tax notes international®

Recent Changes to Canada's Income Tax Laws Affecting Cross-Border Trusts and Estates: An Update

To the Editor:

In a recent issue of *Tax Notes International*, we discussed the 2018 legislative amendments to the cross-border anti-surplus-stripping rule in section 212.1 of the Income Tax Act (Canada). As drafted, the section would have inappropriately — and retroactively — frustrated post-mortem "pipeline" planning designed to avoid double taxation when a Canadian estate has nonresident beneficiaries. (See "Recent Changes to Canada's Income Tax Laws Affecting Cross-Border Trusts and Estates," *Tax Notes Int'l*, Oct. 28, 2019, p. 341.)

This concern has recently been alleviated by a comfort letter issued by Canada's Department of Finance (Finance Canada) on December 2, which was announced at the Canadian Tax Foundation's 71st annual Tax Conference on December 3. Finance Canada agreed that the application of the new look-through rule paragraph 212.1(6)(b) ITA can give rise to results in the post-mortem context that are not consistent with current tax policy. Finance Canada stated:

> [W]e are prepared to recommend to the Minister of Finance that the [ITA] be amended to exclude, from the application of paragraph 212.1(6)(b) [ITA], dispositions of shares by a Canadian resident graduated rate estate 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.

In the comfort letter, Finance Canada appears to have acknowledged that the potential applicability of the new look-through rule to post-mortem pipeline transactions was unintentional, and it appears that such planning should generally remain available for Canadian estates with nonresident beneficiaries.

However, care should be taken to ensure that the estate in question qualifies as a "graduated rate estate" (GRE) at the time the pipeline is implemented. Very generally, an individual's GRE is the estate that arose on, and as a consequence of, the individual's death, if the estate qualifies as a "testamentary trust" as defined in the ITA (the estate will cease to qualify as a GRE 36 months following the individual's death).

Taxpayers and tax practitioners should also be mindful of the potential application of the new look-through rule to fact patterns outside of the limited circumstances involving post-mortem pipelines and GREs addressed in the comfort letter. For instance, post-mortem pipelines implemented for testamentary spousal trusts (which would not qualify as GREs) with nonresident beneficiaries and pipeline planning for *inter vivos* trusts with nonresident beneficiaries would still appear to be caught by the new look-through rule. ■

Rhonda Rudick and Olivia Khazam
Davies Ward Phillips & Vineberg LLP
Montreal
Dec. 18, 2019

© 2019 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes® International* content, please visit www.taxnotes.com.