THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 6, 2018

Via email: Alexandra.MacLean@cra-arc.gc.ca

Ms. Alexandra MacLean
Director
Canada Revenue Agency
344 Slater Street
Ottawa, ON K1A 0L5

Dear Ms. MacLean:

Re: Personal Use of Business Aircraft

I am writing on behalf of the Taxation Law Section of the Canadian Bar Association (CBA Section), concerning possible changes to the administrative policies of the Canada Revenue Agency for the calculation of taxable benefits derived by an individual from personal use of an aircraft owned by a corporation of which the individual is a shareholder or employee. The changes were discussed on a conference call hosted by CRA on August 3, 2017, which the then-Chair of the CBA Section attended, among others. If implemented, the changes would significantly increase the tax liabilities of some affected individuals.

The purpose of this letter is not to comment on any specific aspects of the proposed changes. Rather, our sole focus is on the potential retroactive nature of the changes. As a matter of principle, the CBA Section believes that changes in the official administrative policies of the CRA should apply only on a prospective basis, to periods after public announcement of those changes.

Background

Longstanding provisions of the *Income Tax Act* (Canada) impose tax on an individual who derives a taxable benefit from a corporation of which the individual is a shareholder or employee.[1] It is widely accepted that these provisions may apply to impute taxable income to an individual for a benefit enjoyed by reason of the use of an aircraft owned by the corporation. How the amount of the benefit is to be computed is not specified in the Act or the Regulations under the Act.

[1] Paragraph 6(1)(a) and subsection 15(1) of the Act.

To assist taxpayers in applying general provisions of this nature, CRA historically published Interpretation Bulletins and Information Circulars, which were widely understood to represent the official administrative position of CRA. They were intended to be relied on, and were generally viewed as binding on CRA. CRA published Interpretation Bulletin IT-160R3, dated February 19, 1992, which sets out the official position of CRA on the calculation of taxable benefits with respect to the personal use of business aircraft. That bulletin replaced an earlier version, published in 1981. IT-160R3 included detailed guidance on the calculation of taxable benefits associated with personal use of business aircraft.

Status of IT-160R3

Interpretation bulletin IT-160R3 is one of over 100 previously "archived" interpretation bulletins that were "cancelled" in September 2012.

CRA has encouraged reliance on archived bulletins. As stated on CRA's website:

> On August 1, 2013 a standardized Treasury Board of Canada Secretariat "Archived Content" notice was added to all interpretation bulletins (ITs) on the CRA website. **The notice has no effect on the status or reliability of the ITs**. They are current up to the effective date stated in each publication.
>
> The "Archived" designation merely confirms that the page is not subject to Government of Canada Web standards and that the content will not be altered or updated. Each IT will be cancelled when it is replaced by an income tax folio. For more information, go to Introducing income tax folios.
>
> **Taxpayers and their representatives may continue to refer to the ITs for explanations of the CRA's interpretation of federal income tax law**, keeping in mind the caution that has always applied:
>
> > While the comments in a particular paragraph in an IT may relate to provisions of the law in force at the time they were made, such comments are not a substitute for the law. The reader should, therefore, consider such comments in light of the relevant provisions of the law in force for the particular taxation year being considered, taking into account the effect of any relevant amendments to those provisions or relevant court decisions occurring after the date on which the comments were made.
>
> Effective September 30, 2012, all previously archived income tax interpretation bulletins were cancelled and removed from the CRA website. For additional information, please refer to Cancellation of income tax technical publications." [emphasis added]

While IT-160R3 (like over 100 other bulletins) was "cancelled", after having previously been "archived", CRA's website does not state that "cancelled" and previously "archived" bulletins no longer reflect CRA's position. Indeed, when CRA cancels a bulletin because of a change in position, this is clearly stated (see for example the statement on CRA's website about IT-404, which refers to a change of position on payments to lottery ticket vendors). No relevant changes in law have occurred that would render IT-160R3 obsolete, and, unlike comments made on other bulletins, CRA did not state that its position on the subject matter of IT-160R3 had changed.

To date, over 50 interpretation bulletins have been replaced by income tax folios. CRA's website listing the income tax folios specifically states the date on which the particular interpretation

bulletin was replaced by an income tax folio – generally the publication date of the respective income tax folio.

To date, IT-160R3 has not been replaced by an income tax folio. Consistent with CRA's general practice, IT-160R3 should be treated as an articulation of CRA's official administrative position for all periods until specific notification of a change in policy or replacement of the bulletin with an income tax folio.

Application of New Policies

Again, we make no comment on the substantive merits of any particular administrative policy for calculation of taxable benefits. Our sole focus is on the avoidance of retroactivity.

In the circumstances, we believe taxpayers would reasonably have expected to rely on the administrative policies specified in IT-160R3. Given the absence of any other administrative, statutory or jurisprudential guidance, IT-160R3 represents CRA's last word on the subject, and taxpayers could reasonably be expected to arrange their affairs in reliance on these published policies.

If and when CRA adopts new policies to replace those specified in IT-160R3, we anticipate that those policies should apply only to periods following their public announcement.

CRA has in many other instances, and quite appropriately, refrained from the retroactive adoption of administrative policies that could adversely affect taxpayers, even where there is no applicable interpretation bulletin. One recent example is the adoption of an administrative position on the status of certain US-based limited liability limited partnerships (LLLPs), concluding that LLLPs are corporate entities. Because this position may have adverse effects on taxpayers who had understood these entities to be fiscally transparent, CRA stated that it would apply the new policy on a strictly prospective basis. Furthermore, generous transitional relief was provided for taxpayers that may have relied on their understanding that LLLPs would be treated as fiscally transparent. This approach appropriately respected the fundamental principles of fairness in the administration of tax law.

The CBA Section has consistently supported the principle that retroactive taxation is inappropriate. This is the case whether the retroactivity arises from explicitly retroactive legislation or from the retroactive adoption of administrative policies related to a broadly worded provision for which well understood policies had previously been published by the government.

In the circumstances, we respectfully urge CRA to abide by this principle, and explicitly apply any newly adopted policies concerning personal use of business aircraft only on a prospective basis.

Thank you for your kind consideration.

Yours truly,

(*original letter signed by Tamra L. Thomson for Jeffrey Trossman*)

Jeffrey Trossman
Chair, CBA Taxation Law Section