



June 4, 2009

Mr. Brian Ernewein  
Director, Tax Legislation Division  
Tax Policy Branch  
Department of Finance Canada  
140 O'Connor Street  
Ottawa, ON K1A 0G5

Dear Mr. Ernewein:

**Re: Section 116 Certificates of Compliance – Dispositions of Capital Interests in Trusts**

I am writing on behalf of the Canadian Bar Association's National Wills, Estates and Trust Section concerning the application of section 116 of the *Income Tax Act* (ITA) to the disposition by a non-resident beneficiary of a capital interest in a trust. We recommend that section 116 be amended so that a certificate from the Minister is no longer required in respect of dispositions of capital interests in personal trusts to which subsection 107(2.1) of the ITA applies, except in the specific, limited circumstances referred to below. The Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants also supports this recommendation.

We recognize that the ITA was recently amended so that a certificate under section 116 may not be required if the property disposed of is treaty-exempt property. While this amendment is of significant benefit, there are still situations where the new rule will not apply to dispositions of capital interests in trusts. The most obvious is a non-resident beneficiary resident in a non-treaty country. Even where a beneficiary is resident in a treaty country, the treaty may not afford relief (for example, where the value of the interest in the trust is primarily related to real property situate in Canada).

Under subsection 107(2.1) of the ITA, a trust making a capital distribution is deemed to dispose of the property distributed for fair market value. The beneficiary then acquires that property at a cost equal to the deemed proceeds. The beneficiary's proceeds of disposition of his or her capital interest will equal the deemed proceeds to the trust less, in effect, an amount equal to what the trust gains. In other words, the beneficiary's proceeds will be equal to the trust's cost amount.

Under paragraph 107(1)(a), the adjusted cost base of the beneficiary's capital interest in the trust will generally be equal to its cost amount immediately before the disposition, less all amounts deducted under paragraph 53(2)(g.1) in computing the adjusted cost base immediately before the disposition. "Cost amount" is defined in subsection 108(1) to be, where money or other property has been distributed by the trust to the beneficiary in satisfaction of all or part of the beneficiary's capital interest, the total of the money and the cost of the property to the trust. It follows that if paragraph 53(2)(g.1) is not applicable, the beneficiary's proceeds of disposition of his or her interest in the trust will correspond to the trust's cost amount of the property distributed by the trust, and that this will also be the beneficiary's adjusted cost base of the capital interest in the trust. Accordingly, except where paragraph 53(2)(g.1) applies, the beneficiary cannot realize a capital gain on the interest in the trust as a result of the capital distribution to the beneficiary. Given this, we believe that it should not be necessary for the beneficiary to obtain a certificate under section 116 of the ITA when there is no possibility of a capital gain subject to Canadian tax.

Further, in many situations, compliance with section 116 is cumbersome and can add significant expense and delays to the administration of a trust, such as an estate, particularly where the amount being distributed is modest. The cost of retaining an advisor qualified to deal with Canada Revenue Agency on these matters can be disproportionate. Even with large estates or personal trusts, the time and expense involved in complying with section 116 seems unnecessary.

For these reasons, we recommend that the ITA be amended to provide relief from the certificate requirements under section 116 where there is a capital distribution to which subsection 107(2) applies and the beneficiary does not realize a capital gain as a result of the distribution.

We appreciate your consideration of our views, and look forward to your response.

Yours truly,

*(Original signed by Andre Barette)*

Andre Barette  
Chair, National Wills, Estates and Trusts Section