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Canadian Tax Foundation CRA Roundtable - 2019 Questions of Interest

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2019 Roundtable Questions of Interest
Question #1 – MLI Update

- Question – *Can the CRA provide an update on the measures that were put in place for the administration of the PPT?*
- Abbreviated Answer – new Treaty Abuse Committee ("TAP Committee") – to be formed. Will be comprised of:
  - Chair – director of the international division of ITRD
  - Legislative Policy and Regulatory Affairs Branch of CRA;
  - Tax Avoidance division – international and large business directorate;
  - Department of Finance – tax legislation division; and
  - Department of Justice.
- TAP Committee will make recommendations on application or non-application of the PPT to ITRD in the context of rulings requests or to CRA in the context of proposed reassessments.
- Proceedings will mirror the proceedings of the GAAR Committee.

Question #3 – Safe-income determination time

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- Question – When dealing with cross-border dividend payments, does the CRA agree that the exchange rate at the time of a dividend payment should be used rather than the exchange rate at the safe-income determination time?
- CRA Response:
  - It depends…

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- Facts:
  - Can Opco owns 100% of the shares of US FA and has no other assets.
  - The currency maintained by US FA for reporting purposes is the US$.
  - The ACB of the shares of Can Opco to Can Holdco is nil.
  - The ACB of the shares of US FA to Can Opco is nil.
  - The time (“Time 1”), that is immediately before the safe-income determination time as determined under subsection 55(1) occurs before the time (“Time 2”) that is immediately before the payment of dividend from Can Opco to Can Holdco.

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- Facts:
  - At both times, i.e., at Time 1 and at Time 2:
    - US FA has US$100 of cash and no other assets;
    - The “tax-free surplus balance” of US FA as referred to in subparagraph 55(5)(d)(i) is US$100; and
    - There is no fluctuation in any amount between Time 1 and Time 2.
  - In Scenario 1, the exchange rate of the US dollar is US $1 = CDN $1 at Time 1 and US $1 = CDN $1.2 at Time 2.
  - In Scenario 2, the exchange rate of the US dollar is US $1 = CDN $1.2 at Time 1 and US $1 = CDN $1 at Time 2.

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- CRA Response – Scenario 1: At Time 2, Can Opco pays a dividend of $120 to Can Holdco
  - If US FA pays a dividend of US $100 to Can Opco at Time 2, Can Opco would include $120 in its income based on the application of subsection 261(2).
  - If the FMV of the shares of Can Opco is equal to $120 at Time 2, there is a reduction of $120 of the capital gain on the shares of Can Opco that could have been realized on a disposition at FMV of the shares of Can Opco at that time as a result of the payment of the dividend.
  - The question is whether the dividend of $120 exceeds the amount of income earned or realized by Can Opco at Time 1, that could reasonably be considered to contribute to the capital gain of $120.
  - In the calculation of the income earned or realized by Can Opco at Time 1, there can be added, under paragraph 55(5)(d), an amount equal to the lesser of:
    - The tax-free surplus balance of US FA at Time 1, and
    - The FMV of the shares of US FA at Time 1.

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- CRA Response – Scenario 1: At Time 2, Can Opco pays a dividend of $120 to Can Holdco
  - Provided that the tax-free surplus balance of US FA at Time 1 was US $100, the question is what amount would be included in the income earned or realized by US FA under subparagraph 55(5)(d)(i). The current version of paragraph 55(5)(d) excludes the application of Regulation 5905(5.6) which refers to the application of subparagraph 5902(1)(a)(i) to an election under subsection 93(1).
  - Even where there is no deemed election under subsection 93(1), the scheme of paragraph 55(5)(d) indicates that the exchange rate to be used should be the rate that prevails at Time 1 as if that time was the time on which the "particular amount arose" under paragraph 261(2)(b).
  - At that time, since the exchange rate was US $1 = CDN $1, the amount determined under subparagraph 55(5)(d)(i) would be $100.
  - Even if it is argued that the exchange rate to be used for the amount under subparagraph 55(5)(d)(i) is the rate at Time 2, it remains that the FMV of the shares of US FA would not exceed $100 at Time 1.
  - Therefore, the lesser of the amounts under subparagraphs 55(5)(d)(i) and 55(5)(d)(ii) is $100 and the amount of income of US FA to be added to the income earned or realized by Can Opco at Time 1 is $100.

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- CRA Response – Scenario 2: At Time 2, Can Opco pays a dividend of $100 to Can Holdco
  - If US FA pays a dividend of US $100 to Can Opco at Time 2, Can Opco would include $100 in its income based on the application of subsection 261(2).
  - If the FMV of the shares of Can Opco is equal to $100 at Time 2, there is a reduction of $100 of the capital gain on the shares of Can Opco that could have been realized on a disposition at FMV of the shares of Can Opco at that time as a result of the payment of the dividend.
  - The question is whether the dividend of $100 exceeds the amount of income earned or realized by Can Opco at Time 1, that could reasonably be considered to contribute to the capital gain of $100.
  - In the calculation of the income earned or realized by Can Opco at Time 1, there can be added, under paragraph 55(5)(d), an amount equal to the lesser of:
    - The tax-free surplus balance of US FA at Time 1, and
    - The FMV of the shares of US FA at Time 1.

2019 Roundtable Questions of Interest
Question #3 – Safe-Income Determination Time

- CRA Response – Scenario 2: At Time 2, Can Opco pays a dividend of $100 to Can Holdco
  - Provided that the tax-free surplus balance of US FA at Time 1 was US $100, as indicated in Scenario 1, the amount determined under subparagraph 55(5)(d)(i) would be $120 because the exchange rate was US $1 = CDN $1.2 at that time.
  - The FMV of the shares of US FA would also be $120 at Time 1.
  - Therefore, the lesser of the amounts under subparagraphs 55(5)(d)(i) and 55(5)(d)(ii) is $120 and the amount of income of US FA to be added to the income earned or realized by Can Opco at Time 1 is $120.
  - Because the gain that could be realized on a disposition of the shares of Can Opco immediately before the dividend, i.e., at Time 2, is $100, the income earned or realized by Can Opco that can reasonably be considered to contribute to the accrued gain of $100 on the shares of Can Opco is limited to $100.
  - The dividend paid by Can Opco of $100 would not exceed the amount determined to be the income earned or realized by Can Opco of $100.

Question #4 – Interaction between paragraphs 84.1(1)(b) and 129(1)(a)

2019 Roundtable Questions of Interest
Question #4 – Interaction between paragraphs 84.1(1)(b) and 129(1)(a)

- Question – *Would the CRA still apply the position expressed in technical interpretation 2002-0128955 in situations similar to the one described below?*
- Facts:
  - Mr. A is married to Mrs. A;
  - Both individuals are resident in Canada;
  - Mr. A owns all of the issued and outstanding shares of the capital stock of Opco 1;
  - Mr. A and Mrs. A each own 50% of the issued and outstanding shares of the capital stock of Opco 2;
  - Opco 1 and Opco 2 are both private corporations as that expression is defined in subsection 89(1); and
  - Mr. A transfers his shares of the capital stock of Opco 1 to Opco 2 in consideration for a note.

2019 Roundtable Questions of Interest
Question #4 – Interaction between paragraphs 84.1(1)(b) and 129(1)(a)

- Paragraph 84.1(1)(b) applies and a dividend is deemed to have been paid by Opco 2 to Mr. A and received by him from Opco 2 at the time of the disposition
- Paragraph 129(1)(a) states that Opco 2 may obtain a dividend refund in respect of taxable dividends paid on shares of its capital stock in its taxation year and at the time it was a private corporation.
- Technical Interpretation 2002-0128955 – the CRA took the position that a corporation is not entitled to a dividend refund under paragraph 129(1)(a) with respect to a dividend it is deemed to have paid under paragraph 84.1(1)(b).

2019 Roundtable Questions of Interest
Question #4 – Interaction between paragraphs 84.1(1)(b) and 129(1)(a)

- CRA Response:
  - The technical interpretation no longer represents the CRA's position on this issue.
  - The granting of a dividend refund to a corporation deemed by paragraph 84.1(1)(b) to have paid a dividend provides an outcome that is more in accordance with the integration principle embedded in the Act.

Question #5 – Section 212.1 and Post-mortem “Pipeline” Transactions

2019 Roundtable Questions of Interest
Question #5 – Section 212.1 and Post-mortem "Pipeline" Transactions

- Question – *In situations where section 84.1 would not apply because a trust has full ACB in a Canco's shares, would the CRA seek to apply section 212.1 based on a technical application of the "look-through" rules, even though the non-share consideration received by the trust does not exceed the ACB of the shares that are disposed?*

2019 Roundtable Questions of Interest
Question #5 – Section 212.1 and Post-mortem "Pipeline" Transactions

- CRA Response:
  - Paragraph 212.1(6)(b) may apply in respect of dispositions of shares by any type of Canadian resident trust.
    However, the Department of Finance is prepared to recommend to the Minister of Finance that the Act be amended to exclude certain transactions from the application of paragraph 212.1(6)(b).
  - The excluded transactions would be dispositions of shares by a Canadian resident graduated rate estate (as defined in subsection 248(1)) of an individual who was resident in Canada immediately before the individual's death, *provided that* those shares were acquired by the estate on and as a consequence of the individual's death. The Department of Finance intends to recommend that this proposed amendment apply to dispositions after February 26, 2018.

Question #6 – Distributions of Property by a Canadian Resident Trust to a Canadian Corporation that is Wholly Owned by One or More Non-Residents

2019 Roundtable Questions of Interest
Question #6 – Distributions of Property by a Canadian Resident Trust to a Canadian Corporation that is Wholly Owned by One or More Non-Residents

- Question – *Based on the following facts does the CRA agree with conclusion that the Property will be transferred out of the Trust on a tax-deferred basis pursuant to subsection 107(2)?*
- Facts:
  - The trustees of a Canadian resident discretionary family trust (the "Trust") are planning to distribute all or a portion of the Trust's property (the "Property") to one or more of its beneficiaries in advance of the Trust's 21st anniversary.
  - The Property is taxable Canadian property, as defined in subsection 248(1), but is not property described in subparagraphs 128.1(4)(b)(i) to (iii) nor a share of the capital stock of a non-resident-owned investment corporation.
  - The beneficiaries of the Trust that are intended to receive the Property are natural persons who are non-residents of Canada at the relevant time ("NR beneficiaries").

2019 Roundtable Questions of Interest
Question #6 – Distributions of Property by a Canadian Resident Trust to a Canadian Corporation that is Wholly Owned by One or More Non-Residents

- Facts:
  - Instead of distributing the Property to the NR beneficiaries directly, the trustees propose to distribute the Property, on a tax-deferred basis pursuant to subsection 107(2), to one or more Canadian corporations ("Canco") that are wholly owned by one or more of the NR beneficiaries, and that are beneficiaries of the Trust.
  - The result is that the Property will no longer be held by the Trust and as such will not be subject to the 21-year deemed disposition rule.
  - In addition, since the Property will be distributed to one or more Canadian resident corporations, subsection 107(5) should not be applicable.
  - Therefore, the Property will be transferred out of the Trust on a tax-deferred basis pursuant to subsection 107(2).

2019 Roundtable Questions of Interest
Question #6 – Distributions of Property by a Canadian Resident Trust to a Canadian Corporation that is Wholly Owned by One or More Non-Residents

- CRA Response:
  - If the Property distributed to Canco constitutes taxable Canadian property, other than a property described in subparagraphs 128.1(4)(b)(i) to (iii) or a share of the capital stock of a non-resident-owned investment corporation, such transactions would result in a misuse or abuse of subsections 107(2), (2.1) and (5).
  - Subsections 107(2.1) and (5) effectively result in the immediate realization of capital gains on property distributed to non-residents over which Canada does not retain the absolute right to tax without restriction.
  - The intention of subsection 107(5) is to ensure that Canada maintains the ability to tax capital gains that accrue during the period that property is held by a Canadian resident trust and that the transactions described herein are not consistent with this intention.

2019 Roundtable Questions of Interest
Question #6 – Distributions of Property by a Canadian Resident Trust to a Canadian Corporation that is Wholly Owned by One or More Non-Residents

- CRA Response:
  - **NOTE:** The CRA will consider the application of the GAAR when faced with a similar set of transactions unless substantial evidence supporting its non-application is provided.
  - In addition to the specific transactions described herein, it is the CRA's view that the GAAR may be applicable in respect of other situations involving the distribution of property from a family trust to a Canadian corporation with one or more non-resident shareholders.
  - For instance, it is the CRA's view that it would be appropriate to consider that the same conclusion would apply regardless of whether or not the transactions are being undertaken to avoid the 21-year deemed disposition rule in subsection 104(4)
  - Accordingly, unless substantial evidence supporting the non-application of GAAR is provided, the CRA will not provide any Advance Income Tax Ruling where such structure is proposed to be put in place.

Question #7 – TOSI and Inherited Property

2019 Roundtable Questions of Interest
Question #7 – TOSI and Inherited Property

- Facts:
  - Mr. X owns 100,000 voting preference shares of a corporation (“Investco”).
  - The common shares of Investco are non-voting and are held by a discretionary inter vivos trust (the “Family Trust”).
  - The settlor of the Family Trust is Mr. X.
  - The trustees of the Family Trust are Mr. X and two arm’s length third parties.
  - The beneficiaries of the Family Trust include Ms. X, Ms. Y and Ms. Z.
  - Ms. X is Mr. X’s spouse. Ms. Y and Ms. Z are the children of Mr. X and Ms. X.

2019 Roundtable Questions of Interest
Question #7 – TOSI and Inherited Property

- Facts (continued):
  - The Family Trust acquired its common shares of Investco as a result of an estate freeze.
  - The terms of the Family Trust include the restrictions described in subsection 74.4(4). But for such restrictions, subsection 74.4(2) would have applied to Mr. X as a result of the freeze.
  - None of the other attribution rules in sections 74.1 to 74.3 and subsection 75(2) will apply.
  - Mr. X, Ms. X, Ms. Y and Ms. Z are now all over age 18.
  - Each of Mr. X, Ms. X, Ms. Y and Ms. Z is a “specified individual.”
  - Investco’s business is carried on by Mr. X and Ms. Y. Mr. X and Ms. Y are each a “source individual”
  - Investco’s business is a “related business” with respect to Mr. X, Ms. X, Ms. Y and Ms. Z.

2019 Roundtable Questions of Interest
Question #7 – TOSI and Inherited Property

- Facts (continued):
  - Mr. X has worked in Investco's business on average for more than 20 hours per week a year for more than five years.
  - In Year 1, Mr. X passes away.
  - Pursuant to the terms of Mr. X's will, Mr. X leaves:
    - 1 preference share to Ms. Y,
    - 1 preference share to Ms. Z, and
    - 999,998 preference shares to Ms. X.

2019 Roundtable Questions of Interest
Question #7 – TOSI and Inherited Property

- Facts (continued):
  - In Year 2, Investco pays a dividend on its common shares.
  - The Family Trust pays the dividend to Ms. Z in the year and makes a designation in respect of Ms. Z under subsection 104(19).
  - The Family Trust deducts the amount of the dividend from its income under subsection 104(6) and the amount is included in Ms. Z's income as a dividend received on the Investco common shares under subsections 104(13) and (19).

2019 Roundtable Questions of Interest
Question #7 – TOSI and Inherited Property

- Facts (continued):
  - The amount of the dividend included in Ms. Z's income will be split income and will be subject to the tax on split income (TOSI) under subsection 120.4(2) unless such amount is an "excluded amount" in respect of Ms. Z.
  - Because Mr. X worked on average at least 20 hours per week during the portion of the year the business operates for more than 5 years, Investco's business is an excluded business of Mr. X.

Question #7A – TOSI and Inherited Property

2019 Roundtable Questions of Interest
Question #7A – TOSI and Inherited Property

- Question – *Would the taxable dividend deemed to be received by Ms. Z be an excluded amount because it is an amount derived directly or indirectly from an "excluded business" of Ms. Z taking into consideration the application of the deeming rule in subparagraph 120.4(1.1)(b)(ii)?*
- CRA Response:
  - Because the dividend is in respect of the common shares of Investco, subparagraph 120.4(1.1)(b) would not apply because such shares are owned by the Family Trust and were not acquired by or for the benefit of Ms. Z as a consequence of the death of Mr. X.
  - As a result, the taxable dividends deemed to be received by Ms. Z on the common shares of Investco will not be an excluded amount by reason of being an amount derived directly or indirectly from an excluded business in respect of Ms. Z.
  - The taxable dividend may fall within another category of excluded amount. If not, then the taxable dividend will be included in computing Ms. Z's split income and will be subject to the TOSI.

Question #7B – TOSI and Inherited Property

2019 Roundtable Questions of Interest
Question #7B – TOSI and Inherited Property

- Question
  - Assume the same facts as Question 7(A), except that Mr. X leaves all of his preference shares to Ms. X and the terms of the Family Trust dictate that, on the death of Mr. X, the trustees of the Family Trust are subject to an absolute obligation and must wind-up and distribute the trust property (i.e. the Investco common shares) equally to Mr. X's children in satisfaction of their capital interest.
  - As a result, and pursuant to the terms of the trust, the dividend paid by Investco in Year 2 will be received directly by Ms. Z on the Investco common shares distributed to her on the winding-up of the Family Trust following the death of Mr. X.
  - Would the CRA consider the acquisition of shares by Ms. Z to be "as a consequence of the death" of Mr. X for the purposes of paragraph 120.4(1.1)(b)?

2019 Roundtable Questions of Interest
Question #7B – TOSI and Inherited Property

- CRA Response:
  - In this case, the amount of the dividend received by Ms. Z was in respect of the Investco common shares acquired by her by distribution on the winding-up of the inter vivos Family Trust.
  - Generally, property received from an inter vivos trust, the terms of which require without condition the trust to distribute the property to an individual on the death of another person, can be considered to be property that was acquired as a consequence of the death of the person.
  - The Investco common shares received by Ms. Z from the Family Trust under the terms of the trust that require such shares to be distributed to her on the death of Mr. X will be considered in the circumstances to be property that was acquired by her as a consequence of the death of another person (her father) for purposes of paragraph 120.4(1.1)(b).

2019 Roundtable Questions of Interest
Question #7B – TOSI and Inherited Property

- CRA Response:
  - Accordingly, subparagraph 120.4(1.1)(b)(ii) should apply in the circumstances to the amount of the dividend received by Ms. Z on the Investco common shares for purposes of determining whether such amount was derived directly or indirectly from an excluded business of Ms. Z and will deem Ms. Z to have been actively engaged on a regular, substantial and continuous basis in Investco's business based on Mr. X having worked at least an average of 20 hours per week a year for a period exceeding 5 years during his lifetime.
  - Investco's business will be an excluded business of Ms. Z and the amount of the dividend received on the Investco common shares will be an excluded amount and not subject to TOSI as an amount derived from an excluded business.
  - **NOTE:** A different result would apply where it is reasonable to infer in the circumstances that the terms of the trust were arranged to inappropriately benefit from paragraph 120.4(1.1)(b) and subparagraph 120.4(1.1)(b)(ii) in light of the stated object and purpose of those provisions to provide continuity rules for inherited property, including by reason of the application of the GAAR.

Question #8 – TOSI – Excluded Business

2019 Roundtable Questions of Interest
Question #8 – TOSI – Excluded Business

- Facts:
  - ABC Co. is owned 100% by a family trust, of which Mr. and Mrs. A are both beneficiaries.
  - ABC Co. historically carried on a trucking business from incorporation in 1990.
  - Each of Mr. and Mrs. A were actively engaged on a regular, continuous and substantial basis throughout all of the years of its operations.
  - The business operations were sold in 2018, and the proceeds have been invested inside ABC Co.
  - ABC Co. now carries on an investment business.
  - Mrs. A is active in the investment business but Mr. A is not.
  - As Mr. and Mrs. A, who are both over 24 years old, do not own shares of ABC Co. directly, they will not meet the “excluded share” exception.

2019 Roundtable Questions of Interest
Question #8 – TOSI – Excluded Business

- Question – *Will the excluded business exception apply to Mr. A, given that he had previously been actively engaged on a regular, continuous and substantial basis in the trucking business carried on by ABC Co. for more than five years, notwithstanding that the trucking business has ceased and the proceeds from the sale of its assets have been invested in ABC Co.'s investment business?*

2019 Roundtable Questions of Interest
Question #8 – TOSI – Excluded Business

- CRA Response:
  - Where the family trust makes a subsection 104(19) designation in a particular taxation year of the trust in respect of all or a portion of a taxable dividend it received from ABC Co. (for a taxation year of ABC Co. after its trucking business ceased), such amount would be deemed, *inter alia*, to be a taxable dividend received on a share by Mr. A and/or Mrs. A, in his/her taxation year in which the family trust's particular taxation year ends. Such income would be "split income" of Mr. A unless an excluded amount exception applies.
  - The investment business currently being carried on by ABC Co. is not the same business as the trucking business formerly carried on by it.
  - Any taxable dividend that Mr. A is deemed to receive is considered to be derived directly or indirectly from such investment business.

2019 Roundtable Questions of Interest
Question #8 – TOSI – Excluded Business

- CRA Response:
  - If Mr. A is not actively engaged in the investment business during the particular taxation year or in any five prior taxation years, the amount will not be an excluded amount under subparagraph (e)(ii) of that definition because such amount will not be income derived directly or indirectly from an "excluded business" of Mr. A for the year.
  - Consequently, the taxable dividend designated by the trust in respect of Mr. A pursuant to subsection 104(19) will be split income subject to TOSI unless another excluded amount exception applies.
  - Further information would need to be provided to determine whether such income received would represent a "reasonable return" in respect of Mr. A or whether another excluded amount exception could apply.

Question #9 – TOSI – Excluded Amount and the Non-Related Business Exception

2019 Roundtable Questions of Interest
Question #9 – TOSI – Excluded Amount and the Non-Related Business Exception

- Question
  - Where a specified individual (the “Individual”) receives a dividend from a corporation (the “Corporation”) which, in the past, carried on a related business, but did not do so during the year, would the dividend be an “excluded amount” in the following situations:
    A. The business ceased in a prior year and is no longer operated by anyone.
    B. The business was sold to an unrelated corporation in a prior year and is still active, but no source individual in respect of the dividend recipient was active in the business in the year of the dividend.
    C. The business was sold to an unrelated corporation in a prior year and is still active, but a source individual in respect of the dividend recipient was active in the business in the year of the dividend (for example, a former owner related to the Individual is employed by the new owners in the business, perhaps for a transitional period).

2019 Roundtable Questions of Interest
Question #9 – TOSI – Excluded Amount and the Non-Related Business Exception

- Shared facts:
  - The corporate income that supports the dividend is derived, directly or indirectly, from the related business carried on by the Corporation in the past; and
  - The Corporation did not derive, directly or indirectly, income from a related business in respect of the Individual other than the related business carried on in the past.

2019 Roundtable Questions of Interest
Question #9A – TOSI – Excluded Amount and the Non-Related Business Exception

- CRA Response:
  - Generally, yes.
  - The expression “derived directly or indirectly from a business” has a broad meaning.
  - However, in the circumstances discussed, the dividend will not be considered to have been derived from a related business for the year because the business was not carried on in the particular year.
  - As a result, the dividend received by the Individual would accordingly constitute an “excluded amount”.

2019 Roundtable Questions of Interest
Question #9B – TOSI – Excluded Amount and the Non-Related Business Exception

- CRA Response:
  - Generally, yes.
  - The dividend received by the Individual would be considered to be derived directly or indirectly from a related business, being the related business carried on in the past.
  - However, similar to question (A), in circumstances where the business was sold to an unrelated corporation in a prior year and is still carried on, but no source individual in respect of the dividend recipient was active in the business in the year of the dividend, then a dividend received by the Individual in that subsequent year **will not** be considered to have been derived from a related business for the year because the related business was not carried on in the particular year.
  - As a result, the dividend received by the Individual would accordingly constitute an "excluded amount".
  - **NOTE:** This response assumes that the source individual no longer retains any ownership of the business. If that is not the case, paragraph (c) of the definition of "related business" may be applicable and could result in the application of the tax on split income.

2019 Roundtable Questions of Interest
Question #9C – TOSI – Excluded Amount and the Non-Related Business Exception

- CRA Response:
  - Generally, no.
  - The dividend received by the Individual would be considered to be derived directly or indirectly from a related business.
  - In the circumstances provided, where the business was sold to an unrelated corporation in a prior year and is still carried on, and a source individual was active in the business in the year of the dividend, the business carried on by the unrelated corporation may constitute a related business for the year.
  - If the source individual is considered to be actively engaged on a regular basis in the activities of the unrelated corporation related to earning income from the business, then the business that continues to be carried on by the unrelated corporation would qualify as a related business for the year.
  - As a result, the dividend paid by the Corporation will not meet the requirements to be considered an “excluded amount”. The business carried on by the unrelated corporation will constitute a related business until the source individual is no longer actively engaged on a regular basis in the activities of the unrelated corporation.
  - **NOTE:** Depending on the facts and circumstances of the Individual, another exception from the tax on split income may apply.

Question #13 – Triangular Amalgamation

2019 Roundtable Questions of Interest
Question #13 – Triangular Amalgamation

- Question – In CRA documents February 1991-110 and February 1991-108, the CRA confirmed that the compensatory shares so issued by a Holdco to a Parentco would have a FMV tax basis. Can the CRA confirm if this position is still applicable?
- Facts:
  - Subco is a wholly-owned subsidiary of Parentco.
  - Parentco owned no shares in Targetco.
  - Subco, Targetco and Parentco are taxable Canadian corporations.
  - Subco and Targetco amalgamate to form Amalco.
  - The amalgamation is effected in the following manner:
    - The former shareholders of Targetco receive shares of Parentco; and
    - In consideration for Parentco issuing its shares to the former shareholders of Targetco, Amalco issues compensatory shares to Parentco having a FMV equal to the FMV of the shares of Parentco issued to the former shareholders of Targetco

2019 Roundtable Questions of Interest
Question #13 – Triangular Amalgamation

- **NOTE:**
  - The CRA does not believe that it would be possible for Parentco to have a cost in the shares of Targetco immediately before the amalgamation for purposes of the application of subsection 87(4) on the basis that Parentco had issued its own shares on the amalgamation in consideration for the acquisition of shares of Targetco prior to the amalgamation because that was not the case.
  - Parentco has issued its shares on the amalgamation in order to acquire shares of Amalco and has not issued its shares on, or for, the acquisition of shares of Targetco.
  - If Parentco had acquired Targetco shares prior to the amalgamation from the former shareholders of Targetco, the application of rollover provisions such as subsection 85(1) or 85.1(1) would have to be considered to avoid a taxable event for the vendors.

2019 Roundtable Questions of Interest
Question #13 – Triangular Amalgamation

- CRA Response:
  - In this fact scenario, the shares received by Parentco from Amalco are subject to the application of paragraphs 87(9)(a.4) and 87(9)(c).
  - As such, the cost of the shares of Amalco held by Parentco will not be derived from the value of the consideration given, i.e., shares issued by Parentco, to acquire the shares of Amalco.
  - Taxpayers may try to avoid the above results…

2019 Roundtable Questions of Interest
Question #13 – Triangular Amalgamation

- In this fact scenario, the shares received by Parentco from Amalco are subject to the application of paragraphs 87(9)(a.4) and 87(9)(c).
- As such, the cost of the shares of Amalco held by Parentco will not be derived from the value of the consideration given, i.e., shares issued by Parentco, to acquire the shares of Amalco.
- Taxpayers may try to avoid the above results through an alternative structure…

2019 Roundtable Questions of Interest
Question #13 – Triangular Amalgamation

- Alternative Structure Facts:
  - Subco is a wholly-owned subsidiary of Midco.
  - Midco is a wholly-owned subsidiary of Parentco.
  - Parentco owned no shares in Targetco.
  - Subco, Midco, Targetco and Parentco are taxable Canadian corporations.
  - Subco and Targetco amalgamate to form Amalco.
  - The amalgamation is effected in the following manner:
    - The former shareholders of Targetco receive shares of Parentco.
    - In consideration for Parentco issuing its shares to the former shareholders of Targetco, Midco issues compensatory shares to Parentco having a FMV equal to the FMV of the shares of Parentco issued to the former shareholders of Targetco.
    - In consideration for Midco issuing shares to Parentco, Amalco issues compensatory shares to Midco having a FMV equal to the FMV of the shares of Midco issued to Parentco.

2019 Roundtable Questions of Interest
Question #13 – Triangular Amalgamation

- CRA Response:
  - The shares of Amalco received by Midco are subject to the application of paragraphs 87(9)(a.4) and 87(9)(c), but the shares of Midco received by Parentco are not.
  - If the use of Midco in this situation in order to achieve an increase in cost that would otherwise not be available on the application of paragraphs 87(9)(a.4) and 87(9)(c) had the triangular amalgamation not involved its use, it would constitute an avoidance transaction under subsection 245(3) if it was not done primarily for bona fide purposes other than to obtain the tax benefit.
  - On a prospective basis, taxpayers should not rely on documents February 1991-110 and February 1991-108 (also referred to as document 903669) without considering the potential application of the GAAR. More specifically, the views expressed by the CRA in such documents will only apply to triangular amalgamations implemented before March 31, 2020 as part of a series of transactions or an arrangement that was substantially advanced, as evidenced in writing, before December 3, 2019.

Question #15 – Subsection 104(13.4) and Alter Ego Trusts and Joint Spousal Trusts

2019 Roundtable Questions of Interest
Question #15 – Subsection 104(13.4) and Alter Ego Trusts and Joint Spousal Trusts

- Question – *Can a loss which occurs in the taxation year immediately after the death be reported on the tax return filed for the date of death, rather than requiring the filing of a T3A loss carryback request? The loss will be known at the time of filing both tax returns, and both tax returns would be available for assessment at the same time, so the loss can be verified at the time of filing the date of death trust return.*
- CRA Response
  - Despite the fact that the capital loss incurred in the taxation year ending December 31 is known at the time of filing the T3 return for the taxation year ending July 31, the application of such loss cannot be "reported" on the T3 return filed for the taxation year ending July 31. This can only be done by filing a T3A form, Request for Loss Carryback by a Trust. However, the application of paragraph 104(13.4)(c) is worth noting...

2019 Roundtable Questions of Interest
Question #15 – Subsection 104(13.4) and Alter Ego Trusts and Joint Spousal Trusts

- CRA Response
  - Consider a situation in which the T3 return for each of the trust's taxation years and the form T3A are all filed together, on March 31.
  - Also assume that the net capital loss for the taxation year ending December 31 is equal to the taxable capital gain realized in the taxation year ending July 31.
  - The loss carryback requested on the form T3A will not be processed concurrently with the T3 return for the taxation year ending July 31, as the loss must first be recognized by the CRA before it can be applied to any earlier taxation years in accordance with paragraph 111(1)(b).
  - Therefore, the initial notice of assessment for the taxation year ending July 31 would not reflect the application of the loss carryback. Where the balance of tax is not paid on or before March 31, the assessment would include interest.
  - When the loss carryback request is processed, the loss is applied using the request date of March 31.

2019 Roundtable Questions of Interest
Question #15 – Subsection 104(13.4) and Alter Ego Trusts and Joint Spousal Trusts

- CRA Response
  - For the taxation year ending July 31, the application of paragraph 104(13.4)(c) to subparagraph (a)(ii) of the definition “balance-due day” in subsection 248(1) postpones that day until 90 days after the end of the calendar year in which the taxation year ends, or March 31.
  - Therefore, in the example, the loss carryback is applied on the balance-due day for the taxation year ending July 31, and the net effect will be that there is no tax payable under Part I on the balance-due day of March 31
  - Accordingly, the interest which appeared on the notice of assessment will be reversed on the notice of reassessment for the taxation year ending July 31.

Question #16 – Eligible Dividend Designations – Private Corporations

2019 Roundtable Questions of Interest
Question #16 – Eligible Dividend Designations – Private Corporations

- Question – *Is the CRA willing to adopt a practical approach and extend the administrative position it offers to public corporations, with regard to declaring eligible dividends, to private corporations by permitting a CCPC to meet its requirements by providing its shareholders with a written notice in advance that all dividends are eligible dividends unless otherwise indicated?*
- CRA Response:
  - No.
  - Many compelling reasons exist for providing administrative relief from the statutory designation requirements (as described above) solely to public corporations.
  - There are marked differences in determining eligible dividends for non-CCPCs (of which a public corporation is a subset) versus CCPCs.