectation of income from the OpCo shares at the time she acquired them

Thoughts on Swirsky

- CRA has a history of conflicting policies on interest expense where borrowed funds are used to acquire non-income producing assets/common shares
- Supporting no interest deductibility – see 2001-0084055, 2003-0018115
- Supporting interest deductibility – IT-533, para 31, 2008-0275171E5 and 2010-0376711I7
- *Lipson* – GAAR applied where attribution rules relied on for interest deductibility

Thoughts on Swirsky

- Should a history (or prospect) of dividend be a requirement for an interest deduction?
- Consider:
 - OpCo – reinvests profits in business expansion
 - OpCo – paid dividends when profitable but now in financial difficulty seeking refinancing

Thoughts on Swirsky

- *Swirsky v. The Queen* has been appealed to the Federal Court of Appeal
- Notice of Appeal filed March 27, 2013
- The appeal is to be heard February 4, 2014

Kanji v Attorney General of Canada [2013 ONSC 781]

- Facts:
 - Family Trust created by indenture made March 26, 1992 by law firm Blake Cassels & Graydon LLP
 - Mr. Kanji settlor
 - Mr. and Mrs. Kanji as trustees
 - Mr. and Mrs. Kanji and their children as capital and income beneficiaries

Kanji

- Facts (con't):
 - Under the terms of the trust, Mr. Kanji could remove any of the trustees and appoint, substitute or add trustees
 - Mr. Kanji transferred \$5,000 in cash to the family trust
 - Mr. Kanji deposed that he set up the family trust to allow accumulated wealth to pass to his future children in a tax-efficient manner

Kanji

- Facts (con't)
 - Mr. Kanji read the trust indenture and discussed its terms with the Blakes lawyer before signing it
 - Mr. and Mrs. Kanji received income from the trust after it was settled
 - Income from the settled cash was used by the family trust to purchase shares of a company carrying on a property management business

Kanji

- Facts (con't)
 - Family trust acquired various commercial rental properties
 - Mr. Kanji received legal advice from Fraser Milner Casgrain
 - In 2009, he was informed by that law firm that 75(2) attribution applied and that 107(4.1) would prevent a rollover of property on winding-up of the trust

Kanji

- Facts (con't)
 - 21 year deemed disposition date of family trust was March 26, 2013
 - Value of trust property was approximately \$62 million; capital gains tax of \$11.8 million
 - February 3, 2011, Mr. Kanji commenced an action against Blakes and FMC
 - Rectification action commenced December 21, 2012

Kanji

- TCC reviewed general principles and requirements of rectification:
 - Application must demonstrate on balance of probabilities with convincing evidence that:
 - (i) common, specific intention existed amongst the creators of the instrument effecting the transaction to accomplish a particular result; and
 - (ii) a mistake caused the instrument not to comport with the common intention of the parties

Kanji

- Evidence:
 - Only evidence of intention before TCC came from Mr. Kanji himself
 - Absent oral or documentary evidence from tax advisors including accountant, lawyer from Blakes and lawyer from FMC

Kanji

- Evidence:
 - Letter from Mr. Kanji's counsel in the civil suit answering the undertaking given by Mr. Kanji on examination:

When the statement of claim was served on [lawyer A], our firm as counsel for the applicants asked him whether he might be able to offer evidence in support of the application [for rectification]. In response, counsel for [lawyer A] advised us that the evidence of [lawyer A] would not be supportive or helpful to the applicants' position and that if the application proceeded it would not be with the assistance of evidence from [law firm 1].

Kanji

- Decision of TCC
 - Dismissed application for rectification
 - No independent evidence produced to substantiate a mistake was made

Thoughts on Kanji

- Typically proof of mistake requires the applicant to present evidence to the court from a professional advisor – who is willing to admit to having made a mistake
- This requirement was relaxed in *McPeake* [2012 B.C.S.C. 132] where the applicants submitted evidence that because they had commenced a civil suit against their advisors, direct evidence from the advisors of the error was not available

Thoughts on Kanji

- In *Kanji*, TCC distinguished *McPeake*, in *McPeake* several affiants (not just one) filed evidence concerning intention when trust was created
- Strong reminder to counsel on rectification application that independent corroboration of evidence required:
 - Affidavit or compelled evidence from tax advisor
 - Original tax planning memorandum

Thoughts on Kanji

- Department of Justice Rectification Committee is requiring clear evidence of the nature of the error or the mistake before it will issue a non-opposition letter in favor of an application for rectification

Quebec v. Services Environnementaux AES [2013 SCC 65]

- Considered two cases where Quebec Court of Appeal allowed rectification remedy
- In both cases advisors made an error in executing tax planning documentation
- SCC allowed rectification in both cases

AES 1st Case

- AES entered into corporate reorganization to transfer 25% of shares to subsidiary on a tax-deferred basis
- Tax advisors calculated ACB of shares improperly
- Transaction did not occur on a tax-deferred basis

AES

1st Case

- AES sought declaratory judgment of rectification before the Quebec Superior Court to amend the numbers in the original agreements
- Quebec Superior Court granted the declaratory order for rectification

AES

2nd Case

- Mr. Riopel and Ms. Archambault sold assets of their corporation to a 3rd party and on advice of their accountant, amalgamated their corporation with Mr. Riopel's holding corporation
- Intent of taxpayers was no immediate tax liability to Ms. Archambault
- Advisor's made errors in preparing the documents required to carry out the transactions and tax liability resulted/transfers and amalgamation were carried out in reverse order

AES 2nd Case

- Taxpayers brought declaratory judgment for rectification to the Quebec Superior Court asking the court to give effect to the original terms of the transactions by amending or replacing some documents:
 - (1) change the date of sale of shares
 - (2) changes to schedules to Articles of Amalgamation
 - (3) changes to filed tax forms
- ARQ and CRA through AGC intervened
- Quebec Superior Court denied the declaratory order for rectification

AES Quebec Court of Appeal

- Article 1425 Civil Code of Quebec allows for correction of documents similar to common law of rectification
- AGC and ARQ argued only available for clerical errors
- Court of Appeal found rectification of contracts in a tax context is permissible under the code

AES SCC

- SCC notes that excepting certain situations, tax law applies to transactions governed by, and the nature and legal consequences of which are determined by reference to, the common law or the civil law.
- Therefore, a court must decide whether the parties' actions are consistent with their true intention. If an error in the documentation is proved, the court must note the error and ensure it is remedied

AES SCC

- At para 52:

In the civil law, the tax authorities do not have an acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent
- This principle should be equally applicable under the common law

AES SCC

- AGC in oral argument asked SCC to reject the line of common law authority on rectification that stems from *Juliar* (50 O.R. (3d) 728, 2000)
- AGC argued that *Juliar* is overbroad and therefore incompatible with SCC decisions in *Shafroon* (2009 SCC 6) and *Sylvan Lake Golf* (2002 SCC 19) both non-tax rectification cases
- SCC refused to comment; current case under civil law – *Juliar* under common law

Thoughts on AES

- SCC decision does not extend or curtail limits of rectification from common law perspective
- AGC sought leave to appeal to SCC in *Juliar* and leave was refused
- Status quo remains; rectification ok for fixing errors but not for retroactive tax planning
- SCC warns do not view decision as “an invitation to engage in bold tax planning on the assumption that it will always be possible to redo their contract retroactively should the planning fail”

Ollenberger v. The Queen, [2013 FCA 74]

- What is an “active business”
 - Does the word “active” add anything to the description of the “business”?
- Critical part of the definition of “small business corporation”
 - CCPC, all or substantially all of the fair market value of the assets of which are attributable to assets used principally in an **active business** carried on primarily in Canada

Ollenberger v. The Queen

Facts:

- Taxpayer invested in a private oil and gas exploration company based in Calgary (AEF)
- AEF required funds for a deposit which it borrowed from Taxpayer
- Deposit was lost; loan was not repaid
- Taxpayer claimed a business investment loss (BIL)
- CRA denied entitlement to BIL; AEF was not a small business corporation because not carrying on an “active business”
- AEF in pre-inception state and not sufficiently advanced

Ollenberger v. The Queen

TCC Decision (2012 TCC 30)

- Agreed with CRA: “active business” must be one that is “carried on”, i.e. must be “active”

FCA Decision

- Reversed the decision of the TCC
- ITA defines “active business” to be “any business” other than specific exemptions
- “Carrying on business” required minimal activity: *Weaver* (2008 FCA 238)
- AEF was actively pursuing ventures

Ollenberger v. The Queen

FCA

- When two defs read together the term “active business” clearly means “any business carried on by the taxpayer” subject to specific exclusions
- Court looked at legislative history surrounding words “active business”
- AEF was actively pursuing ventures involving buying oil and gas properties = active business

***Envision Credit Union v. Canada* [2013 SCC 48]**

Facts:

- Delta Credit Union and First Heritage Credit Union amalgamated to form Envision Credit Union
- Amalgamation occurred under the *Credit Union Incorporation Act* (BC) (“CUIA”), which provides a continuation style of amalgamation, much like CBCA or OBCA
- Goal: avoid the application of s. 87 in order to reset preferred-rate amount (“PRA”) and increase UCC of assets

Envision v. Canada

- Amalgamation agreement provided that at the moment of amalgamation, beneficial ownership of certain assets owned by the predecessors was transferred to a new subsidiary (“619”)
- Envision took the position that s. 87 did not apply to the amalgamation because “all of the property” of predecessors owned immediately before the merger did not become property of Envision “by virtue of the merger”

Envision v. Canada

Taxpayer's position

- Because s. 87 ITA did not apply, non-qualifying amalgamation
- Therefore, AmalCo did not inherit tax attributes of predecessor
- PRA = reset to zero
- UCC = \$51 million (original cost of assets)

Envision v. Canada

TCC Decision (2010 DTC 1399)

- Tax Court held that s. 87 did not apply
 - Could contract out of s. 23(b) of CUIA
 - Predecessors had legal capacity to transfer surplus properties at moment of amalgamation
- However, decision in *R. v. Black and Decker Manufacturing Co.* (1 SCR 411) applied
 - Continuation model of amalgamation
 - Tax attributes carried over to amalgamated company

Envision v. Canada

FCA Decision (2011 FCA 321)

- S. 87 did apply
 - All property could be traced to property held by Envision
 - Look through 619
- Agreed with Tax Court that *Black and Decker* decision caused UCC balances to flow through to Envision

Envision v. Canada

SCC

- S. 20 of CUIA permits credit unions to set terms and conditions of amalgamation
- However, s. 23(b) of CUIA prescribes the consequences of an amalgamation under the CUIA

On and after the date of amalgamation...

(b) the amalgamated credit union is seized of and holds and possesses all the property, rights and interests and is subject to all the debts, liabilities and obligations of each amalgamating credit union

Envision v. Canada

SCC

- Amalgamating credit unions cannot contract out of s. 23(b) – express statutory consequences of amalgamation
- At moment of amalgamation, predecessors could not dispose of property to 619 – they no longer had separate legal personalities
 - Companies continued inside Envision (*Black and Decker*)
 - Legal obligations to be fulfilled at or after time of amalgamation by Envision – Envision transferred properties to 619
 - Amalgamation agreement not invalid
- Therefore, s. 87 requirements are met: para. 23(b) caused Envision to be seized of all predecessor assets at moment of amalgamation

Thoughts on Envision

- Welcome statement about tax planning (para. 1)

“Every taxpayer is entitled to order his or her affairs so that the tax payable is less than it otherwise would be. Taxpayers often engage in tax planning to achieve that result.”

Thoughts on Envision

- Is it possible to contract out of s. 87 in a continuation style of amalgamation?
 - BCBCA/CBCA similar to CUIA
- What are the effects from a tax perspective of an amalgamation to which s. 87 does not apply?
 - *Black and Decker* decision

INCOME SPLITTING OPPORTUNITIES

Stephen Rukavina

Associate, Vancouver
srukavina@millerthomson.com
604.643.1277

WHAT IS INCOME SPLITTING?

- “You must pay taxes. But there’s no law that says you gotta leave a tip.”
 - Morgan Stanley advertisement

WHAT IS INCOME SPLITTING?

- Spread income to multiple family members to reduce family’s overall tax burden
- Works b/c income tax applies to each individual & progressive tax rates

WHAT IS INCOME SPLITTING?

- Already earned \$150,000 in 2014
- \$0.458 of tax on the next dollar earned
- Shift dollar to a family member in the lowest tax bracket = \$0 to \$0.2006 of tax

WHAT IS INCOME SPLITTING?

- Tax reduction from income splitting also relates to
 - Basic personal amounts
 - Unique nature of dividend taxation
 - Lifetime capital gains exemption
 - Tax-deferred plans

EMPLOYMENT OF FAMILY MEMBER

- Income splitting + deductible expense to the business
- Often described as “simple” income splitting strategy but...

EMPLOYMENT OF FAMILY MEMBER

- Doesn't work if children's salary or wages circulate back to parents or business
(*Muhammedi v The Queen*, 2004 TCC 408; *Keegan v MNR* (1984), 84 DTC 1839; *Blake v MNR* (1980), 81 DTC 31; *Slingerland v MNR* (1978), 78 DTC 1280)
- Children need possession & control of the money

EMPLOYMENT OF FAMILY MEMBER

- “But in a related family, parent-child situation, payment must be made and deposited as it would be to a stranger. The payee must receive and control the alleged payment in his or her name and be able to use it for his or her benefit without any further control by the payer. That did not happen in this case.”

Bradley v The Queen, 2006 TCC 500

EMPLOYMENT OF FAMILY MEMBER

- “This comment [quote reproduced above] suggests that the children must have complete discretion over the expenditures made. I would respectfully disagree with this and note that *Bradley* is not a binding precedent since it was an informal procedure case. I see nothing wrong with parents having a veto over expenditures made by their children.”

Bruno v The Queen, 2012 TCC 316

EMPLOYMENT OF FAMILY MEMBER

- Can only deduct expenses that are “reasonable in the circumstances” (*ITA*, s 67)
- Reasonableness relates primarily to quantum (*Gabco Limited v MNR* (1968), 68 DTC 5210; *Hammil v R*, 2005 DTC 5397)

EMPLOYMENT OF FAMILY MEMBER

- Necessary to keep adequate books & records
- Burden on taxpayer to prove work was done, amounts were paid, amounts were reasonable, etc. (*Bruno v The Queen*, 2012 TCC 316; *Tiede v The Queen*, 2011 TCC 84; *White v The Queen*, 2010 TCC 530; *Keegan v MNR* (1984), 84 DTC 1839)

GIFT OR LOAN TO FAMILY MEMBER

- Attribution rules generally stop shifting of investment income & capital gains (*ITA*, ss 56(4.1), 74.1(1), 74.1(2), 74.2(1))
- Apply when gift or loan made to family members
- But numerous exceptions

GIFT OR LOAN TO FAMILY MEMBER

- “Every culture has some ritual for joining two people together and making them stay that way, and ours is giving tax breaks.”
 - Bauvard, *Some Inspiration for the Overenthusiastic*

GIFT OR LOAN TO FAMILY MEMBER

- TFSA exception
 - Transferred property held in recipient spouse's TFSA &
 - Recipient spouse has sufficient contribution room (*ITA*, s 74.5(12)(c))
- There are somewhat similar exceptions for RRSPs (*ITA*, s 74.5(12)(a))

GIFT OR LOAN TO FAMILY MEMBER

- Prescribed rate loan exception
 - Interest at *prescribed rate at time loan is made* (currently 1%) &
 - Interest paid 30 days after the end of each calendar year loan outstanding (*ITA*, ss 56(4.2), 74.5(2))

GIFT OR LOAN TO FAMILY MEMBER

- High income spouse loans \$250,000 at 1%
- Low income spouse invests at 5% return (\$12,500)
- High income spouse includes \$2,500 interest in income & low income spouse deducts interest expense
- \$10,000 has been shifted to low income spouse

GIFT OR LOAN TO FAMILY MEMBER

- Traps: Stub periods
 - Loan made December 19, 2002 with interest calculated annually
 - 1st interest payment needs to be made by January 30, 2003 (CRA Documents 2009-0330081C6 & 2008-027422117)

GIFT OR LOAN TO FAMILY MEMBER

- Traps: Refinancing
 - Prescribed rate *at the time the loan is made* must be charged
 - Paying off old prescribed rate loan with new prescribed rate loan doesn't work (CRA Documents 2002-0143985 & 9336625)

GIFT OR LOAN TO FAMILY MEMBER

- Traps: Minor children
 - Limited ability to enter into loan
 - Instead make prescribed rate loan to trust with minor as beneficiary (See *Harvey v Canada* (1994), 94 DTC 1910 (TCC); *Harvey v Canada* (1997), 98 DTC 1089)
 - “kiddie tax”
 - Trust should invest in publicly-traded securities

USE OF CORPORATION TO INCOME SPLIT

- Dividends paid by incorporated family business can be split between family members
- Not as tax efficient as employing family members b/c dividends not deductible
- But no requirement to work & no reasonableness requirement

USE OF CORPORATION TO INCOME SPLIT

- Having multiple family members own shares enables multiplication of lifetime capital gains exemption (“LCGE”)
- LCGE = \$800,000 & shields up to \$400,000 of taxable capital gain (*ITA*, s 110.6)

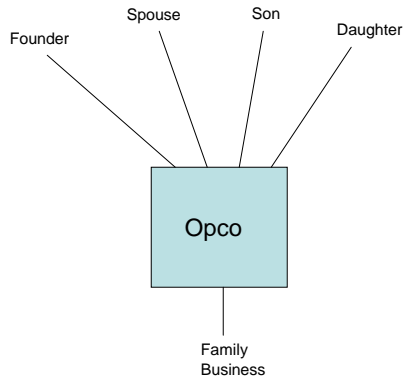
USE OF CORPORATION TO INCOME SPLIT

- LCGE can be multiplied by having a trust own shares
- Trust can allocate capital gains to beneficiaries
(*ITA*, ss 104(21), 104(21.2))

USE OF CORPORATION TO INCOME SPLIT

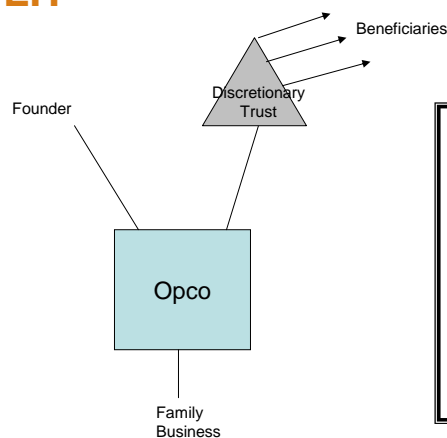
- LCGE applies to capital gains from “qualified small business corporation shares”
 - At time of sale, 90% or more of value of assets attributable to assets used in an active business &
 - 24 months before sale
 - shares owned by the individual or a related individual &
 - 50% or more of the value of assets used in an active business (*ITA*, s 110.6(1))

USE OF CORPORATION TO INCOME SPLIT



1. Founder may have common shares, preferred shares, vote only shares, or any combination
2. Spouse & children will have common shares or "dividend only" shares e.g., non-voting & redeemable
3. Dividends can be paid on one class to exclusion of others
4. Rights & restrictions affect value of shares & thus ability to multiply LCGE
5. May have another corporation as shareholder but watch out for Part IV tax

USE OF CORPORATION TO INCOME SPLIT



1. Founder may have common shares, preferred shares, vote only shares, or any combination
2. Trust will have common (growth) shares to enable multiplication of LCGE
3. Family members will be beneficiaries of trust
4. May have another corporation as shareholder or beneficiary of trust but watch out for Part IV tax

USE OF CORPORATION TO INCOME SPLIT

- Two ways to set up
 - On incorporation
 - Freeze transaction
- Freeze transaction = Exchange common shares for preferred shares of equivalent value

USE OF CORPORATION TO INCOME SPLIT

- Traps: Exchange not at FMV
 - Common shares worth \$100 exchanged for preferred shares worth \$80 & then family members subscribe for shares
 - Transfer of \$20 of corporate equity
 - Attribution rules will apply (*The Queen v Kieboom* (1992), 92 DTC 6382; see also *Garron (Trustee of) v Canada*, 2010 FCA 309)

USE OF CORPORATION TO INCOME SPLIT

- Traps: Exchange not at FMV cont'd
 - Solution
 - Use best efforts to transact at FMV &
 - Use price adjustment clause (*Guilder News Company (1963) Limited v MNR*, 73 DTC 5048; CRA, Income Tax Folio S4-F3-C1, "Price Adjustment Clauses")

USE OF CORPORATION TO INCOME SPLIT

- Trap: Kiddie tax
 - Child does not turn 18 in the year & receives dividends from private corporation
 - Dividends taxed at highest marginal rate (*ITA*, ss 120.4)

USE OF CORPORATION TO INCOME SPLIT

- Trap: Corporate Attribution
 - Property transferred to a corporation (e.g., on a freeze transaction) & spouse or minor children purchase shares
 - Transferee generally deemed to receive interest at prescribed rate on outstanding amount of loan or transferred property

USE OF CORPORATION TO INCOME SPLIT

- Trap: Corporate attribution cont'd
 - Solutions
 - Attribution reduced by amount of interest on loan & dividends on preferred shares (*ITA*, ss 74.4(2))
 - “Springing trust” (*ITA*, ss 74.4(4))
 - More aggressive methods also available

TRAPS WHEN USING TRUSTS

- 21-year deemed disposition rule (*ITA*, s 104(4))
- Attribution catches indirect transfers using trusts (*ITA*, ss 56(4.1), 74.1(1), 74.1(2), 74.2(1), 74.3(1))

TRAPS WHEN USING TRUSTS

- “Reversionary trust” leads to attribution + restrictions on roll out
 - Property may revert to transferor
 - Transferor may determine who receives property after trust created or
 - Property can’t be disposed of without transferor’s consent (*ITA*, s 75(2))

TRAPS WHEN USING TRUSTS

- *New Family Law Act*
 - Non-beneficiary spouse gets half the growth in value of discretionary trust property
 - Multiple beneficiaries suffer relationship breakdown = Claims against value of trust property exceed its value (*FLA*, ss 81(b), 84(2)(g), 85(1)(f))

CROSS-BORDER ESTATE PLANNING TIPS & TRAPS

Greg P. Shannon, Q.C., ICD.D, TEP
Partner, Calgary
gshannon@millerthomson.com
403.298.2482

AGENDA

1. Snowbird Planning Issues
 - U.S. Tax Residency & Immigration Issues
 - U.S. Estate Planning Matters
 - Ownership of U.S. Real Property
2. U.S. Citizens in Canada
 - U.S. Estate Tax Matters
 - Life Insurance Issues
 - Estate Planning Requirements

SNOWBIRD – U.S. INCOME TAX ISSUES

- U.S. tax residency can be attained based on the number of days in the U.S.
- Canadians must file a U.S. tax return (Form 1040NR with Schedule E) if they rent their U.S. real property
- Canadians are also required to file a U.S. tax return (Form 1040 NR with Schedule D) if they dispose of U.S. real property

SNOWBIRD – U.S. INCOME TAX ISSUES

The “Substantial Presence Test”

- A calculation to determine U.S. tax residency based on the number of days of physical presence in the U.S. over a 3-year period
- Calculation of the sum of:
 - 1) number of days present in the U.S. in the current year; plus
 - 2) one-third (1/3) the days present in the U.S. in the preceding year; plus
 - 3) one-sixth (1/6) the days present in the U.S. in the second preceding year.

SNOWBIRD – U.S. INCOME TAX ISSUES

The Substantial Presence Test

- If the total of this number exceeds 183 days or more; and
- The Canadian is present in the U.S. for more than 31 days for the current year, then:
- They are a “U.S. resident alien” for tax purposes
- So generally, Canadians in the U.S. a little over 4 months every year, would meet the “*substantial presence test*” and would be U.S. residents for income tax purposes

The “Substantial Presence Test”

Mr. Snowbird		Example 1
Year	Days in the U.S.	Equivalent Days
2013	120	120
2012	$120 \times 1/3$	40
2011	$120 \times 1/6$	<u>20</u>
		<u>180</u>

Because the days calculated are less than 182, Mr. Snowbird is taxed as a *non-resident alien* for U.S. income tax purposes (good result)

The “Substantial Presence Test”

Mr. Snowbird		Example 2
Year	Days in the U.S.	Equivalent Days
2013	130	130
2012	$120 \times 1/3$	40
2011	$120 \times 1/6$	<u>20</u>
		<u>190</u>

Because the days calculated are greater than 182, Mr. Snowbird is taxed as a *resident alien* for U.S. income tax purposes (bad result)

SNOWBIRD – U.S. INCOME TAX ISSUES Closer Connection Exception Statement

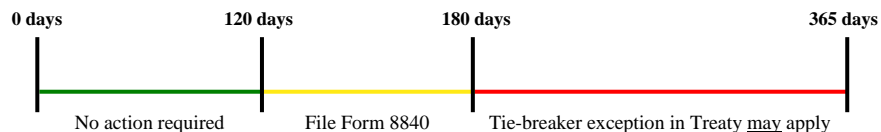
- File IRS Form 8840 – (the sunscreen you need to protect you from being burned by the IRS)
- Statement to the IRS that you have a “closer connection” to Canada than to the U.S. and desire to be treated as a non-resident for U.S. income tax purposes
- The facts and circumstances that determine one’s “closer connection” to Canada include: (i) the location of permanent home; (ii) family; (iii) personal belongings; (iv) social, political, cultural or religious ties; and (v) your business activities
- Deadline to file for tax calendar year is the following June 15th
- If Form 8840 is not filed in a timely manner, the right to claim the exception for the tax year may be lost and \$1,000 penalty for failing to disclose a treaty-based position

SNOWBIRD – U.S. IMMIGRATION ISSUES Days Allowed in the U.S.



182 Days in the Calendar Year

180 Days in Rolling 12 Month Year



Notes:

- (1) Phase IV of Entry/Exit Initiative will make it harder for Canadians travelling to U.S. to fudge days in the U.S. The good old days of lax enforcement of "day count" will end in 2014.
- (2) Consequences of overstaying – 3 year bar or 10 year bar on re-entry.

SNOWBIRD – U.S. IMMIGRATION ISSUES

Proposed Snowbird VISA

- JOLT Act (Jobs Originating Through Launching Travel Act of 2013)
 - If passed would allow snowbirds to stay 240 days in the U.S.
 - Section 4503 – Encouraging Canadian Tourism to the United States
 - Visa would be renewable every 3 years
 - Section 4504 – Retiree Visa
- Devil is in the details:
 - Cash purchase of new residence worth \geq US\$500,000;
 - Must be at least 55 years of age; and
 - Have to live in residence for at least 180 days.
- What about:
 - U.S. Income Tax (cannot file IRS Form 8891, as deemed a U.S. resident under U.S. Immigration rules) – trap for the uninformed!
 - U.S. Estate Tax – Domicile (see Estate of Robert A. Jack v. United States)
 - Health Care Issues

SNOWBIRD – U.S. Estate Planning Issues

Canadian's Ownership of U.S. Property

- Canadians referred to as non-resident aliens (“NRA”)
 - Taxed on FMV of U.S. Situs property owned at death
 - If worldwide estate < US\$5.34M (NOTE: was \$5.25M in 2013), then NO U.S. estate tax; otherwise,
 - If U.S. assets < US\$60,000, then NO U.S. estate tax
 - May be increased under the Canada – U.S. Treaty
 - U.S. estate return (IRS Form 706NA) is required to be filed if U.S. property held at death is over US\$60,000

SNOWBIRD – U.S. Estate Planning Issues Canadian's Ownership of U.S. Property

- Canadians get an Enhanced Unified Credit/Exemption
 - Allows for a pro-rated amount of the unified credit available to a U.S. person, calculated as follows;
 - Unified Credit $(\$2,081,800) \times \text{U.S. Assets/Worldwide Estate}$
 - Unified Credit is never less than U.S. \$13,000 provided for under U.S. domestic tax law
 - If property is left to spouse, estate receives an additional credit under Treaty (marital credit)
- So, with an exemption of \$5.34M, no estate tax will be due at 1st death if married;
 - If married, no estate tax if worldwide estate is greater than \$10.68M ($\$5.34\text{M} \times 2$)
 - If greater than that amount, use QDOT to defer estate taxes or Spousal Rollover Trust provisions in decedent's Canadian will

SNOWBIRD – U.S. Estate Planning Issues Canadian's Ownership of U.S. Real Property

- Generally, a trade-off based on results
- Non-U.S. investors in U.S. real estate typically have to decide to:
 1. Pay higher U.S. Corporate taxes (to insulate from U.S. estate tax); OR
 2. Accept some level of U.S. estate tax risk for current U.S. income tax savings
 - 39% (Corp rate) vs. 15%/23.8%⁽¹⁾ (U.S. Personal LTCG Rate)

Note: (1) This rate is the maximum long-term capital gains rate where taxable income is over U.S. \$400,000 (re: "Obamacare")

SNOWBIRD – U.S. Estate Planning Issues Canadian’s Ownership of U.S. Real Property

- Personal Ownership
 - Joint Tenancy
 - Tenancy-in-Common
 - Personal Ownership
- Structure
 - Canadian Corporation
 - Limited Partnership
 - Canadian Resident Trust
- There are Pros and Cons for each one – please obtain independent tax advice
- Need to determine based on individual client’s particular situation.
“ONE SIZE DOES NOT FIT ALL”

U.S. CITIZENS IN CANADA

- Who is a U.S. Citizen?
 - A person born in the U.S.A.; or
 - Naturalized; or
 - With a U.S. parent (under certain circumstances)
 - Watch for this!
 - Many of these in Canada who are not aware or deny that they are U.S. citizens

U.S. CITIZENS IN CANADA

U.S. Estate Tax Issues

- Subject to U.S. estate tax on FMV of worldwide estate, which includes ALL property owned at death, even the following:
 - Certain trust interests
 - Insurance proceeds (if incidents of ownership)
 - Registered Plans (RRSPs/RRIFs/Pensions)
 - Property held jointly with spouse
 - Jointly held property is 100% includable, unless surviving spouse is a U.S. citizen (rebuttable presumption)
- Eligible for US\$5.34M exemption on worldwide estate
- If married, can double up at first death under the Marital Credit from Treaty (\$10.68 M)

U.S. CITIZENS LIVING IN CANADA

Life Insurance

- Insurance included for U.S. estate tax purposes if U.S. citizen has “incidents of ownership”:
 - Right to change beneficiaries or their shares
 - Right to surrender the policy for cash or to cancel it
 - Right to borrow against the policy reserve
 - Right to pledge the policy as collateral and
 - Right to assign the policy or cancel an assignment
- Controlling shareholder of corporate-owned insurance – included in estate tax calculation

U.S. CITIZENS LIVING IN CANADA Life Insurance

- Move insurance!
 - Owned by Canadian spouse
 - Canadian spouse must fund all premium payments
 - Watch US gift tax if moving existing policy
 - Who owns if Canadian spouse dies first?

U.S. CITIZENS LIVING IN CANADA Life Insurance

- Planning for the purpose of life insurance
 - Use an Irrevocable Life Insurance Trust (“ILIT”)
 - ILIT is owner of insurance (likely Cdn trust)
 - Family members are beneficiaries, U.S. person is not a trustee
 - Funding of insurance premiums?
 - Take advantage of \$5.34 million gift and Generation Skipping Tax exemption (“GST”)

U.S. CITIZENS IN CANADA

U.S. Estate Planning

- Planning for Canadian Married to U.S. Citizen Spouse
 - Structure the Will such that property inherited by the U.S. citizen spouse can be protected from future U.S. estate tax
 - Create a spousal trust under Will for the inheritance. Also qualify for Canadian spousal rollover rules
- Structure to keep assets out of the estate:
 - No general power of appointment. Can't appoint assets to:
 - Oneself
 - One's creditors
 - One's estate
 - the estate's creditors

U.S. CITIZENS IN CANADA

U.S. Estate Planning

- Planning for Canadian Married to a U.S. Citizen Spouse
 - Trust terms:
 - Entitled to all income, including capital gains, to avoid adverse U.S. throw-back rules
 - Discretionary capital entitlement
 - "5 and 5 power"
 - Right to demand greater of \$5,000 and 5% of trust capital once a year
 - Can be a trustee
 - Subject to an "ascertainable standards" restriction (health, support, maintenance and education – Note: strict interpretation of these terms)
 - Can't participate in decisions to distribute to oneself above the "ascertainable standards" restriction

U.S. CITIZENS IN CANADA

U.S. Estate Planning

- U.S. client married to a Canadian spouse
 - No rollover for U.S. estate tax purposes (must be U.S. citizen spouse)
 - Unless a Qualified Domestic Trust (QDOT) is used
 - Income Tax Treaty helps:
 - With marital credit, U.S. citizen decedent can shelter approximately \$10.68M from U.S. estate tax

U.S. CITIZENS IN CANADA

Other Matters

- Required to file U.S. Tax Return and other compliance forms on an annual basis
- Need to come clean:
 - Foreign Account Tax Compliance Act ("FATCA"), kicks in July 1, 2014
 - Offshore Voluntary Disclosure Program
 - Streamlined Filing Compliance Procedures Program
- Is Renunciation of U.S. Citizenship an options?
 - Be careful! Can be serious U.S. income tax consequences!!
 - May be denied re-entry to the U.S. on a permanent basis!!

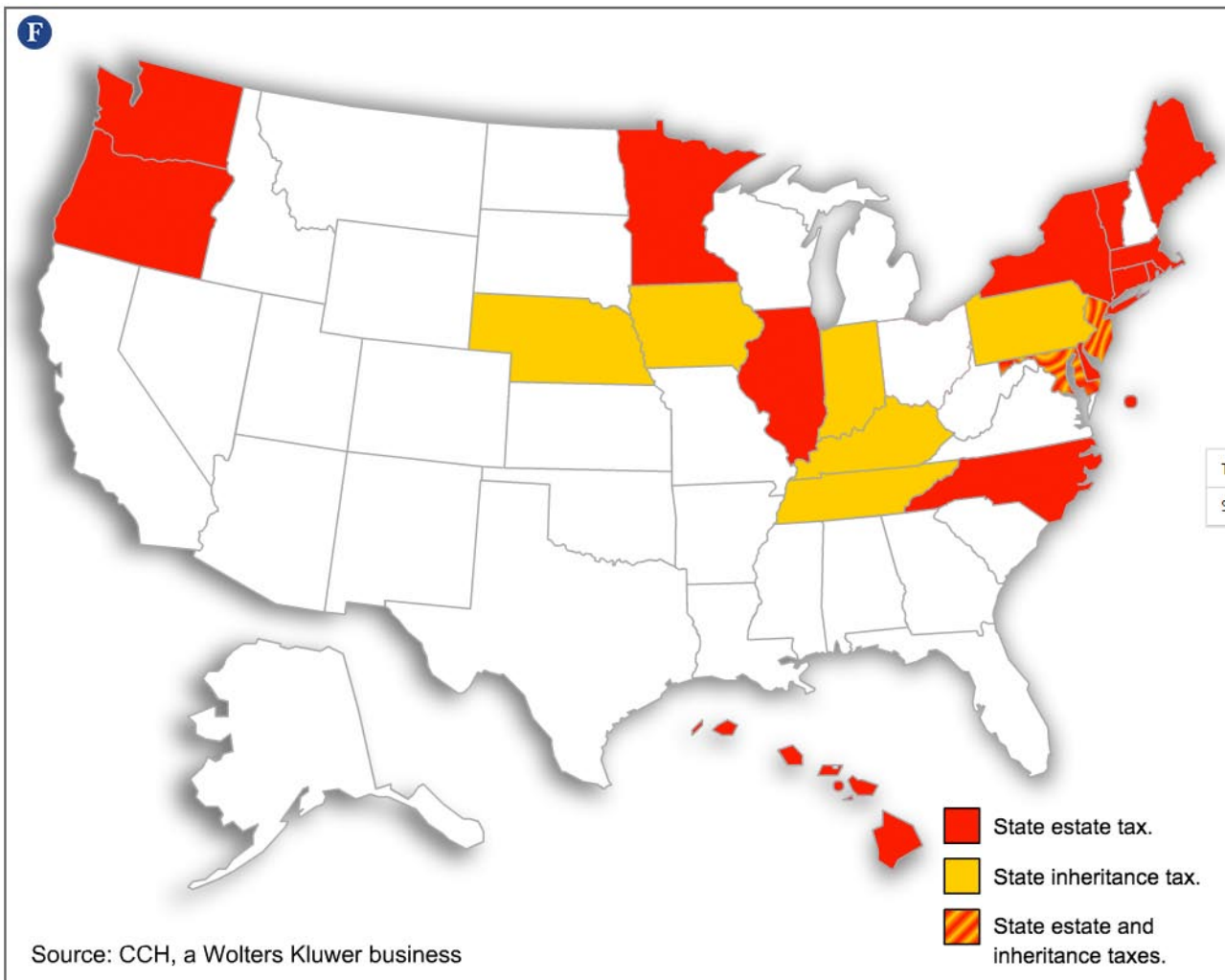


Ashlea Ebeling, Forbes Staff

I write about how to build, manage and enjoy your family's wealth.

TAXES | 1/28/2013 @ 12:43PM | 183,422 views

Where Not To Die In 2013



See [Where Not To Die In 2013 Update](#) for the latest on 2013 death tax legislation.

Think you don't have to worry about estate [taxes](#) because of the new generous federal estate tax law? Not so, for families in 21 states and the District of Columbia where separate state levies are still a big concern. "For the vast majority of people who are wealthy, the fear factor of the federal estate tax is gone, but many still need to focus on state estate and inheritance taxes," says Martin Shenkman, an estate lawyer in Paramus, N.J.

What makes this extra tricky is that state estate and inheritance taxes have been in constant flux over the last decade. And it's not just the list of states that has been changing, but in some states, the level at which the tax kicks in has been changing (both up and down). So it's important to stay on top of this to avoid a surprise tax bill.

Thanks to the fiscal cliff tax deal (the American Taxpayer Relief Act), the federal estate tax exemption of a generous \$5 million per person, indexed for inflation, is now permanent. So for 2013, up to \$5.25 million of an individual's estate will be exempt from federal estate tax, with a 40% tax rate applied to any excess over the exemption amount.

By contrast, states with estate taxes typically exempt \$1 million or less per estate from their tax and impose a top rate of 16%. New York, for example, sets its exemption at \$1 million. So the estate of a person dying in New York with \$5.25 million would owe no federal tax, but would owe New York \$420,800, calculates Donald Hamburg, an estate lawyer with Golenbock Eisenman in New York City.

Six states levy only an inheritance tax, with the rate depending on the relationship of the heir to the deceased and the taxes kicking in, in some cases, on the first dollar of bequest. Two states, Maryland and New Jersey, impose both. Maryland, for example, imposes an estate tax of up to 16% above a \$1 million exemption, and a 10% inheritance tax on every dollar left to a niece, nephew, friend or partner, but no inheritance tax on money left to children, grandchildren, parents or siblings. (Any estate tax owed is reduced by the inheritance tax paid.) As in the federal system, bequests to a spouse are tax-free.

Lately, the trend is towards eliminating state estate taxes, or at least lessening the tax bite by increasing the amount exempt from the tax. Ohio no longer has an estate tax, effective Jan. 1, 2013 (Republican Gov. John Kasich signed the repeal law in 2011). Delaware falls off the list effective July 1, 2013 when its current temporary estate tax expires. Indiana's inheritance tax is repealed effective Jan. 1, 2022 (Republican Gov. Mitch Daniels signed the repeal law last year). [Tennessee's inheritance tax is repealed](#) effective Jan. 1, 2016.

Meanwhile in Indiana there's a gradual phase-out of the tax, starting with a 10% credit effective Jan. 1, 2014, and in Tennessee the amount that is exempt from the state inheritance tax is going up each year, from \$1.25 million this year, to \$2 million in 2014 and \$5 million in 2015. Other states are upping their exemption amounts this year too. Maine's exemption doubles to \$2 million this year (as part of Republican Gov. Paul LePage's budget). Rhode Island's exemption goes up to \$910,725 this year, up from \$859,350 in 2012 as it's indexed for inflation.

Connecticut is the only state going in the other direction recently. In 2011, Connecticut lowered the amount it exempts from its tax from \$3.5 million to \$2 million per estate, retroactive to Jan. 1, 2011. And Illinois is the most recent state to implement an estate tax—it resurrected an estate tax in 2011 with a \$2 million exemption—now \$4 million as of Jan. 1, 2013.

The next state to watch out for is North Carolina. Newly elected Rep. Governor Pat McCrory made abolishing the state estate tax one of his campaign promises: “North Carolina is now the only state in the Southeast with the death tax. This tax unfairly punishes those who would inherit their loved one's possessions or business, forcing some families to sell off a small business or family farm just to pay the tax. As governor, [I] will fight to eliminate the death tax for North Carolinians.”

Could more states add stand-alone estate taxes? A technical provision of the federal estate tax law includes a deduction for state tax paid—instead of the pre-2001 state death tax credit, which allowed states to share in the estate tax revenue the feds collected. For states that were hoping for a return to that revenue sharing, it's possible that they will consider adding stand-alone taxes, according to James Walschlager, a research analyst at tax publisher CCH, a Wolters Kluwer business.

In the meantime, click on the interactive map above showing state estate and inheritance taxes for 2013. Hover over each state to see the dollar amount exempt from taxes and the top rate.

See also:

[Four Ways To Beat State Death Taxes](#)

[States Face \\$3 Billion Estate Tax Windfall If We Fall Off Fiscal Cliff](#)

[After The Fiscal Cliff Tax Deal, Estate and Gift Tax Explained](#)

[The Forbes Guide To Estate Taxes: 2013 Edition](#)

This article is available online at:

<http://www.forbes.com/sites/ashleaebeling/2013/01/28/where-not-to-die-in-2013/>

Closer Connection Exception Statement for Aliens

Department of the Treasury
Internal Revenue Service

▶ Attach to Form 1040NR or Form 1040NR-EZ.
▶ Information about Form 8840 and its instructions is at www.irs.gov/form8840.

2013

For the year January 1—December 31, 2013, or other tax year

Attachment
Sequence No. **101**

beginning , 2013, and ending , 20 .

Your first name and initial

Last name

Your U.S. taxpayer identification number, if any

Fill in your addresses only if you are filing this form by itself and not with your U.S. tax return

Address in country of residence

Address in the United States

Part I General Information

- 1 Type of U.S. visa (for example, F, J, M, etc.) and date you entered the United States ▶ _____
- 2 Of what country or countries were you a citizen during the tax year? _____
- 3 What country or countries issued you a passport? _____
- 4 Enter your passport number(s) ▶ _____
- 5 Enter the number of days you were present in the United States during:
2013 _____ 2012 _____ 2011 _____ .
- 6 During 2013, did you apply for, or take other affirmative steps to apply for, lawful permanent resident status in the United States or have an application pending to change your status to that of a lawful permanent resident of the United States (see instructions)? Yes No

Part II Closer Connection to One Foreign Country

- 7 Where was your tax home during 2013? _____
 - 8 Enter the name of the foreign country to which you had a closer connection than to the United States during 2013
▶ _____
- Next, complete Part IV on the back.

Part III Closer Connection to Two Foreign Countries

- 9 Where was your tax home on January 1, 2013? _____
- 10 After changing your tax home from its location on January 1, 2013, where was your tax home for the remainder of 2013?

- 11 Did you have a closer connection to each foreign country listed on lines 9 and 10 than to the United States for the period during which you maintained a tax home in that foreign country? Yes No
If "No," attach an explanation.
- 12 Were you subject to tax as a resident under the internal laws of (a) either of the countries listed on lines 9 and 10 during all of 2013 or (b) both of the countries listed on lines 9 and 10 for the period during which you maintained a tax home in each country? Yes No
- 13 Have you filed or will you file tax returns for 2013 in the countries listed on lines 9 and 10? Yes No
If "Yes" to either line 12 or line 13, attach verification.
If "No" to either line 12 or line 13, please explain ▶ _____

Next, complete Part IV on the back.

Part IV Significant Contacts With Foreign Country or Countries in 2013

- 14 Where was your regular or principal permanent home located during 2013 (see instructions)? _____
- 15 If you had more than one permanent home available to you at all times during 2013, list the location of each and explain ► _____
- 16 Where was your family located? _____
- 17 Where was your automobile(s) located? _____
- 18 Where was your automobile(s) registered? _____
- 19 Where were your personal belongings, furniture, etc., located? _____
- 20 Where was the bank(s) with which you conducted your routine personal banking activities located?
 a _____ c _____
 b _____ d _____
- 21 Did you conduct business activities in a location other than your tax home? Yes No
 If "Yes," where? _____
- 22a Where was your driver's license issued? _____
 b If you hold a second driver's license, where was it issued? _____
- 23 Where were you registered to vote? _____
- 24 When completing official documents, forms, etc., what country do you list as your residence? _____
- 25 Have you ever completed:
 a Form W-8BEN or any other W-8 form (relating to foreign status)? Yes No
 b Form W-9, Request for Taxpayer Identification Number and Certification? Yes No
 c Form 1078, Certificate of Alien Claiming Residence in the United States? Yes No
 d Any other U.S. official forms? If "Yes," indicate the form(s) ► _____ Yes No
- 26 In what country or countries did you keep your personal, financial, and legal documents? _____
- 27 From what country or countries did you derive the majority of your 2013 income? _____
- 28 Did you have any income from U.S. sources? Yes No
 If "Yes," what type? _____
- 29 In what country or countries were your investments located (see instructions)? _____
- 30 Did you qualify for any type of "national" health plan sponsored by a foreign government? Yes No
 If "Yes," in what country? _____
 If "No," please explain ► _____
 If you have any other information to substantiate your closer connection to a country other than the United States or you wish to explain in more detail any of your responses to lines 14 through 30, attach a statement to this form.

Sign here only if you are filing this form by itself and not with your U.S. tax return

Under penalties of perjury, I declare that I have examined this form and the accompanying attachments, and to the best of my knowledge and belief, they are true, correct, and complete.

Your signature _____
Date

Section references are to the U.S. Internal Revenue Code, unless otherwise specified.

Future Developments

For the latest information about developments related to Form 8840 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8840.

General Instructions

Purpose of Form

Use Form 8840 to claim the closer connection to a foreign country(ies) exception to the substantial presence test. The exception is described later and in Regulations section 301.7701(b)-2.

Note. You are not eligible for the closer connection exception if any of the following apply.

- You were present in the United States 183 days or more in calendar year 2013.
- You are a lawful permanent resident of the United States (that is, you are a green card holder).
- You have applied for, or taken other affirmative steps to apply for, a green card; or have an application pending to change your status to that of a lawful permanent resident of the United States.

Even if you are not eligible for the closer connection exception, you may qualify for nonresident status by reason of a treaty. See the instructions for line 6 for more details.

Who Must File

If you are an alien individual and you meet the closer connection exception to the substantial presence test, you must file Form 8840 with the IRS to establish your claim that you are a nonresident of the United States by reason of that exception.

For more details on the substantial presence test and the closer connection exception, see Pub. 519, U.S. Tax Guide for Aliens.

Note. You can download forms and publications at IRS.gov.

Substantial Presence Test

You are considered a U.S. resident if you meet the substantial presence test for 2013. You meet this test if you were physically present in the United States for at least:

- 31 days during 2013 and
- 183 days during the period 2013, 2012, and 2011, counting all the days of physical presence in 2013 but only 1/3 the number of days of presence in 2012 and only 1/6 the number of days in 2011.

Days of presence in the United States. Generally, you are treated as being present in the United States on any day that you are physically present in the country at any time during the day.

However, you do not count the following days of presence in the United States for purposes of the substantial presence test.

1. Days you regularly commuted to work in the United States from a residence in Canada or Mexico.
2. Days you were in the United States for less than 24 hours when you were traveling between two places outside the United States.
3. Days you were temporarily in the United States as a regular crew member of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States unless you otherwise engaged in trade or business on such a day.
4. Days you were unable to leave the United States because of a medical condition or medical problem that arose while you were in the United States.
5. Days you were an exempt individual.

In general, an exempt individual is a (a) foreign government-related individual, (b) teacher or trainee, (c) student, or (d) professional athlete competing in a charitable sports event. For more details, see Pub. 519.

Note. If you qualify to exclude days of presence in the United States because you were an exempt individual (other than a foreign government-related individual) or because of a medical condition or medical problem (see item 4 above), you must file Form 8843, Statement for Exempt Individuals and Individuals With a Medical Condition.

Closer Connection Exception

Even though you would otherwise meet the substantial presence test, you will not be treated as a U.S. resident for 2013 if:

- You were present in the United States for fewer than 183 days during 2013,
- You establish that during 2013, you had a tax home in a foreign country, and
- You establish that during 2013, you had a closer connection to one foreign country in which you had a tax home than to the United States, unless you had a closer connection to two foreign countries.

Closer Connection to Two Foreign Countries

You may demonstrate that you have a closer connection to two foreign

countries (but not more than two) if all five of the following apply.

1. You maintained a tax home as of January 1, 2013, in one foreign country.
2. You changed your tax home during 2013 to a second foreign country.
3. You continued to maintain your tax home in the second foreign country for the rest of 2013.
4. You had a closer connection to each foreign country than to the United States for the period during which you maintained a tax home in that foreign country.
5. You are subject to tax as a resident under the tax laws of either foreign country for all of 2013 or subject to tax as a resident in both foreign countries for the period during which you maintained a tax home in each foreign country.

Tax Home

Your tax home is your main place of business, employment, or post of duty regardless of where you maintain your family home. If you do not have a regular or main place of business because of the nature of your work, then your tax home is the place where you regularly live. If you do not fit either of these categories, you are considered an itinerant and your tax home is wherever you work.

Establishing a Closer Connection

You will be considered to have a closer connection to a foreign country than to the United States if you or the IRS establishes that you have maintained more significant contacts with the foreign country than with the United States.

Your answers to the questions in Part IV will help establish the jurisdiction to which you have a closer connection.

When and Where To File

If you are filing a 2013 Form 1040NR or Form 1040NR-EZ, attach Form 8840 to it. Mail your tax return by the due date (including extensions) to the address shown in your tax return instructions.

If you do not have to file a 2013 tax return, mail Form 8840 to the Department of the Treasury, Internal Revenue Service Center, Austin, TX 73301-0215 by the due date (including extensions) for filing Form 1040NR or Form 1040NR-EZ.

Penalty for Not Filing Form 8840

If you do not timely file Form 8840, you will not be eligible to claim the closer connection exception and may be treated as a U.S. resident.

You will not be penalized if you can show by clear and convincing evidence that you took reasonable actions to become aware of the filing requirements and significant steps to comply with those requirements.

Specific Instructions

Line 1

If you had a visa on the last day of the tax year, enter your visa type and the date you entered the United States. If you do not have a visa, enter your U.S. immigration status on the last day of the tax year and the date you entered the United States. For example, if you entered under the visa waiver program, enter "VWP", the name of the Visa Waiver Program country and the date you entered the United States.

Line 6

If you checked the "Yes" box on line 6, do not file Form 8840. You are not eligible for the closer connection exception. However, you may qualify for nonresident status by reason of a treaty. See Pub. 519 for details. If so, file Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b), with your Form 1040NR or Form 1040NR-EZ.

Line 14

A "permanent home" is a dwelling unit (whether owned or rented, and whether a house, an apartment, or a furnished room) that is available at all times, continuously and not solely for short stays.

Line 29

For stocks and bonds, indicate the country of origin of the stock company or debtor. For example, if you own shares of a U.S. publicly traded corporation, the investment is considered located in the United States, even though the shares of stock are stored in a safe deposit box in a foreign country.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. Section 7701(b) and its regulations require that you give us the information. We need it to determine if you meet the closer connection exception to the substantial presence test.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.

**U.S. Information Return for Beneficiaries of
Certain Canadian Registered Retirement Plans**

▶ Attach to Form 1040.

Department of the Treasury
Internal Revenue Service

For calendar year 20____, or tax year beginning _____, 20____, and ending _____, 20____.

Attachment
Sequence No. **139**

▶ Information about Form 8891 and its instructions is at www.irs.gov/form8891.

Name as shown on Form 1040

Identifying number (see instructions)

Address

1 Name of plan custodian	2 Account number of plan
3 Address of plan custodian	4 Type of plan (check one box): <input type="checkbox"/> Registered Retirement Savings Plan (RRSP) <input type="checkbox"/> Registered Retirement Income Fund (RRIF)

5 Check the applicable box for your status in the plan (see *Definitions* in the instructions):
 Beneficiary
 Annuitant (Complete only lines 7a, 7b, and 8.)

6a Have you previously made an election under Article XVIII(7) of the U.S.-Canada income tax treaty to defer U.S. income tax on the undistributed earnings of the plan? ▶ **Yes** **No**

b If "Yes," enter the first year the election came into effect _____ and go to line 7a. If "No," go to line 6c.

c If you have not previously made the election described on line 6a above, you can make an irrevocable election for this year and subsequent years by checking this box ▶

7a Distributions received from the plan during the year. Enter here and include on Form 1040, line 16a	7a		
b Taxable distributions received from the plan during the year. Enter here and include on Form 1040, line 16b	7b		
8 Plan balance at the end of the year. If you checked the "Annuitant" box on line 5, the "Yes" box on line 6a, or the box on line 6c, stop here. Do not complete the rest of the form	8		
9 Contributions to the plan during the year	9		
10 Undistributed earnings of the plan during the year:			
a Interest income. Enter here and include on Form 1040, line 8a	10a		
b Total ordinary dividends. Enter here and include on Form 1040, line 9a	10b		
c Qualified dividends. Enter here and include on Form 1040, line 9b	10c		
d Capital gains. Enter here and include on Form 1040, line 13	10d		
e Other income. Enter here and include on Form 1040, line 21. List type and amount ▶ _____ _____	10e		

Section references are to the Internal Revenue Code.

Future Developments

For the latest information about developments related to Form 8891 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8891.

General Instructions

Purpose of Form

Form 8891 is used by U.S. citizens or residents (a) to report contributions to Canadian registered retirement savings plans (RRSPs) and registered retirement income funds (RRIFs), (b) to report undistributed earnings in RRSPs and RRIFs, and (c) to report distributions received from RRSPs and RRIFs. See Notice 2003-75, which is available at IRS.gov.

Form 8891 also can be used to make an election pursuant to Article XVIII(7) of the U.S.-Canada income tax treaty to defer U.S. income tax on income earned by an RRSP or an RRIF that has been accrued, but not distributed. Taxpayers who have not previously made the election can make it on this form by checking the box on line 6c.

Who Must File

Form 8891 must be completed and attached to Form 1040 by any U.S. citizen or resident who is a beneficiary of an RRSP or RRIF. Do **not** file Form 8891 by itself.

A U.S. citizen or resident who is an annuitant of an RRSP or RRIF must file the form for any year in which he or she receives a distribution from the RRSP or RRIF.

A separate Form 8891 must be filed for each RRSP or RRIF for which there is a filing requirement. If you and your spouse are both required to file Form 8891, each of you must complete and attach a separate Form 8891 to Form 1040, even if you file a joint return.

Definitions

Beneficiary. A beneficiary of an RRSP or RRIF is an individual who is subject to current U.S. income taxation on income accrued in the RRSP or RRIF or would be subject to current income taxation had the individual not made the election under Article XVIII(7) of the U.S.-Canada income tax treaty to defer U.S. income taxation of income accrued in the RRSP or RRIF.

Annuitant. For purposes of this form, an annuitant of an RRSP or RRIF is an individual who is designated pursuant to the RRSP or RRIF as an annuitant and is not also a beneficiary as defined above.

Record Retention

Taxpayers must retain supporting documentation relating to the information reported on Form 8891, including Canadian forms T4RSP, T4RIF, or NR4, and periodic or annual statements issued by the custodian of the RRSP or RRIF.

Other Reporting Requirements

Pursuant to section 6048(d)(4), annuitants and beneficiaries who are required to file Form 8891 will not be required to file Form 3520 and will not be subject to the associated penalties described in section 6677 on such RRSPs or RRIFs.

You may be required to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts. You may also be required to file Form 8938, Statement of Specified Foreign Financial Assets, for other Canadian assets not reported on this Form 8891. For more information, see the instructions for Schedule B (Form 1040A or 1040) at www.irs.gov/form1040, and the instructions for Form 8938 at www.irs.gov/form8938.

Specific Instructions

All amounts listed must be in U.S. dollars.

Name and Address

Enter your name and address as shown on Form 1040. Even if you are filing a joint Form 1040 with your spouse, enter only your name.

Identifying number

Enter your U.S. social security number (SSN) or individual taxpayer identification number (ITIN). Do not enter a Canadian identifying number.

Beneficiaries

A beneficiary who previously made the election to defer income on the plan or is making it initially by checking the box on line 6c must only complete lines 1 through 8 of the form.

Annuitants

If you are treated as an annuitant for purposes of this form (see *Definitions*), you should complete only lines 1 through 5, 7a, 7b, and 8.

Line 6(a)

If the election you made previously was made under Rev. Proc. 89-45, check the "No" box. If an election (other than an election under Rev. Proc. 89-45) was made for an RRSP, and amounts from the RRSP were rolled over tax-free to an RRIF or another RRSP, the election is considered to have been made for the plan which received the tax-free rollover.

Line 6(c)

If you did not make the election under Article XVIII to defer income tax on income earned by an RRSP or an RRIF in a previous year, you cannot make a late election on Form 8891. However, you may be able to seek relief from the IRS for failure to timely elect the deferral of income on Form 8891 in an earlier year.

Line 7(b)

For information on figuring taxable distributions, see section 72 and Pub. 939, General Rule for Pensions and Annuities.

Paperwork Reduction Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Internal Revenue Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.

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Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 8833 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8833.

General Instructions

Purpose of Form

Form 8833 must be used by taxpayers to make the treaty-based return position disclosure required by section 6114. The form must also be used by dual-resident taxpayers (defined later) to make the treaty-based return position disclosure required by Regulations section 301.7701(b)-7. A separate form is required for each treaty-based return position taken by the taxpayer.

Who Must File

Generally, a taxpayer who takes a treaty-based return position must disclose that position. See *Exceptions from reporting* below.

A taxpayer takes a treaty-based return position by maintaining that a treaty of the United States overrules or modifies a provision of the Internal Revenue Code and thereby causes (or potentially causes) a reduction of tax on the taxpayer's tax return. For these purposes, a treaty includes, but is not limited to, an income tax treaty; estate and gift tax treaty; or friendship, commerce, and navigation treaty. See Regulations sections 301.6114-1(a) and (b) for more details and for examples of treaty-based return positions taken by taxpayers for which they must make disclosure.

Exceptions from reporting. See Regulations section 301.6114-1(c) for examples of treaty-based return positions taken by taxpayers for which they are not required to make disclosure.

In general, disclosure of a treaty-based return position is not required for amounts that are:

1. Reported on Form 1042-S, and
2. Received by a:
 - a. Related party from a reporting corporation within the meaning of section 6038A (relating to information returns on Form 5472 filed by U.S. corporations that are 25-percent owned by a foreign person),

b. Beneficial owner that is a direct account holder of a U.S. financial institution or qualified intermediary, or a direct partner, beneficiary or owner of a withholding foreign partnership or trust, from that U.S. financial institution, qualified intermediary, or withholding foreign partnership or trust, or

c. Taxpayer that is not an individual or a State, if the amounts are not received through an account with an intermediary or with respect to an interest in a partnership or a simple or grantor trust, and if the amounts do not total more than \$500,000 for the tax year.

However, Regulations sections 301.6114-1(c)(6)(ii), (7)(iv), and (8)(ii) provide that the exceptions described above do not apply to any amounts for which a treaty-based return disclosure is specifically required under these instructions.

The following are amounts for which a treaty-based return disclosure on Form 8833 is specifically required.

- Amounts described in paragraph 2a or 2c earlier that are received by a corporation that is a resident under the domestic law of both the United States and a foreign treaty jurisdiction.
- Amounts described in paragraph 2a or 2c earlier that are received by a corporation that is a resident of both the jurisdiction whose treaty is invoked and another foreign jurisdiction that has an income tax treaty with that treaty jurisdiction. See Revenue Ruling 2004-76, 2004-31 I.R.B. 111, available at www.irs.gov/pub/irs-irbs/irb04-31.pdf.
- Amounts described in paragraph 2a or 2c earlier that are received by a foreign collective investment vehicle that is a contractual arrangement and not a person under foreign law. See Example 7 of Regulations section 1.894-1(d)(5).
- Amounts described in paragraph 2a or 2c earlier that are received by a foreign "interest holder" in a "domestic reverse hybrid entity," as those terms are used in Regulations section 1.894-1(d)(2).

Dual-resident taxpayer. An alien individual is a dual-resident taxpayer if that individual is considered to be a resident of both the United States and another country under each country's tax laws. If the income tax treaty between the United States and the other country contains a provision for resolution of conflicting claims of residence by the United States and its treaty partner, and the individual determines that under those provisions he or she is a resident of the foreign country for treaty purposes, the individual may claim treaty benefits as a resident of that foreign country, provided that he or she complies with the instructions below.

If you are an individual who is a dual-resident taxpayer and you choose to claim treaty benefits as a resident of the foreign country, you are treated as a nonresident alien in figuring your U.S. income tax liability for the part of the tax year you are considered a dual-resident taxpayer. If you are eligible to be treated as a resident of the foreign country pursuant to the applicable income tax treaty and you choose to claim benefits as a resident of such foreign country, attach Form 8833 to Form 1040NR, U.S. Nonresident Alien Income Tax Return, or Form 1040NR-EZ, U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents. In order to be treated as a resident of the foreign country, you must timely file (including extensions) Form 1040NR or Form 1040NR-EZ with the Form 8833 attached. If you choose to be treated as a resident of a foreign country under an income tax treaty, you are still treated as a U.S. resident for purposes other than figuring your U.S. income tax liability (see Regulations section 301.7701(b)-7(a)(3)).

When and Where To File

Attach Form 8833 to your tax return (i.e., Form 1040NR, Form 1040NR-EZ, Form 1120-F, etc.). If you would not otherwise be required to file a tax return, you must file one at the IRS Service Center where you would normally file a return to make the treaty-based return position disclosure under section 6114 (see Regulations section 301.6114-1(a)(1)(ii)) or under Regulations section 301.7701(b)-7.

Specific Instructions

U.S. Taxpayer Identifying Number

The identifying number of an individual is his or her social security number or individual taxpayer identification number. The identifying number of all others is their employer identification number.

For more information about identifying numbers, see the instructions for the tax return with which this form is filed.

Reference ID Number

If the taxpayer is a foreign corporation, enter any reference ID number assigned to the foreign corporation by a U.S. person with respect to which information reporting is required (for example, on Form 5471 or Form 5472).

Address in Country of Residence

Enter the information in the following order: city, province or state, and country. Follow the country's practice for entering the postal code. Please **do not** abbreviate the country name.

Termination of U.S. Residency

If you are a dual-resident taxpayer and a long-term resident (LTR) and you are filing this form to be treated as a resident of a foreign country for purposes of claiming benefits under an applicable U.S. income tax treaty, you will be deemed to have terminated your U.S. residency status for federal income tax purposes. Because you are terminating your U.S. residency status, you may be subject to tax under section 877A and you must file Form 8854, Initial and Annual Expatriation Statement. You are an LTR if you were a lawful permanent resident of the United States in at least 8 of the last 15 tax years ending with the year your status as an LTR ends. For additional information, see the Instructions for Form 8854, and Publication 519, U.S. Tax Guide for Aliens.

Line 3

Income that is fixed or determinable annual or periodical includes interest (other than original issue discount), dividends, rents, premiums, annuities, salaries, wages, and other compensation. For more information (including other items of income that are fixed or determinable annual or periodical), nonresident aliens and dual-resident taxpayers filing as nonresident aliens should see section 871(a) and Regulations section 1.871-7(b) and (c). Foreign corporations should see section 881(a) and Regulations section 1.881-2(b) and (c).

Line 5

If the taxpayer answers "Yes" to the question on line 5, the taxpayer must enter the subsection of Regulations section 301.6114-1(b) with respect to which the taxpayer is disclosing a treaty-based return position. The taxpayer must also provide the information requested on line 6.

Line 6

All taxpayers taking a treaty-based return position must provide the requested information on line 6, regardless of whether reporting is explicitly required under Regulations section 301.6114-1(b).

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545-0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for all other taxpayers who file this form is shown below.

Recordkeeping 3 hr., 7 min.

Learning about the law or the form 1 hr., 35 min.

Preparing and sending the form to the IRS 1 hr., 43 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.

TAX ISSUES AND PLANNING TODAY

Cheryl Teron
Partner, Vancouver
cteron@millerthomson.com
604.643.1286

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AGENDA

- A. Surplus Stripping
- B. Rectification Update
- C. Tax Planning and Risk Management for Tax
Advisors and Their Clients

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WHAT IS SURPLUS STRIPPING?

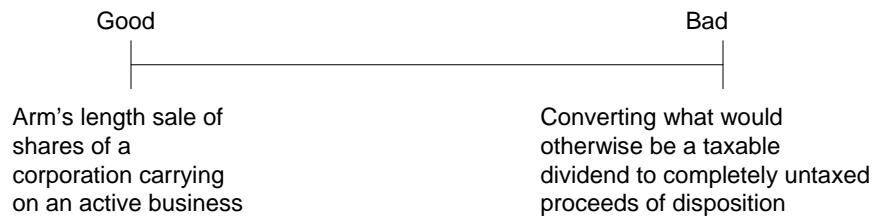
- No precise definition
- Realizing economic value of corporate surplus through a transaction characterized as a sale of shares that give rise to a capital gain, rather than a distribution from the corporation that is taxed as a dividend

KEY PROVISIONS OF THE *INCOME TAX ACT* (ITA) REGARDING DOMESTIC SURPLUS STRIPPING

- s. 84(2) – Distribution on winding-up, etc.
- s. 84.1 – Non-arm's length sale of shares
- s. 245 – General anti-avoidance rule (GAAR)

VIEW OF THE CANADA REVENUE AGENCY (CRA)

- Meaning of surplus stripping is broad, hard to define and falls across a spectrum

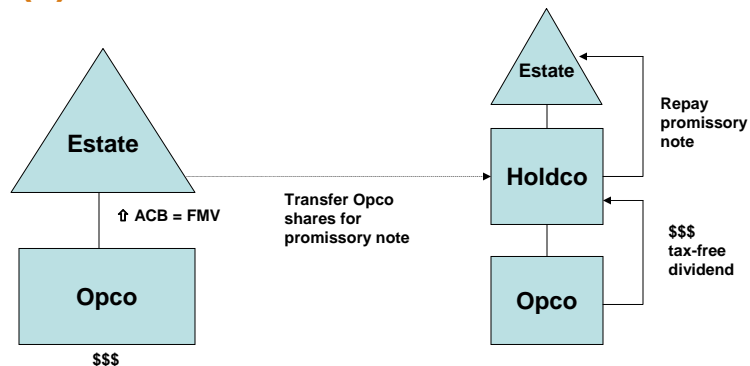


- Uncertainty in where a transaction crosses the line

s. 84(2) of ITA

- Applies to a distribution or appropriation in any manner whatever to a shareholder on the winding-up, discontinuance or reorganization of the corporation's business
- Pipeline planning

s. 84(2) of ITA



Assumes:

- no RDTOH, CDA or GRIP in Opco
- outside basis avoids dividend under s. 84.1 of ITA (no V-day value increment and no capital gains exemption for deceased or NAL person on shares / substituted shares)

s. 84(2) of ITA

- CRA's concerns relate primarily to cash corporations
- Viable circumstances for avoiding possible application of s. 84(2):
 - Able to wait to distribute funds for a sufficiently long time that the initial transaction is not part of the winding-up
 - More than 1 year – safe harbour?
 - Corporation has more than cash

s. 84(2) of ITA

- CRA rulings may require a higher standard than a judge would
- *MacDonald* (FCA 2013) – broadest interpretation of “in any manner whatever”

s. 84.1 of ITA

- Can apply where an individual sells shares in a subject corporation to a purchaser corporation with which it does not deal at arm's length
- s. 251(1)(c) – It is a question of fact whether persons not related to each other are dealing with each other at arm's length

s. 84.1 of ITA

- Jurisprudence for analyzing whether a non-arm's length (NAL) relationship exists
 - Is a common mind directing the bargaining for both parties to the transaction?
 - Did the parties to the transaction act in concert without separate interests?
 - Did one party to the transaction exercise *de facto* control over the other?
- Query – Does the CRA use a lower threshold for an NAL relationship?

s. 84.1 of ITA

- Impact of s.84.1 on Employee Buyco Planning?
- 2012 CRA Panel Discussion at CTF Conference
- Pre-ordained with accommodation corporation vs. one-off transaction

s. 245 of ITA – GAAR

- Consistent view of the courts after SCC decision in *Canada Trustco Mortgage Co. (2005)* is that there is no general statutory scheme against surplus stripping in the ITA
- Another way of saying this is that there is no policy of the ITA so as to necessarily tax corporate distributions as dividends in the hands of shareholders

s. 245 of ITA – GAAR

- Recent CRA view at 2013 CTF Conference:
 - Surplus stripping is not inherently abusive, but it has not fully made its case where the surplus stripping is abusive in CRA's view
 - CRA will seek a finding of abuse based on the specific provisions used by a taxpayer and not on a broad policy issue

RECTIFICATION

- An equitable remedy that allows judicial corrections of a document that, by error in writing, does not reflect or is not consistent with the true intentions of the parties
- Rectification effective from the point in time of formation of the document (*ab initio*)

RECTIFICATION

- Tax law is accessory to the general law
- SCC:
“Tax law applies to transactions governed by, and the nature and legal consequences of which are determined by reference to, the common law or the civil law.”

TWO RECENT SCC DECISIONS IN QUEBEC RECTIFICATION CASES

- *Quebec v. Services Environnementaux AES Inc. (2013)*
- *Quebec v. Riopel (2013)*
- Upheld lower court decisions that rectification was available to correct documents under Quebec civil law

TWO RECENT SCC DECISIONS IN QUEBEC RECTIFICATION CASES

- Declined the request of the AG of Canada to consider and reject the rectification line of authority established in *Juliar* (OCA 2000)
- SCC confirmed that retroactive tax planning is bad / correcting errors okay
- Intention to reduce tax liability is not on its own the object / intention of an agreement

RECTIFICATION OF A TRUST

- Rectification is available for a trust deed
- Party seeking rectification must demonstrate that the written document does not reflect the true intention of the parties

RECTIFICATION OF A TRUST

- Contrasting results:
 - *McPeake* (BCSC 2012)
 - Rectification granted
 - Sufficient evidence on initial intent on balance of probabilities
 - S. 75(2) of ITA irrevocable trust rule not intended to apply
 - *Kanji* (ONSC 2013)
 - Application for rectification dismissed
 - No contemporaneous documents or independent evidence of intent to pass accumulated wealth to family members in tax-efficient manner so s.75(2) of ITA applicable

TAX PLANNING AND RISK MANAGEMENT FOR TAX ADVISORS AND THEIR CLIENTS

- The right tax plan for the right client
- The CRA is not always right, but sometimes (or often?) they are
- Does the tax advisor's tool kit need to include both a Tax Act and a crystal ball?

THE RIGHT PLAN FOR THE RIGHT CLIENT

- Positives of tax plan being successfully upheld
 - More after-tax cash in jeans
 - Happy advisor-client relationship

THE RIGHT PLAN FOR THE RIGHT CLIENT

- Negatives of tax plan being disallowed by the CRA
 - Higher taxes
 - Interest
 - Possible penalties
 - Costs of representation (can also be a negative in successfully upholding a tax plan)
 - Uncertainty
 - Stress in life
 - Length of time for the tax appeal process
 - Strained advisor-client relationship
 - Reputational risk

THE RIGHT PLAN FOR THE RIGHT CLIENT

- Balancing of positives and negatives
- One plan does not fit all
- Informed decision making by client is important
 - Nature of the plan
 - Actual implementation of and living with the plan
 - Prospect of success
 - Understanding the positives and negatives

THE RIGHT PLAN FOR THE RIGHT CLIENT

- Assessing and communicating the prospect of success
- Is there a minimum prospect of success before a plan should be proposed to a client?
- Differences from one client to the next client
- Technical compliance with ITA as a bare minimum

THE RIGHT PLAN FOR THE RIGHT CLIENT

- Tax Opinion Standards

Percentage Chance of Success	Standard of Opinion
100%	Will
75%	Good – Should
63%	Likely
51%	More Likely Than Not
50%	Your Guess is as Good as Mine
40%	It Arguably Might Work
30%	Might
21%	I've Seen Worse
8%	Perhaps if Nobody Finds it

THE RIGHT PLAN FOR THE RIGHT CLIENT

- Private company versus public company
 - Who bears the burden of the negatives?
- The big company perspective:
 - Focus on the outcome
 - Tax position
 - Reputational risk
 - Compliance with law
 - Believe plan will be upheld vs. uncertainty
 - Is this normal business or artificial?
 - How does this relate to current government policy?

THE CRA IS NOT ALWAYS RIGHT

- Examples:
 - Sommerer* (FCA 2012) – s.75(2) for purchase of property at FMV
 - Craig* (SCC 2012) – Restricted farm loss
 - Neuman* (SCC 1998) – Dividend sprinkling
 - McMullen* (TCC 2007) – No general scheme in ITA against surplus stripping
 - Collins & Aikman Products Co.* (FCA 2010)
 - Daishowa-Marubeni International Ltd.* (SCC 2013) – Proceeds of disposition with respect to assumption of reforestation obligations

THE CRA IS NOT ALWAYS RIGHT

- Caution re:
 - Avoiding a CRA position that is incorrect in law
 - Relying on a CRA position that is incorrect in law
- Dealing with a CRA chill approach
 - 10-8 insurance products
 - Charitable planning schemes

BUT SOMETIMES (OR OFTEN?) THE CRA IS RIGHT

- Examples:
 - Garron/St. Michael's Trust Corp.* (SCC 2012) – Residence of a trust
 - Triad Gestco Ltd.* (FCA 2012) – Value shifts or loss generators
 - 1207192 Ontario Ltd.* (FCA 2012)
 - Global Equity Fund Ltd.* (FCA 2012)
 - GAAR cases

BUT SOMETIMES (OR OFTEN?) THE CRA IS RIGHT

- Caution re:
 - Jurisprudence changing or establishing new law after the transaction has been implemented
 - Planning involving technical compliance, but no economic substance

NEED FOR BOTH A TAX ACT AND A CRYSTAL BALL

- Tax planning done today is effectively judged in the future
- What can change?
 - Jurisprudence can change the law
 - Enhanced enforcement
 - Government attitudes
 - Societal attitudes
 - Professional standards

NEED FOR BOTH A TAX ACT AND A CRYSTAL BALL

- Is paying all the taxes you are required to enough?
- Must consider impact of the new reality

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