Member Advisory

April 2016

2014 Canada Revenue Agency (CRA) Tax Roundtable

The annual Canada Revenue Agency (CRA) Roundtable Meeting was held in May 2014. A number of CRA representatives were in attendance, along with representatives from the profession.

As in previous years, two concurrent roundtable sessions were held, one focusing on GST issues and the other on income tax matters. All participants also attended a general wrap-up session.

For more information on the session, or on the 2016 Roundtable, contact Director of Professional Services Larry Brownoff, CPA, CA at lbrownoff@cpaalberta.ca or call 1-800-232-9406.

The responses are provided by CRA for information purposes only and relate to provisions of the law and policies in force at the time of publication and are not a substitute for the law. Responses might not extend to all situations and are not determinative of the tax treatment of a specific taxpayer's situation.

2014 CRA Roundtable

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Income Tax Questions

1. Contingent Liabilities – Post *Daishowa*

Based upon the historically published positions of CRA, please comment and/or confirm whether the following points, in the context of a purchase of business assets between arm's length parties, are a fair summary of CRA's position on contingent liabilities for the time period prior to May 23, 2013:

(a) The vendor's proceeds of disposition include the fair market value of the contingent liability.
(b) The asset cost to the purchaser does not include the contingent liability until the contingency has occurred.
(c) Once the purchaser pays the contingent liability, the amount is on account of capital and is added to the purchase price of the assets.

Assuming the above represents a fair summary, can the CRA comment on whether the above is still a fair summary after the Supreme Court of Canada's decision on May 23, 2013 in *Daishowa-Marubeni International Ltd. v. R.*? If the above does not represent the CRA's views post *Daishowa*, can the CRA comment on what deviations it may have from the above?

Post *Daishowa*, is CRA of the view that the fair market value of a contingent liability (that has the characteristics described in the decision) be required to be included at its fair market value in the application of paragraph 85(1)(b) when two arm's length parties are determining the agreed amount in the context of a purchase of business assets between them?

Would the answer to the above question change if it was in the context of a non-arm's length inter-corporate reorganization?

CRA's Response

The issue in the Daishowa-Marubeni (DMI) case (2013 SCC 29) was whether the vendor was required to include in its proceeds of disposition, on the sale of forest tenures, the amount of its reforestation (silviculture) obligations that were assumed by the purchaser. The SCC decided that the reforestation obligations were not a distinct existing liability and therefore should not be included in the proceeds of disposition. Instead, the reforestation obligations were "embedded" in the forest tenures and therefore, depressed their value. The SCC also stated that, as an embedded future cost, the reforestation obligations were properly excluded from the proceeds of disposition regardless of whether they are contingent or absolute.

It is the CRA's position that the DMI decision generally applies to reforestation obligations in the forest industry and to reclamation obligations in the mining and oil and gas industries, where such obligations are embedded in the related tenures or rights, as they cannot usually be

severed. Accordingly, the assumption of such an obligation by a purchaser of those tenures or rights should not be included in the vendor's proceeds of disposition. However, depending on the facts, there may be exceptions to this general position.

The CRA's position does not apply to sales transactions outside the resource industries nor to other obligations or liabilities, whether they are contingent or absolute. It should be noted that the decision in the DMI case does not apply where there is a distinct, existing liability, as opposed to an embedded obligation.

2. Restrictive Covenants

Subsection 56.4(2) of the *Income Tax Act* includes in computing a taxpayer's income the total amounts received in respect of a restrictive covenant granted by the taxpayer, subject to certain exceptions, such as those provided in subsection 56.4(3).

(a) One of the conditions for the exception to the income inclusion rule is that the amount of the restrictive covenant granted by the taxpayer must be consideration for an undertaking by the particular taxpayer not to provide, directly or indirectly, property or services in competition with the property or services provided or to be provided by the purchaser (or by a person related to the purchaser) – see subparagraph 56.4(3)(c)(ii).

It is common for the taxpayer disposing of his or her business to grant restrictive covenants that include non-competition, non-solicitation of employees and suppliers, and confidentiality restrictions.

A strict reading of subparagraph 56.4(3)(c)(ii) appears that the exception provisions only apply if the restrictive covenant grant relates to non-competition and the exception may not apply to other types of restrictive covenants such as non-solicitation and confidentiality provisions.

Can the CRA please provide its comments on the above?

CRA's Response

As indicated by the Department of Finance in response to Question 14 of the 2009 association de planification fiscal et financière ("APFF") Round Table, where a vendor grants a non-competition covenant to the purchaser, such an undertaking would normally include the requirement not to solicit the employees of the purchaser. We generally agree with that view; however, a determination as to whether or not the various covenants (e.g., non-solicitation covenants) provided are in respect of a non-competition agreement remains a question of fact that can only be evaluated on a case-by-case basis.

(b) Subsection 56.4(7) provides a number of conditions that must be met for the exception to the application of the "deemed receipt" rule under paragraph 68(c) to restrictive covenant grants by taxpayers. One of the conditions is paragraph 56.4(7)(d) and states that no proceeds are received or receivable by the vendor for granting the restrictive covenant. As the CRA knows, some form of consideration, usually a nominal amount, must be granted in order to ensure that a contract is legally valid.

Will the CRA consider this nominal amount as proceeds, thereby making the condition under paragraph 56.4(7)(d) invalid?

CRA's Response

While we understand that a nominal amount of consideration may be given by the parties in a contract relating to a restrictive covenant to ensure that the contract is legally binding, it is the CRA's view that this would still constitute an amount of proceeds received or receivable by the particular party for granting the RC. As such, the exceptions set out in subsection 56.4(6) and (7) could not apply because the respective conditions in paragraph 56.4(6)(e) and paragraph 56.4(7)(d) would not technically be met. In such cases, the amount of proceeds (or any additional amount deemed by paragraph 68(c)) received or receivable by the taxpayer for the RC would be taxable as ordinary income under subsection 56.4(2) unless one of the three exceptions in subsection 56.4(3) otherwise applies.

As such, taxpayers seeking relief in these circumstances may want to contact the Department of Finance Canada to outline their concerns on this issue.

3. Personal service business

The significant consequences of a corporation being determined to be carrying on a personal service business make this area a matter of concern to many of our members. Can the CRA please comment on the following?

(a) If a corporation is determined to be a PSB, such that its income is not eligible for the small business deduction but enhances the general rate income pool (GRIP), would the CRA permit a late eligible dividend designation, pursuant to Subsection 89(14.1), given the taxpayer would have been unaware they could legitimately designate dividends as eligible at the time they were paid?

CRA's Response:

In a situation where the CRA determines that a corporation is not eligible for the small business deduction because the CRA considers the company to be a personal services business, in certain circumstances, the CRA may consider a late eligible dividend designation under subsection 89(14.1), when the following conditions are met:

- *the company's general rate income pool is sufficient to avoid an excessive dividend designation;*
- *the late designation request does not involve aggressive tax planning;*
- *the company has carefully examined the rules governing the small business deduction and the definition of a personal services business before completing its statement of income and the company had serious arguments to conclude that they were entitled to the small business deduction;*
- *the company or its representatives have not shown to be carefree in the implementation of the provisions of the Income Tax Act in respect of personal services businesses and the small business deduction.*

Such determinations are a question of fact which must be decided on a case-by-case basis, after a review of all the facts and circumstances surrounding each specific situation. Any request for a late dividend designation, along with the reasons why it would be just and equitable to permit the late designation, should be sent directly to the company's appropriate Taxation Centre.

(b) Paragraph 18(1)(p) of the *Income Tax Act* contains limitations on expenses that may be deducted in computing the income from a personal services business. Subparagraph 18(1)(p)(ii) allows the deduction of "the costs to the corporation of any benefit or allowance provided to an incorporated employee in the year". Would the CRA comment upon the types of benefits contemplated by subparagraph 18(1)(p)(ii) that would be allowed as a deduction in computing the corporation's income from a personal services business? Would this include any expenditure determined to result in a taxable benefit to the incorporated employee?

(c) In particular, would the corporation be entitled to deduct the costs relating to a vehicle provided to the incorporated employee for his or her use?

CRA's Response (b) & (c):

In general terms, a "personal services business" is defined in subsection 125(7) of the Act and is carried on by a corporation in the business of providing services in circumstances where the specified shareholder (the "incorporated employee") of that corporation would, if it were not for the existence of the corporation, reasonably be regarded as an officer or employee of the entity to whom the services were provided. Paragraph 18(1)(p) of the Act limits the expenses that may be deducted by a personal services business. However, subparagraph 18(1)(p)(ii) allows the deduction of "the costs to the corporation of any benefit or allowance provided to an incorporated employee in the year." Any benefit or allowance as described in subparagraph 18(1)(p)(ii)is not restricted to paragraph 6(1)(a) benefits or 6(1)(b) allowances.

The following expenses would be deductible pursuant to subparagraph 18(1)(p)(ii) to the extent that, in accordance with the post-amble of paragraph 18(1)(p), the expenses would be deductible if the corporation were not carrying on a personal services business:

- *Contributions to a Private Health Services Plan for the incorporated employee (see IT-339R2)*
- *Contributions to an Employee Profit Sharing Plan for the incorporated employee (see IT-280R)*
- *A retiring allowance (as defined by subsection 248(1) of the Act) paid to an incorporated employee*
- *A car allowance (fixed monthly amount) paid to the incorporated employee. However, the corporation could not deduct the costs relating to a vehicle provided to the incorporated employee for his or her use.*

(d) Is an audit initiative with respect to whether or not corporations are carrying on a personal services business planned, or currently occurring?

CRA Response:

There are no national projects involving personal service corporations at this time.

4. Surplus stripping

At the Canada Revenue Agency Round Table discussion held at the 2013 annual Canadian Tax Foundation conference, the CRA advised that they viewed surplus stripping on a spectrum. At one end of the spectrum, the CRA commented that an arm's length sale of shares of a corporation that carries on an active business would be a form of surplus stripping that is acceptable to the CRA. However, where surplus stripping results in completely untaxed proceeds of disposition rather than a taxable dividend, such a result was considered to be unacceptable surplus stripping to the CRA that should be taxed as a dividend to the recipient of the proceeds.

Would the CRA comment upon whether they would consider that the general anti-avoidance rule or some other specific provision in the *Income Tax Act* should apply to re-characterize proceeds of disposition as a dividend in the following circumstances:

(a) An arm's-length sale of shares in a corporation where the resulting taxable capital gain is included in the vendor's income.

(b) An arm's length sale of shares in a corporation where the resulting taxable capital gain is reduced in whole or in part by losses of the vendor.

(c) An arm's length sale of shares in a corporation where some or all of the taxable capital gain is reduced by the capital gains deduction.

CRA's response:

The Canada Revenue Agency cannot provide specific comments on the application of the general anti-avoidance rule (GAAR) or some other specific provision in the Income Tax Act (the "Act") with respect to the situations described in a), b) and c) of your question. An analysis of all the relevant facts and circumstances surrounding a particular situation would be required to reach a conclusion in that particular situation. Such analysis would be done on a case-by-case basis.

When reviewing the application of specific provisions of the Act (such as subsection 84(2), subsection 84(3) or section 84.1) or the GAAR, the relevant facts and circumstances surrounding a particular situation would include the following:

- *a description of the business carried on by the corporation, if any;*
- *the nature of the underlying assets of the corporation (and particularly the amount of cash or near-cash);*
- *the tax attributes of the shares of the capital stock of the corporation;*
- *the number of shares sold to the arm's-length person;*
- *the amount of the corporate surpluses;*
- *the other transactions occurring in the same series of transactions or events; and*
- *the tax consequences resulting from the transactions.*

The CRA would examine all the relevant facts and circumstances before and after the transactions are completed.

Although the examination of the facts and circumstances is done on a case-by-case basis, the

CRA is particularly concerned with some specific types of situations, such as the following:

- *the use of a corporation to accommodate the acquisition of a departing shareholder (see 2012 Canadian Tax Foundation Annual Conference – CRA Panel[1]);*
- *the sale of shares of the capital stock of a corporation having limited activity, most of the assets of which are cash or near-cash;*
- *the "in-house" monetization of the capital gains deduction;*
- *the shifting of the paid-up capital between individuals and corporations;*
- *paid-up capital fabrication (see 2012 Canadian Tax Foundation Annual Conference – CRA Panel[2]); and*
- *75(2) strip plans (see 2012 Canadian Tax Foundation Annual Conference – CRA Panel[3]).*

5. Assessments – Due Dispatch

In Ficek v Attorney General (Canada), 2013 FC 502, the CRA refused to assess a taxpayer's return because she had participated in a particular charitable donation tax shelter. The Federal Court held that the CRA's refusal to assess the taxpayer's return until the tax shelter had been audited violated the Minister's duty under subsection 152(1) of the *Income Tax Act* to assess her return "with all due dispatch," as it found that the CRA delayed the assessment to discourage taxpayers from participating in similar arrangements in the future and not to ascertain the taxpayer's liability.

The CRA did not appeal that decision. However, the CRA has stated that it will continue to delay assessing the returns of taxpayers who participate in charitable donation tax shelters until it has audited the tax shelter. On what basis is the CRA disregarding the Federal Court's decision in Ficek?

CRA's Response:

For the 2013 tax year, the Canada Revenue Agency (CRA) will not assess taxes owed or provide a refund to taxpayers who claim a tax credit under a gifting tax shelter scheme until the CRA has audited the tax shelter. However, if a taxpayer makes a claim under a gifting tax shelter scheme, the taxpayer can have his or her tax return assessed before the related tax shelter has been audited if they agree to remove the claim from their return.

Holding the assessment of a participant's tax return prevents an invalid refund from being issued. This protects participants because the CRA does not have to:

- *take collection action on the participant once the audit is completed to recover an invalid or overstated refund; or*
- *charge the participant additional arrears interest and potentially increase certain penalties.*

[1] Mickey Sarazin, "The Income Tax Rulings Directorate and Its Interaction with Practitioners", *Report of Proceedings of the Sixty-Fourth Tax Conference*, 2012 Conference Report (Toronto: Canadian Tax Foundation, 2013), 5:1-17, at 5:12.
[2] Ibid, at 5:16.
[3] Ibid.

The CRA has to date denied more than $5.9 billion in donation claims and reassessed over 182,000 taxpayers who participated in gifting tax shelter schemes.

6. Exchange of Information with IRS

It is our understanding that income reported on some U.S. 1099 slips are being matched to Canadian returns, presumably with IRS cooperation under treaty. With the U.S. implementation of a requirement that slips be filed for all accounts generating $10 or more of interest, and the FATCA-motivated Intergovernmental Agreement, the information provided to CRA will presumably increase markedly. With that in mind:

(a) What U.S. slips is the CRA using to confirm income and which ones are part of the matching program?

CRA's Response:

While it is well-known that the CRA exchanges information automatically with some of its treaty partners, the CRA does not comment on the details of those exchanges. Taxpayers should expect that it is possible to automatically exchange any bulk information collected and that our treaty partners may send information spontaneously that may be of interest to the CRA. As you know, the CRA also exchanges information on request with treaty and Tax Information Exchange Agreement partners.

(b) Specifically, what additional types of slips and information will the CRA be obtaining with regards to the new Intergovernmental Agreement relating to FATCA with the U.S.?

CRA's Response:

Article 2 of the Intergovernmental Agreement states the information that will be exchanged for FATCA.

That is: with respect to each Canadian Reportable Account of each Reporting U.S. Financial Institution:

(1) the name, address, and Canadian TIN of any person that is a resident of Canada and is an Account Holder of the account;
(2) the account number (or the functional equivalent in the absence of an account number);
(3) the name and identifying number of the Reporting U.S. Financial Institution;
(4) the gross amount of interest paid on a Depository Account;
(5) the gross amount of U.S. source dividends paid or credited to the account; and
(6) the gross amount of other U.S. source income paid or credited to the account, to the extent subject to reporting under chapter 3 of subtitle A or chapter 61 of subtitle F of the U.S. Internal Revenue Code.

The format for exchanging the information is still under discussion.

(c) Of specific concern is that income reported on a 1099, or another U.S. form, could be included in various areas of a T1 that may be overlooked in the matching process (a problem already faced with Canadian slips). As well, we are aware of some organizations which issue both U.S. and Canadian reporting slips, for example to Canadian resident citizens of the United States, or to Canadians investing in U.S. investments required to file with the IRS. What steps will CRA take to ensure that the income reflected on these U.S. slips, which do not perfectly match income categorizations used in Canada, is not already on the relevant return? The problems faced by our members due to reassessments being undertaken with no prior communication to the taxpayer or their representative have been discussed several times in past Round Tables, with no resolution.

CRA's Response:

When reviewing a potential discrepancy between the income reported by the taxpayer and the information slips on records, staff are instructed to review the taxpayer's and/or the spouse or common-law partner's return, attachments, historical notes and documents, as well as prior-year files, to determine if a reassessment is warranted. Every effort is made to provide taxpayers with correct assessments. If staff determine from the information on record, e.g. information slips, past history, paper returns, documents, etc., that a reassessment is fully warranted, no contact is made. However, if the information available is not sufficient to determine if a reassessment is warranted, staff are directed to contact the taxpayer by telephone to resolve the file in the most efficient manner. Due to the volume of files reviewed each year, it is impossible to contact every taxpayer and/or representative before proceeding with a reassessment.

7. Loans to Shareholders

The question is best illustrated with a hypothetical example. A Partnership (P) has three partners, being an individual (I), a corporation (GP) and a trust (T). The shareholder and director of GP are related to I. The trustee of T is I and all beneficiaries are related to I. Based on these relationships, none of the entities act at arm's length. P has accumulated earnings, but has not distributed or returned capital to any partners. P has advanced a loan to T in the amount of $100 without any set repayment terms. The loan does not meet any of the exceptions which would exempt it from Subsection 15(2) if it were considered a loan subject to that provision.

The Norco Development Ltd. case (85 DTC 5213) stands for the proposition that assets and liabilities of a partnership are generally assets and liabilities of the partners, as Section 96 deems the partnership to be a separate person for only limited purposes of the Act. With this in mind, we have the following questions:

(a) Does the CRA consider that S 15(2) applies to T on the basis that GP, as a partner of the trust, is a partial owner of the indebtedness due from T to LP?

CRA Edited Question: Eliminates the presence of a trust; the trust does not impact the issues involved in this question therefore CRA reduced the question to its simplest form for illustrative purposes:

> A partnership (P) has **two partners**, being an individual (I) and a corporation (GP). The shareholder and director of GP are related to I. Based on these relationships, the parties do not deal at arm's length. P has accumulated earnings, but has not distributed or returned capital to any partners. P has advanced a loan to I in the amount of $100 without any set repayment terms. The loan does not meet any of the exceptions which would exempt it from subsection 15(2) if it were considered a loan subject to that provision.
>
> Assuming the Norco Development Ltd. case (85 DTC 5213) stands for the proposition that assets and liabilities of a partnership are generally assets and liabilities of the partners, as section 96 deems the partnership to be a separate person for only limited purposes of the Act, we have the following questions.

(a) Does the CRA consider that subsection 15(2) applies to I on the basis that GP, as a partner of P, is a partial owner of the indebtedness due from I to P?

CRA's Response:

Assuming that all parties are not dealing with each other at arm's length as stated in the facts, subsection 15(2.1) should apply such that the person (i.e., I) is connected with a particular corporation (i.e., GP) because I is not dealing at arm's length with the shareholder of GP.

Therefore, when applying subsection 15(2) to the scenario presented, a person (i.e., I) is connected with a shareholder of a particular corporation (i.e., GP) and has in a taxation year received a loan from a partnership (i.e., P) of which the particular corporation is a member (i.e. GP).

Subsection 15(2) therefore applies to I based on a reading of the provision. GP is a member of the partnership that issued the loan to I and, as stated in the facts, I is not dealing at arm's length with GP.

(b) Assuming the answer to (a) is Yes, would the income inclusion to I be:

(i) $100, the full amount of the loan, because a corporation connected to I is a partner?

(ii) $100 X GP's proportionate interest in the partnership (i.e., proportionate interest could be based on capital, income, or something else?), on the basis that this proportion is GP's proportion of the loan to I?

(iii) Dependent on the facts, as each partner's contribution to the funds used to advance the loan would be relevant?

CRA's Response:

b)(i) Yes, based on a reading of subsection 15(2), the income inclusion to I would be $100.

Refer to our response to question (a).

b)(ii) No. See response to question (a) and (b)(i).

b)(iii) No. See response to question (a) and (b)(i).

(c) Would the answer to question (b) vary if GP were the general partner of P and I were the limited partner, such that the decision to advance the loan was GP's alone?

CRA's Response:

No. The answer to question (b) should not change.

(d) Alternatively, would the fact that P's funds used to advance the loan were not advanced to P by any corporation mean that no corporation has advanced funds to I, such that Subsection 15(2) would not apply?

CRA's Response:

No. The answer to question (a) should not change.

(e) Initially stated: Assume the advance was instead a drawing by T from its partnership interest.

(i) Would this remove the application of Subsection 15(2)?
(ii) If Subsection 15(2) had previously been applied, would this constitute repayment for purposes of a deduction under paragraph 20(1)(j)?
(iii) Would the CRA's answer differ depending on whether T's equity account was sufficient to cover this withdrawal?

e) **CRA edited:** *Assume that instead of a loan for $100, it was a drawing by I from his partnership capital account.*

(i) Would subsection 15(2) apply if the drawing by I from his partnership capital account exceeded his proportion of partnership capital?
(ii) If subsection 15(2) applies in (e)(i), would the subsequent allocation of income to I's partnership capital account constitute a repayment for purposes of a deduction under paragraph 20(1)(j)?
(iii) Would the CRA's answer differ depending on whether I's partnership capital account was sufficient to cover this withdrawal?

CRA's Response:

(e)(i) No. Subsection 15(2) should not apply in this scenario.

This is based on paragraph 79 in Erb v. R (2000) 1 C.T.C 2597 (TCC). In this paragraph, Justice Bowman stated "…the law is clear that where a partner's capital account falls into a deficit position, or to use the current colloquial expression 'goes negative,' this does not create indebtedness." At paragraph 80 he stated: "Even if I were to conclude that one could find in

the excess of the drawings over the allocated income an 'indebtedness,' it would seem that as a matter of statutory construction the specific provisions relating to withdrawals from a partnership would override the more general provisions of subsection 15(2), which deal broadly with a variety of types of indebtedness to corporations and partnerships. Generalia specialibus non derogant. "

Additionally, at paragraph 83, Justice Bowman stated that "the provisions that I have summarized contain a specific and complete code on one relatively narrow aspect of the fiscal consequences of being a partner. To import into the Act a presumption of indebtedness whenever a partner's capital account falls into a deficit position, with the consequent application of subsection 15(2), is in my view contrary to the scheme of the Act and the explicit provisions of subsections 53(1), 53(2), 40(3), 98(1) and 100(2)."

e)(ii) No. In order for paragraph 20(1)(j) to apply, subsection 15(2) must apply to include the amount of the loan or indebtedness into I's income. Refer to response to question e)(i).

e)(iii) No. See response to question e)(i).

8. CRA 13 / CPA 19) Section 116 Compliance Certificates – Comfort Letters

We understand the volume of T2062 – *Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property* forms filed with the CRA has increased significantly of late and consequently the turnaround time for issuing compliance certificates is often several months. In the past, the CRA would issue "comfort letters" to applicants, allowing purchasers (or their agents) to retain the required withholding amounts beyond the remittance date, until such time as a compliance certificate is issued or a demand for payment by the CRA is made. Recently, however, it appears that the CRA has stopped issuing these comfort letters.

Please advise whether there has been a change in policy in this regard and, if so, the reasons for such change.

CRA's Response:

We will issue a "comfort letter" if:

- *the purchaser's and/or vendor's representative contacts the Agency and requests one; and,*
- *the date on which a purchaser remittance is required is coming due; and,*
- *a Certificate of Compliance has not yet been issued.*

We will review the request for a comfort letter to ensure that the following minimum conditions have been met prior to issuing the letter:

a) We have received the T2062 in question;
b) We have reviewed the contract of purchase and sale agreement to verify the completion date; and
c) We have confirmed that the requestor of the comfort letter is the authorized representative of the vendor.

9. CRA 18 / CPA 25) Costs of Representation

Question 8 of the 2011 Round Table addressed the costs of responding to CRA enquiries and requests for information. CRA referred to Paragraph 7 of IT 99R5, which indicates "[a] taxpayer may deduct amounts expended in connection with legal and accounting fees incurred for advice and assistance in making representations after having been informed that the taxpayer's income or tax for a taxation year is to be reviewed, whether or not a formal notice of objection or appeal is subsequently filed."

In CRA document 2012-0437831E5, CRA indicated costs incurred with respect to a voluntary disclosure were not deductible, as they were neither incurred to earn income from business or property, nor in relation to an objection or appeal. In the Tracey Ridout decision (2013 TCC 260), the Tax Court upheld CRA's denial of fees incurred in filing a claim for the taxpayer's disabled child, commenting that Paragraph 60(o) applies only to fees related to an objection or appeal. It would seem that taxpayers wishing to ensure their costs, particularly costs unrelated to income from business or property, are deductible would be well-advised to arrange their affairs to link such costs to an objection or appeal. For example, it seems that Ms. Ridout may have had greater success obtaining a deduction if she had filed an Objection, at least in respect of the tax year(s) still open for objection, rather than requesting adjustments under the usual T1 Adjustment (and taxpayer relief) process.

(a) Has CRA's policy on the costs of responding to CRA information requests set out in IT 99R5 been reviewed since the 2011 Round Table, or does CRA consider such costs relate to a potential objection which could arise from the review of such claims and therefore fall under paragraph 60(o)?

CRA's Response:

Paragraph 60(o) allows taxpayers to deduct reasonable fees and expenses incurred and paid for advice or assistance in respect of an objection or appeal even if the expenses are not otherwise deductible (for example, section 9 or paragraph 8(1)(f)). As explained in the last sentence of paragraph 7 of Interpretation Bulletin IT-99R5, "Legal and Accounting Fees [Consolidated]", on an administrative basis, the CRA will allow taxpayers to deduct reasonable expenses incurred to respond to inquiries from the CRA, whether or not a formal notice of objection or appeal is subsequently filed.

We have reviewed the administrative position and we are not prepared to extend it beyond what has already been granted.

As you noted above, CRA document 2012-0437831E5 explains that the CRA does not consider the costs incurred to make a voluntary disclosure to be deductible under paragraph 60(o) nor would they generally be incurred to earn income from a business or property. However, where a taxpayer earns income from a business, the cost of making a voluntary disclosure relating to that business may be deductible as a cost of representation pursuant to paragraph 20(1)(cc).

(b) Clearly many costs incurred in respect of adjusting, or completing, income tax returns are not considered deductible by CRA nor the courts. Can the CRA advise as to their basis for differentiating costs incurred in tax filings between deductible and non-deductible costs? It seems

unreasonable that one taxpayer might engage an advisor to review possible claims and file his return correctly from the outset, resulting in non-deductible fees, where another might file a return with, say, only his T4 slip, then file an objection to advance his other deduction and credit claims, with a similar fee cost, but full deductibility because an objection is filed. However, this appears to be the state of the law.

CRA's Response:

The CRA expects taxpayers to be able to show that the amount claimed is deductible under the Act or fits within the administrative position described in the interpretation bulletin.

(c) While CRA administrative policies may permit the deduction of some costs which do not lead to an objection or appeal, the taxpayer has no assurance that CRA will apply their policy in any given case. Indeed, the Ridout decision noted that similar claims had been allowed by CRA, but CRA had since adopted a policy that they should always be disallowed. As well, administrative policies can be changed at CRA's discretion. If requested by taxpayers, would the CRA support a recommendation to expand the deductibility of costs related to properly filing income tax returns without resorting to the objection or appeals process to legislate their administrative practices and provide greater certainty for taxpayers?

CRA's Response:

The Department of Finance is responsible for federal tax policy and legislation. This is a question of tax policy and should be addressed directly to the Department of Finance.

GST Questions

1. **Arranging for financial services**

The assignment of a right to be paid money falls within the definition of a financial service. Accordingly, in example No. 15 from TIB 105, the CRA has rightfully concluded that an automobile dealership that is assigning a loan is making an exempt supply.

Over the past year there have been audits conducted by the CRA where businesses have been assessed for failing to collect the GST/HST on referral fees where the businesses have assigned the loan agreement to a financial institution; this is consistent with the above example.

Currently there are a number of these assessments under appeal that are awaiting decisions, with various industry groups and practitioners making representations on these matters.

Is the CRA in the process of developing or coming to some sort of understanding with various industry groups on the treatment of the loan agreements that are assigned?

Will the CRA be publishing any additional information to provide clarity on these fees and transactions?

CRA's Response:

When considering whether an intermediary is arranging for a supply of a financial service, the CRA looks at the facts of each scenario, which includes the parties involved (the supplier, the intermediary and the recipient), all relevant agreements, the normal business practices of the intermediary, and whether that is the predominant element of the supply by the intermediary.

It is first necessary to determine whether the supply that the intermediary is potentially arranging for is actually a financial service. Where, for example, an intermediary is arranging for the transfer or assignment of an agreement for a taxable supply (such as the supply by way of lease or sale of personal property), the intermediary would not be considered to be arranging for a financial service.

The term "arranging for" is generally intended to include intermediation activities that are normally performed by financial intermediaries described in paragraph 149(1)(a)(iii) of the Excise Tax Act (ETA), such as agents, brokers and dealers in financial instruments or money. In determining if an intermediary's service is included in paragraph (l) of the definition of "financial service" found in subsection 123(1) of the ETA and not referred to in paragraphs (n) to (t) of the definition, all the facts surrounding the transaction, including the following factors, must be considered:

1. *the degree of direct involvement and effort of the intermediary in the provision of a financial service referred to in any of paragraphs (a) to (i);*

2. *the time expended by the intermediary in the provision of a financial service referred to in any of paragraphs (a) to (i);*

3. *the degree of reliance either or both the supplier and the recipient have on the intermediary in the course of providing a financial service referred to in any of paragraphs (a) to (i);*

4. *the intention of the intermediary – i.e., it is the intention of the intermediary to effect the supply of a financial service referred to in any of paragraphs (a) to (i); and,*

5. *the normal business activities of the intermediary in a given industry, including whether the intermediary is engaged in a business of providing financial services. Part of this consideration may include if the intermediary is licensed or otherwise regulated by a governing body of some kind.*

A referral service is not considered to be an arranging for service. Thus, where an intermediary receives a fee for referring a person to the provider of a financial service (e.g., a loan), the intermediaries' service would not be included in paragraph (l) of the definition of financial service.

Where an intermediary performs a number of services, including services described in any of paragraphs (n) to (t) of the definition of financial service as part of an agreement to arrange for a supply of a financial service, the single supply of the bundled services may be a supply of a financial service within the ambit of paragraph (l), depending on the facts surrounding the transaction, the above listed factors, and the predominant element of the supply. Please refer to GST/HST Technical Bulletin B-105, Changes to the Definition of Financial Service (TIB B-105), under the heading "Determining whether a supply is a financial service," for additional information on this issue.

One of the exclusionary paragraphs found in the definition of financial service, paragraph (r.4), clarifies that certain services that are preparatory to or provided in conjunction with a financial service are excluded from that definition. Excluded under this paragraph is a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l) of the definition of financial service, or that is provided in conjunction with a service referred to in any of those paragraphs that is:

- *a service of collecting, collating or providing information, or*
- *a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or similar service.*

Regarding the question: *Is the CRA in the process of developing or coming to some sort of understanding with various industry groups on the treatment of the loan agreements that are assigned?*

The CRA has provided and is currently working on providing additional rulings and interpretations concerning these issues involving a variety of industries and relating to specific transactions. It is necessary to ascertain by examining agreements and all other related documentation whether a particular transaction qualifies as a financial service. Each situation must be dealt with on a case-by-case basis. Industry associations and other persons who require guidance in addition to the information published in TIB B-105 are encouraged to contact the CRA directly for a written ruling or interpretation with respect to their particular

situation and to provide copies of the relevant agreements with all of the parties involved (including any intermediaries) in that particular transaction.

Regarding the question: *Will the CRA be publishing any additional information to provide clarity on these fees and transactions?*

TIB B-105, published in February of 2011, provides information on the meaning of the term "arranging for" in the definition of financial service. The CRA will update this publication periodically with examples to reflect the rulings and interpretations issued dealing with new or novel circumstances.

2. Selected Listed Financial Institutions ("SLFI's")

(a) We have encountered pension plan entities that are financial institutions and registered for GST purposes, but are not selected listed financial institutions. We are trying to determine what amounts to include in calculating its "income" under the Income Tax Act for the purpose of paragraph 273.2(c) of the Excise Tax Act.

Can the CRA provide some specific guidance on what amounts must be included in "income" for the purpose of this test under paragraph 273.2(c) of the ETA.

CRA's Response:

Under subsection 273.2(3) of the ETA, a "reporting institution" is required to file an information return with the Minister for a fiscal year of the reporting institution in prescribed form containing prescribed information on or before the day that is six months after the end of the fiscal year. This information return is Form GST111, Financial Institution GST/HST Annual Information Return (Form GST111).

For the purposes of section 273.2, a person, other than a prescribed person or a person of a prescribed class, is a "reporting institution" throughout a fiscal year of the person if

(a) the person is a financial institution at any time in the fiscal year;

(b) the person is a registrant at any time in the fiscal year; and

(c) the total of all amounts each of which is an amount included in computing, for the purposes of the Income Tax Act, the person's income, or, if the person is an individual, the person's income from a business, for the last taxation year of the person that ends in the fiscal year, exceeds the amount determined by the formula:

$$\$1{,}000{,}000 \times A/365$$

where A is the number of days in the taxation year.

As a result, in order to determine whether a particular pension plan entity that is a registered financial institution is a reporting institution it is necessary to determine the pension plan entity's total income for income tax purposes for the taxation year that ends in the particular fiscal year.

It is beyond the purview of the Excise and GST/HST Rulings Directorate of the CRA to comment on the application of the provisions of the Income Tax Act, including the question of what is considered "income" for purposes of that Act. If you would like more guidance on what amounts are to be included in income in a particular situation for purposes of the Income Tax Act, please contact the Income Tax Rulings Directorate, Legislative Policy and Regulatory Affairs Branch. The Directorate has a general enquiries email address where you can send your question: itrulingdirectorate@cra-arc.gc.ca.

(b) Section 284.1 provides that every reporting institution that fails to report or misstates an actual amount when and as required under subsection 273.2(3) is liable to a penalty equal to the lesser of $1,000 and 1% of the absolute value of the difference between the actual amount and zero if the actual amount was not reported, and If the actual amount is misstated, the amount reported.

In situations where a GST registrant does not realize that it is required to file the GST 111 return, will the CRA levy penalties under section 284.1 if they file the return late. For example, if a "de minimus" financial institution neglected to file Form GST 111 for its 2010 and 2012 fiscal years, what penalties will be levied if the pertinent forms are filed late (but accurately) in 2014?

CRA's Response:

The requirement to file an information return for financial institutions that are reporting institutions applies to fiscal years beginning after 2007. Penalties under subsections 284.1(1) and 284.1(2) were introduced to promote compliance and can apply if a reporting institution fails to report an amount as and when required, or misstates such an amount in Form GST111. This would include a situation where a reporting institution files its information returns late, but accurately. It is important to note that a penalty under subsection 284.1(1) or (2) will only apply where the reporting institution did not exercise due diligence.

Subsection 284.1(3) provides the Minister of National Revenue with the authority to waive or cancel penalties payable under this section. This authority is delegated to certain positions in the CRA and is exercised on a case-by-case basis. Generally, penalties would be cancelled or waived where they have resulted from an extraordinary circumstance beyond a person's control which prevented the person from complying with the reporting requirements in section 273.2. The fact that a particular financial institution is unaware of its obligations to file an information return for its 2010-2012 fiscal years by itself would not generally be sufficient justification for the Minister to waive or cancel penalties payable under section 284.1.

However, under the Voluntary Disclosures Program, GST/HST registrants can make disclosures to disclose information they have not provided during previous dealings with the CRA, and may avoid penalty or prosecution if they make a valid disclosure. The CRA's Information Circular IC00-IR3, Voluntary Disclosures Program, provides more information on making a voluntary disclosure and can be viewed on our website at: www.cra-arc.gc.ca/gncy/nvstgtns/vdp-eng.html.

3. 2014 Budget proposed changes to the section 156 Election

(a) Will the CRA be reviewing the filed elections in detail to determine if registrants qualify and will they be sending letters of confirmation?

CRA's Response:

It is the registrants' responsibility to determine whether they are eligible for the election under section 156 of the Excise Tax Act and to file the election in prescribed form containing prescribed information and to specify the effective date of the election or revocation of the election. Confirmation of eligibility may be carried out during a verification or audit process at a later time.

There is no legislative requirement for CRA to issue a notice to a registrant that is making or revoking an election under section 156. When a specified member of the qualifying group jointly elects or revokes a previously made election with another member, both registrants are agreeing to common information with respect to a single or common election or revocation.

(b) Will registrants be allowed to file these elections electronically?

CRA's Response

Work is occurring to permit the electronic filing of the election under section 156. It is anticipated that electronic filing of the election will be available early in 2015 and the paper format will remain available for registrants who do not file electronically. Until electronic filing is available, the election must be made using the paper format. The same legislative requirements that apply with respect to the paper format also apply to electronic filing.

(c) If paper filing is acceptable, where do we send the elections (Tax Centre vs. Tax Services Office)?

CRA's Response

The form is to be sent to a Tax Centre; however, not before January 1, 2015.

(d) Will a new version of the election be published?

CRA's Response

Yes, a new election form RC4616, Election or Revocation of an Election for Closely Related Corporations and/or Canadian Partnerships to Treat Certain Taxable Supplies as Having Been Made for Nil Consideration for GST/HST Purposes is under development and will replace the GST25.

(e) Will elections filed with the old form be accepted?

CRA's Response

Due to significant proposed amendments to section 156, the Form GST25 is being replaced with the new Form RC4616. Where, after 2014, a specified member of a qualifying group elects jointly with another specified member of the group, the election should be filed using the Form RC4616. The Form RC4616 should be filed on or before the day on which the GST/HST

return for the reporting period that includes the effective date of the election is required to be filed. The form is to be filed by the earliest date that a GST/HST return is due from the specified members who intend to make the election.

Where a specified member of a qualifying group has an election with another specified member of the group in effect before 2015 that is still in effect on January 1, 2015, and they are jointly electing to continue to use the election (when all of the eligibility requirements continue to be met), they must also file the Form RC4616. It must be filed after 2014 and before January 1, 2016. In this case, the effective date indicated on the form would be the effective date of the original election.

(f) What evidence will the CRA consider as proof of "reasonable to expect that…" as legislated in (c) (iii) of the definition of "qualifying member" in Section 156?

CRA's Response

It is a question of fact whether a registrant has met all the conditions and is eligible to use the election under section 156 and this will generally be reviewed on a case-by-case basis during the time of an audit process. The CRA would review documents available at that time to support that it is reasonable to expect that:

- *the registrant will be making supplies throughout the next twelve months;*
- *all or substantially all of these supplies will be taxable supplies; and*
- *all or substantially all of the property (other than financial instruments and property having a nominal value) to be manufactured, produced, acquired or imported by the registrant within the next twelve months will be for consumption, use or supply exclusively in the course of its commercial activities.*

4. Rebates

Vendor A sells taxable real property to Purchaser B; Purchaser B tells Vendor A that it is registered for GST/HST, so Vendor A does not charge GST/HST. It turns out, however, that Purchaser B was not registered for GST/HST on the closing date of the transaction. Purchaser B, in turn, sells the taxable real property to Purchaser C who is also not registered for GST/HST. Purchaser B collects the GST/HST from Purchaser C and properly reports and remits this tax to CRA. Since Purchaser B has now made a taxable sale of real property and remains a non-registrant for GST/HST, it would, therefore, be eligible to claim a rebate under section 257 for the Basic Tax Content of the real property supplied to Purchaser C.

Even though Purchaser B did not pay GST/HST when it acquired the real property from Vendor A, could CRA comment on whether Purchaser B would be entitled to the section 257 rebate?

CRA's Response

Subsection 286(1) of the ETA provides that every person who makes an application for a rebate shall keep records in such form and containing such information as will enable the determination of the amount of any rebate or refund to which the person is entitled.

Provisions applicable to various types of rebates are contained in Division VI of Part IX of the

ETA (Sections 252 to 264). Each of these sections provide for certain filing requirements to claim the rebates, including requirements to provide prescribed information.

Section 262 of the ETA sets out the application requirements in respect of rebates under Division VI whereby it requires an application for a rebate to be made in prescribed form containing prescribed information and to be filed with the Minister in prescribed manner. For a rebate application form or the manner of filing that form, "prescribed" means authorized by the Minister. In the case of information to be given on a form, "prescribed" means specified by the Minister.

Form GST 189, General Application for Rebate of GST/HST, includes the requirement to provide an original document and is, thus, a part of the prescribed information. Further, in Part E of the same form, the applicant is required to certify that in addition to any documents submitted with the rebate application, books, records, and invoices are available for inspection, hence bringing all these under the gamut of prescribed information.

As Purchaser B made a false declaration to avoid paying tax to the vendor, Purchaser B would not be able to substantiate that tax became payable and would therefore be unable to meet the documentary requirements to claim a rebate pursuant to section 257 of the ETA.

In addition, the question seems to use the terms "not registered" and "non-registrant" interchangeably. It is important to note that a person may not be registered for GST/HST but that it could still be a "registrant".

Although the facts are insufficient to fully analyze the application of all of the potential provisions that may apply in this scenario, it is also important to note that the false declaration by Purchaser "B" may give rise to penalties under section 285 for knowingly making a false statement in respect of a transaction.

5. Section 167 Election

Would CRA confirm that, where an election is made under section 167 of the ETA between two persons that are **not registered** for GST/HST (e.g., two medical PCs), the form GST44 is not required to be filed with CRA? We have received conflicting responses from CRA, one of which indicated that the GST44 be filed with CRA even though our understanding is that the requirement to do so does not appear in the legislation.

The CRA has provided conflicting responses on the filing of the GST 44 election between two non-registered parties. Please clarify whether this election needs to be filed with the department.

CRA's Response

Subsection 167(1.1) sets out the filing requirements of the section 167 election for the supply of business assets. This subsection provides, in part, that "Where a supplier and a recipient make a joint election under subsection (1) in respect of a supply of a business or part of a business and the recipient, if a registrant, files the election with the Minister…".

Therefore, as noted on the back of the election Form GST44, Election Concerning the Acquisition of a Business or Part of a Business, when the supplier and recipient are both non-registrants, you do not need to file the election form with the CRA. Instead, the recipient must

keep this form or a copy on file.

It is important to note that it is possible, in certain circumstances, for a supply of a business to take place where the personal property is not subject to GST/HST, even without an election under subsection 167(1), if the requirements of paragraph 141.1(1)(b) are met. For additional information please refer to paragraphs 27 and 28 of GST/HST Memorandum 14.4, Sale of a Business or Part of a Business.

6. Construction

A person involved in "commercial activity" puts out a request for bids on a large construction project. To encourage as many quality bids as possible, the person has agreed to pay each unsuccessful bidder (that meets certain criteria) an amount of money. As there is no "supply" at the time the payment is made, nor is there an "agreement for a supply" (since the bids are unsuccessful), would GST/HST attach to the payment? Obviously, this would impact both the person paying the unsuccessful bidders (i.e., would it claim an ITC or not?) as well as the unsuccessful bidders themselves (i.e., would they be required to remit GST/HST as part of the payment received?). Policy 218 did not appear to provide anything on this issue.

CRA's Response

All legislative references are to the Excise Tax Act unless otherwise specified.

Based on the information provided, we understand that the unsuccessful bidders that receive a payment are GST/HST registrants that are engaged in commercial activities in Canada.

Subsection 165(1) provides that every recipient of a taxable supply made in Canada must pay the GST/HST on the value of the consideration for the supply. Furthermore, subject to a few exceptions that are not applicable in the circumstances, subsection 221(1) requires that every person who makes a taxable supply shall collect the tax payable by the recipient in respect of that supply.

Under subsection 123(1), a "taxable supply" means a supply that is made in the course of a commercial activity; a "supply" generally means the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition; and "service" means anything other than property, money, and anything that is supplied to an employer by an employee in the course of or in relation to the employee's office or employment.

Based on the broad definitions of "supply" and "service," it is our view that in the circumstances described, when a registrant submits a bid, it is making a supply of a service. Furthermore, given that the unsuccessful bidder is a registrant engaged in a commercial activity in Canada, the submission of the bid in the circumstances described is a taxable supply for GST/HST purposes.

Subsection 123(1) defines "consideration" to include any amount payable by operation of law. In the case at hand, we note that the person soliciting bids is paying amounts of money "to encourage as many quality bids as possible." It is our opinion that the payment to an unsuccessful bidder represents consideration for a taxable supply of a service made by the

unsuccessful bidder. As such, the unsuccessful bidder will be required to collect the tax payable in respect of the supply, calculated on the value of the consideration.

Under these circumstances, the person requesting bids, as recipient of the supply, may be entitled to claim an ITC for the tax paid or payable, provided that the general rules for claiming an ITC are met.

7. Transactions involving pipelines

(a) Will an amount paid to a landowner for a pipeline easement constitute a sale of real property or will it be considered a lease of real property or will it be deemed not to be a supply by virtue of S162?

CRA's Response:

Amounts paid to a landowner for a pipeline easement in real property would be considered to be amounts paid in respect of a supply of real property. Where a pipeline easement is granted in perpetuity for a single consideration, the supply would generally be considered a supply of real property by way of sale. Where a pipeline easement is not granted in perpetuity, the supply is a supply made by way of an arrangement similar to a lease or licence. Although, in these circumstances, the supply of real property may be considered a right of entry or user for purposes of paragraph 162(2)(b) of the Excise Tax Act (ETA), it is not considered to be in respect of a "right to explore for or exploit a natural resource, a peat bog or deposit of peat or a forestry, water or fishery resource". As such, section 162 does not apply.

The CRA is currently reviewing the policy regarding the phrase the "right to explore for or exploit a natural resource, a peat bog or deposit of peat or a forestry, water or fishery resource" as the phrase is used in paragraph 162(2)(a) of the ETA in light of the Tax Court of Canada's decision in Dunbar[4]. The Dunbar decision resulted in a wider interpretation of the phrase as it is used in the Income Tax Act to include the transportation of barrels of crude oil by tanker to the refinery.

(b) Where land access fees, pipeline easements, and reimbursement of repair costs are all bundled together in one contract for one lump sum fee, who will remit the GST on these taxable supplies (pipeline easement, if sale of real property, will trigger S221(2)(b), whereas other supplies would require vendor to collect tax)?

CRA's Response

Where land access fees, pipeline easements, and reimbursement of repair costs are all bundled together in one contract for one lump sum, an analysis is required to determine whether multiple supplies are being made or whether the fee is being paid for a single supply.

The CRA uses the following principles to determine whether a transaction consisting of several elements is to be regarded as a single supply or multiple supplies:

- *Every supply should be regarded as distinct and independent.*

[4] Dunbar v The Queen 2005 TCC 769

- *A supply that is a single supply from an economic point of view should not be artificially split.*
- *There is a single supply where one or more elements constitute the supply and any remaining elements serve only to enhance the supply.*

Multiple supplies occur when one or more of the elements can sensibly or realistically be broken out.

Conversely, two or more elements are part of a single supply when the elements are integral components; the elements are inextricably bound up with each other; the elements are so intertwined and interdependent that they must be supplied together; or one element of the transaction is so dominated by another element that the first element has lost any identity for fiscal purposes.

It is important that the analysis be confined to the transaction at issue rather than referring to other possible transactions containing the same or similar elements. This process should not involve artificially splitting something that commercially is a single supply. Moreover, when examining an agreement, it should not be viewed in isolation. Rather, it must be examined in the context of other factors such as the intent of the parties, the circumstances surrounding the transaction, and the supplier's usual business practices. It may be appropriate in some cases to discount the terms of an agreement if they do not reflect the reality of the transaction.

It should also be remembered that the way in which the price for a transaction is set out does not itself determine whether there are one or more supplies. A single price does not automatically mean there is one supply. Equally, separately identified prices for certain elements do not necessarily mean that there are two or more supplies.

According to the general rules under Part IX of the ETA, the vendor, if registered for GST/HST purposes, is required to collect and account for the GST/HST on all taxable supplies.

The supply of real property, by itself, is taxable, unless an exempting provision in Schedule V applies. In accordance with paragraph 221(2)(b), the vendor is not required to collect and account for the GST/HST if the supply is made to a person who is registered for GST/HST purposes (provided that the supply is not a supply of a residential complex to an individual). The vendor is also not required to collect the GST/HST if the vendor is a non-resident or is a resident of Canada only because it is deemed to be a resident in respect of activities carried on through a permanent establishment of the non-resident in Canada. Instead, the recipient of the supply is required to account for the GST/HST on the supply and self-assess the tax payable.

If it is determined that the vendor is making a single supply, it will be necessary to determine the nature of the supply. If the supply is characterized as a supply of real property made by way of sale, the vendor will not be required to collect the GST/HST if the conditions of paragraph 221(2)(b) are met. If the single supply is not considered to be a supply of real property made by way of sale, the vendor will be required to collect the GST/HST.

In the case of multiple supplies and one of those supplies is a taxable supply of real property made by way of sale, the vendor would not be required to collect the GST/HST in respect of the supply of real property.

(c) A pipeline company paid a one-time fee to access pipelines buried in vacant land owned by a corporation for the purposes of repair and maintenance to the pipeline. On the basis that corporation is registered for GST purposes, should there be GST collected and paid on this fee?

CRA's Response:

In the absence of additional clarifying information, a fee paid to access a pipeline buried in vacant land is consideration for a taxable supply. Where the corporation providing the access is a GST/HST registrant, the corporation is required to collect tax in respect of the supply.

(d) Both S162 of the *Excise Tax Act* and P110R approach the payment of fees for mineral rights but does not address this situation where the purpose is not to explore/exploit a mineral but to access underground structures used to transport oil/gas.

CRA's Response:

No question is contained in this statement.

8. Bare Trusts

GST/HST Notice 284 provides guidance and offers administrative tolerance for bare trusts and/or Nominee Corporations in relation to Section 273 of the ETA. Will the CRA offer similar administrative tolerance to bare trusts and/or nominee corporations where Section 273 does not apply? For example, if a single operating corporation in a commercial real estate business (i.e. commercial rentals), inadvertently reported the GST collected and claimed Input Tax Credits (ITC) in the GST/HST account of a bare trust that only held legal title, wouldl the CRA offer any administrative relief to the parties involved where the net tax reported is correct?

CRA's Response:

The CRA's position on bare trusts is not new and has been addressed in CRA publications. In 1992, the CRA issued policy statement P-015, Treatment of Bare Trusts under the Excise Tax Act (ETA) explaining that in a bare trust arrangement, the bare trustee only holds legal title and will convey such title on demand in accordance with specific instructions of the beneficial owner(s). There are no discretionary powers performed by a bare trust. Therefore, a bare trustee is not carrying on any commercial activity with respect to the trust property, and thus the trust is not required to register under the ETA.

Then, in 1993, the CRA issued Technical Information Bulletin B-068, Bare Trusts. That publication stated that where a trust is viewed by the CRA as a bare trust, all powers and responsibilities to manage and/or dispose of the trust property would be reserved to the beneficial owner(s). As a result, the beneficial owner(s), rather than the bare trust, would be involved in commercial activities relating to the trust property.

It is recognized that the term "bare trust" may be used somewhat loosely by businesses. If the question is referring to a bare trust at law, then the bare trust has registered in error.

Where a bare trust has registered in error, consideration should be given to making a voluntary disclosure with the CRA in order to correct any misapplication of the ETA.

Assessments have been raised in these types of situations. There are no plans to extend the administrative tolerance explained in GST/HST Notice 284 to bare trusts and/or nominee corporations where section 273 does not apply.

9. Bare Trust

Will a bare trust or nominee corporation that holds legal title to real property be allowed to register for GST purposes if, in addition to holding legal title to real property it also lends its name (to the beneficial owner) to be used in commercial contracts (i.e., on commercial lease (revenue) contracts or on purchase contracts such as the acquisition of utilities)? The bare trust or nominee corporation will not be compensated by the beneficial owner for this "lending of the name". For example, ABC Company Ltd. (a beneficial owner) wishes to be anonymous in a real estate transaction, and thereby chooses to use the name of XYZ Company Ltd., a nominee corporation that owns legal title, on the commercial lease agreements with third party lessees. ABC Company Ltd. is actively operating the commercial leasing business and will report all the income.

Does this "lending of the name" allow XYZ Company Ltd. to register for GST purposes?

CRA's Response:

CRA considers a bare trust to exist where a person (the trustee, such as a nominee corporation) is merely vested with the legal title to property and has no other duty to perform, responsibilities to carry out, or powers to exercise as trustee of the trust property.

The sole duty of a bare trustee is to convey legal title to the trust property on demand and according to the instructions of the beneficial owner(s). This is generally provided for in the trust document or other documents establishing the trust. The bare trustee does not have any independent power, discretion or responsibility pertaining to the trust property. A trust is not considered to be a bare trust where the trustee has other duties which involve independent or discretionary powers and responsibilities. Simply using the name of the trustee on lease agreements in respect of the trust property is not considered to be other duties of the trustee that involve independent discretionary powers and responsibilities. Where a trustee of a bare trust is a nominee corporation, the nominee corporation is not engaged in a commercial activity and is, therefore, not permitted to register for GST/HST purposes.

If a trustee performs functions in addition to holding bare legal title, but does so strictly on the instructions of the beneficial owners without any discretionary powers and is acting as an agent, the trust may still be a bare trust.

Where a person acts under a duty to manage and/or dispose of the trust property, and the person has independent or discretionary power or responsibility to do so, CRA considers this person to be acting as a trustee of the trust and not as an agent of the beneficial owner(s).

In a trust which is called a bare trust, it is necessary to examine the nature of the duties contemplated by the trust to determine whether the principles of agency rather that the principles of trust apply. Once it is determined whether the principles of trust or agency apply, thi, in turn determines whether the trust is considered to be a bare trust, and consequently who, between the beneficial owner(s) and the trustee is required to register for GST/HST

purposes.

To determine whether a trust is required to register for GST/HST purposes, it is necessary to determine who between the trust and the beneficial owner(s) is engaged in commercial activities in respect of the property placed in the trust, assuming the property is not used in exempt activities. The person who makes the supplies, if any, related to the trust property is the person CRA considers to be engaged in commercial activities.

In a bare trust situation, since the beneficial owner(s) are considered to be engaged in commercial activities relating to the trust property, they would be required to account for the GST/HST to the extent of their share of the trust property, file GST/HST returns, and generally comply with the obligations placed on GST/HST registrant under the ETA.