

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

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Private and Confidential

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Mr. Grant Nash
Tax Legislation Division
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Dear Mr. Nash:

Competent Authority Requests on Behalf of Subsection 94(3) Trusts

We understand that representatives of the Department of Finance (“Finance”) and the Canada Revenue Agency (“CRA”) will be meeting to discuss the handling of competent authority requests relating to trusts that are deemed to be resident in Canada under proposed paragraph 94(3)(a) (such a trust will be referred to in this letter as a “94(3) Trust”). This letter lists certain matters that we believe should be addressed in the discussions and in published guidelines.

It is assumed for the purposes of this letter that once section 94 is enacted, a 94(3) Trust will be considered a resident of Canada for the purposes of Canada’s tax treaties. While this is the CRA’s position, we note that the matter is not free from doubt and we should not be considered to be agreeing with the position.

If a trust that is factually resident in a foreign country that has a tax treaty with Canada is deemed to be resident in Canada under proposed paragraph 94(3)(a), then Canada’s tax treaty with that foreign country would generally provide that the competent authorities shall endeavour to settle the question of the trust’s residency for the purposes of the tax treaty. It would be of considerable assistance to taxpayers if the CRA were to publish guidelines setting out the factors that will be taken into account in deciding whether to agree that a 94(3) Trust is not resident in Canada for

the purposes of a tax treaty.¹ Taxpayers would then be able to determine whether a competent authority request will be favourably considered in their particular circumstances.

Residency Factors to Consider

The sorts of factors that might enter into a residency decision with respect to a 94(3) Trust include the following:

- a) The reason the trust was established outside Canada. Are there non-tax or foreign tax reasons for locating the trust in the other country?
- b) The tax treatment of the trust in the other country, and the tax treatment of distributions to beneficiaries.
- c) The strength of the trust's ties to Canada relative to the strength of its ties to other jurisdictions. These ties would include the location of beneficiaries of the trust and the amounts contributed to the trust by Canadian residents relative to the amounts contributed by others.
- d) When the trust was established. Relevant dates for this purpose may include the date on which the government announced its intention to amend section 94 and the dates on which draft legislation was introduced.
- e) The residency of the settlor when the trust was established. Was the trust established by a non-resident settlor who did not have any firm intention of becoming a Canadian resident?

It should be emphasized that we are not taking any position at this time as to what factors the Joint Taxation Committee believes should enter into the residency determination. The above is merely intended to be a list of factors that Finance and the CRA might consider relevant.

Procedural Issues to Consider

In addition to the factors that will enter into a decision, taxpayers need guidance on procedural matters, including the following:

- a) According to paragraph 53 of Information Circular IC 71-17R5, a competent authority agreement is not considered to be a precedent for subsequent taxation years. Will it be necessary for a 94(3) Trust to make a request for each taxation year or will a decision continue to apply as long as there are no material changes in the facts?
- b) When should a competent authority request be made? Can it be made during a particular year or should it be made only after an assessment has been issued by the CRA?

¹ These guidelines would be specific to 94(3) Trusts and would be in addition to the information currently published in Information Circular IC 71-17R5.

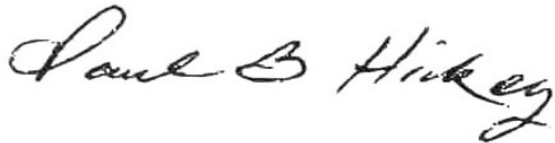
c) Should a competent authority request also be sent to the competent authority of the country of factual residence?

CRA Assistance in Obtaining Refunds of Excess Tax Withholdings?

There is a further matter on which 94(3) Trusts may require assistance from the Canadian competent authority. This assistance could be required where the trust is a resident of Canada for the purposes of a particular tax treaty with another country (not necessarily the country in which the trust is located). If tax is withheld on payments to the trust from that country at a rate in excess of the rate stated in the tax treaty, will competent authority assist the trust in attempting to obtain a refund of the excess tax?

We hope that the foregoing is of assistance to Finance in its discussions with the CRA on competent authority requests made by 94(3) Trusts. We thank you for the opportunity to provide comments on this matter.

Yours truly,



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Cc Mr. Brian Ernewein, Dept of Finance
Mr. Wally Conway, Dept of Finance