

The Joint Committee on Taxation of  
The Canadian Bar Association  
and The Canadian Institute of  
Chartered Accountants

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Mr. Wayne Adams  
Director General,  
Income Tax Rulings Directorate  
Policy and Planning Branch  
Place de Ville  
16th Floor, Tower A  
320 Queen Street  
Ottawa, Ontario  
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Dear Mr. Adams:

**Subject: Scope of Subsection 95(6) Anti-Avoidance Rule**

We are writing to express our thanks to you and other CRA officials for meeting with us and other representatives of the Joint Committee on November 30, 2004 in Toronto. We appreciate the chance to discuss with you the scope of subsection 95(6) of the Income Tax Act in the context of a number of generic examples.

We also appreciate your intention to provide greater certainty to Canadian taxpayers and their advisers through the publication of an issue of Technical News or a similar document as soon as possible in 2005. We understand that the document will provide general comments on the CRA's view of the scope of the provision and examples of where it will not apply and where it may apply. We also understand that the CRA's view on the scope of the provision is still developing, and we appreciate the opportunity to provide you with our comments.

Taxpayer Concerns

We remain concerned about the impact that a broad interpretation of this provision may have on our tax system. Taxpayers and their advisers have historically understood that this provision may apply in very limited circumstances, such as the example described in the technical notes to the provision when it was amended in 1995. It is apparent from the recent high profile reassessments that the CRA has chosen to pursue under subsection 95(6) (in the cases of Univar and Kruger), and from CRA comments at the Canadian Tax Foundation's 2004 CRA Round Table session, that the CRA now has a broader view of the provision.

The words of subsection 95(6) are capable of a potentially broad interpretation. As discussed in one of our examples, even the incorporation of a foreign branch could be subject to subsection 95(6) if the principal purpose of the incorporation is to defer or reduce Canadian tax on the branch earnings.

We understand that the checks and balances within the CRA that have been put in place to ensure the judicious and consistent application of the GAAR do not currently exist with respect to the application of subsection 95(6). Such cases are not referred to the GAAR Committee. There is also no requirement for input from Rulings and the Department of Finance before the provision is applied by Audit, although we understand that this may occur informally.

#### Request to CRA

We appreciate your assurance that the CRA would not seek to apply subsection 95(6) to the incorporation of a foreign branch and to certain examples of common financing transactions. However, as was apparent in our discussions, it is often difficult to distinguish between the “good” and “bad” cases in tax policy terms on the basis of the words in subsection 95(6). It was not clear to us why subsection 95(6) might apply to some of the examples we discussed with you and your officials. Further, the views of the CRA with respect to the offensiveness of a transaction may change over time.

We would ask you, therefore, to establish a committee, with membership similar to the GAAR Committee, which would develop principles to be applied consistently in connection with reassessments made pursuant to subsection 95(6) and to require that no reassessment be issued pursuant to subsection 95(6) without the approval of such Committee.

We would also urge you to reconsider your decision to seek to apply subsection 95(6) in circumstances such as those in Univar and Kruger and to adopt a constrained interpretation of the scope of the provision, consistent with the technical notes.

In view of our concerns, we also are considering whether officials of the Department of Finance should be engaged to discuss our concerns. Although we would prefer an administrative solution, we expect to be making the case that amendments to subsection 95(6) (and its counterpart, subsection 17(14)) may be necessary if these provisions are applied too broadly by the CRA. It may become necessary for the rules to be amended to provide guidelines for their application similar to the GAAR to provide appropriate certainty to taxpayers and to ensure that the integrity of the tax system is maintained.

Once again, we thank you for meeting with us and look forward to the continuation of this dialogue.

Yours truly,



Paul B. Hickey, CA  
Chair, Taxation Committee  
Canadian Institute of Chartered Accountants



Brian R. Carr  
Chair, Taxation Section  
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