Member Advisory

June 2013

2012 Canada Revenue Agency (CRA) Tax Roundtable

The annual Canada Revenue Agency (CRA) Roundtable Meeting was held in May 2012. 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 2014 Roundtable, contact Director of Professional Services Sean Johnson CA at s.johnson@icaa.ab.ca or call 1-800-232-9406.

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Income Tax Questions

1. Schedule 33 – Taxable Capital

Could the CRA clarify the circumstances under which it expects Schedule 33 to be filed? The form itself indicates that it should be filed where a provincial capital tax return is also being filed. It also indicates the form should be used in determining taxable capital, but is silent on whether it should be filed whether or not the corporation is a "large corporation." We are finding that tax software assumes Schedule 33 should not be filed unless there is a provincial capital tax return, and we note that the questions in the T2 Jacket on taxable capital do not refer to any schedules. Are we correct in understanding the Schedule 33 is only to be filed where a provincial capital tax computation is included in the return? As you may appreciate, most Alberta corporations do not file provincial capital tax returns.

CRA Response:

Schedule 33, Taxable Capital Employed in Canada, is only required to be filed when there is provincial tax on Large Corporations. Currently, the only province with provincial tax on Large Corporations is Nova Scotia. As of July 1, 2012, Nova Scotia will eliminate its provincial tax on Large Corporations.

2. Eligible Dividends

At various Roundtables, including Q14 of the 2010 Canadian Tax Foundation National Conference Roundtable, the CRA has indicated that an eligible dividend which is deemed to be a capital gain or proceeds of disposition pursuant to S 55(2) will not increase the general rate income pool (GRIP) of the recipient, but will reduce the GRIP of the payor.

The definition of "eligible dividend" in S 89(1) refers to "a taxable dividend that is received by a person resident in Canada…" Item E of the definition of general rate income pool in that same subsection provides for a corporation's GRIP to be increased by "an eligible dividend received by the corporation," while Item G reduces a corporation's GRIP by the amount of each "eligible dividend paid by the corporation in its previous taxation year."

If S 55(2) is applicable to a transaction, the dividend received by the corporation "shall be deemed not to be a dividend received by the corporation." As such, it seems appropriate that Item G cannot be applicable because in order to be an eligible dividend the dividend must be "a taxable dividend that is received by a person resident in Canada…" If the amount received is deemed not to be a dividend, then it cannot be an eligible dividend. If it is not an eligible dividend then it cannot reduce the GRIP pool.

If the CRA does not agree with the above analysis, would the CRA support a taxpayer request to the Department of Finance for a technical amendment that restores the GRIP of the dividend payor where subsection 55(2) applies to the recipient?

CRA Response:

It continues to be the position of the CRA that the GRIP of the payer at the end of the taxation year that follows the year in which the corporation would have paid the eligible dividend must be reduced by the full amount of the eligible dividend.

Furthermore, at the time that the dividend is paid by the payer and received by the recipient, the dividend is a taxable dividend that is received by a person resident in Canada for the purposes of the application of the definition of "eligible dividend" in subsection 89(1) to the payer corporation and for the purposes of computing the GRIP of the payer corporation, although this dividend is also received by a corporation resident in Canada in respect of which the latter corporation is entitled to a deduction, pursuant to subsection 112(1), for the purposes of the application of subsection 55(2) to the dividend recipient. In other words, the effect of the deeming provision in paragraph 55(2)(a) should be limited to the dividend recipient and should have no bearing on the computation of the GRIP of the payer.

CRA Document #: E2010-0385991C6
CRA Document #: F2008-0284961C6

3. Guarantee Fees

Could the CRA comment on the classification of income received by shareholders receiving a fee for guaranteeing loans of their corporation? We would note that:

- Document 9119185 indicates the CRA considers such fees to arise from "an undertaking of any kind whatsoever," and thus from a business, based on a measure of court support.
- Document 2002-0121795 indicates such fees would not be business income unless the taxpayer is in the business of providing loan guarantees, and as such would not be earned income for RRSP purposes. The document offers no indication of what the source would be.
- Document 2005-0116281E5 indicates that guarantee fees are "fees for services rendered," and should be reported as such on T4A slips. Such fees would seem to be business income, and we are aware of at least one reassessment where income reflected as such on a T4A was reclassified to business income.

Can the CRA indicate the classification it considers appropriate for guarantee fees received by shareholders guaranteeing corporate debts, and how they should be reported to ensure they are not reclassified by CRA's matching program?

CRA Response:

We cannot envision any circumstance where a guarantee fee would be employment income.

Income from a guarantee fee could be from property or a business depending on the facts. For example, if a taxpayer/shareholder made numerous loan guarantees on a regular basis to a variety of non-arm's length clients (in addition to the corporation they are a shareholder), it would likely be income from a business undertaking. This would especially be the case if the shareholder held themselves out to the public as providing services of this nature. The parallel could be drawn between a financial institution making loans in the ordinary course of their business, contrasted with a taxpayer who only occasionally lends money to an individual or a related business. In the latter case the income would likely be on account of property.

We would also comment that the guarantee fee must be reasonable in the circumstance when paid to a non-arm's length party pursuant to section 67.

4. S 85, S 51 and S 86

Referring to CRA Document 2010-0373231C6, the Agency has indicated that where shares received by a taxpayer in exchange for other shares of the same corporation are not authorized at the time of the share exchange the provisions of subsection 51(1) will not apply. This is contrasted to S 85(2), where the Dale case indicates that the election may be made even if the shares are not authorized at the date of the transaction. This differentiation is based on the fact that S 85(1) requires the consideration received by the transferor "include shares" where S 51(1) requires that shares "be acquired…from the corporation."

In our experience, many transactions to which S 51(1) would apply also meet the criteria for application of S 86(1). The fact that the shares to be issued were not authorized at the date of the transaction would seem to indicate a “reorganization of capital” was required to effect the transactions. S 86(1) requires that shares of the corporation be “receivable,” which seems an even stronger indication the shares need not be authorized at the date of the transaction. Would the CRA agree that the application of S 86(1) is not impeded by the fact that the shares to be received by the transferor are not authorized at the effective date of the transaction?

We would also note that any transaction to which S 51(1) (or S 86(1)) would otherwise apply can be the subject of an election under S 85(1). Would the CRA accept a late election pursuant to S 85(1) where they propose to reassess a taxpayer on the basis that S 51(1) does not apply because the relevant shares were not authorized at the effective date of the transaction? Assuming this would be accepted, would the CRA consider it generally appropriate to waive the usual penalty for a late filed T2057, given the taxpayer intended to effect a transaction on a rollover basis, which failed solely due to the need to amend the corporate Articles?

CRA Response:

The wording used in the various sections referenced above for shares received on a tax deferred rollover is different and therefore can produce different results. In subsection 51(1), shares must be acquired; subsection 85(2) refers to a disposition that includes shares as consideration; in subsection 86(1), property must be received that includes shares.

However, implicit in the legislative provisions is that an exchange occurred and if shares do not change hands it is questionable whether an exchange has taken place. In *Peter Dale and Bernard Dale v. HMQ* 97 DTC 5252 (FCA), there were shares of other classes outstanding at the time the asset was exchanged for the preference shares, so there was a way to elect directors and carry out corporate functions.

If a Section 51 re-organization purports to exchange all the shares of a company as of a particular date, but the company does not actually do so, there could be problems of corporate existence. As a result, the CRA would look at legal and other supporting documentation to determine whether the conditions of subsections 51(1), 86(1) and section 85 have been met in any particular situation. The CRA will be reasonable in its approach in resolving any contentious issues that may arise unless it is determined that the reorganization plan is part of a tax avoidance scheme or a deliberate attempt to circumvent a particular provision of the *Act*.

5. Property Seizure

Where the CRA seizes property of a corporation as part of a debt collection remedy, what steps are taken to insure the safety and maximization of value of the seized property? On a related note, how often does the CRA seize property in satisfaction of a debt?

CRA Response:

When it comes to ensuring the safety and maximization of value of seized personal property, CRA will generally do whatever is reasonable and cost effective, and it should be noted that we are also subject to the *Civil Enforcement Act of Alberta*. In Alberta, CRA engages the services of a Civil Enforcement Agency to oversee the seizure, removal, and sale of personal property. If there are any concerns about the "safety" of the seized goods, those will generally be addressed prior to effecting seizure. For example, special provisions would have to be made for the seizure of perishable goods, livestock, liquor, firearms, or cash. In some instances, CRA may have to purchase short-term insurance coverage for seized personal property. In regards to "maximization of value" of seized personal property, Section 48 of the *Civil Enforcement Act* allows for the sale of the seized property by any commercially reasonable method. The three basic sales options that are available to enforcement creditors are: (1) Public Auction or Sale, (2) Private Sale, and (3) Sale by Tender. Internet venues such as Ebay and Kijiji are acceptable methods of sale. In the case of a private sale, the CRA may obtain an independent appraisal to ensure that any offer to purchase is reasonable. A sale may be postponed if it is commercially reasonable to do so. For example, if CRA has seized seasonal goods, such as golf or ski equipment, it may be prudent to delay sale until the seized items are in season.

It is important to remember that when a shortfall on realization of seized corporate property is anticipated, CRA does have the ability to assess the directors personally for that shortfall (Payroll, GST, Excise Duties, Air Travellers Security & Softwood Lumber).

In regards to the frequency of CRA seizures of corporate property, we do not keep statistics for Alberta. Generally, CRA will only initiate the seizure of corporate property after having exhausted all other avenues of recovery.

6. Children's Arts Tax Credit

a) Can an individual claim, for example, ballet lessons for a child under the Children's Arts Tax Credit and, on a separate invoice, charges for, say, jazz dancing from the same dance studio as the Children's Fitness Tax Credit?

b) Is the CRA reconsidering any of the activities that it previously indicated would qualify for the Children's Fitness Tax Credit on the basis they are more appropriately eligible for the Children's Arts Tax Credit?

CRA Response:

a) The issue is addressed in 2012-0438981M4.

b) Whether a particular activity qualifies for either the Children's Arts Tax Credit or Fitness Tax Credit is a question of fact. Information on the Children's Art Tax Credit is available at www.cra-arc.gc.ca/artscredit and Information on the Children's Fitness Amount is available at www.cra-arc.gc.ca/fitness.

7. Foreign Tuition Fees

Does CRA accept the decision in the *Abdalla* case (2010-3762(IT)I) which notes that the 13 consecutive week test with respect to a university outside Canada may be met if the courses in the year are less than 13 consecutive weeks on the basis that the words in the singular include the plural? Would this concept apply to the three-week test for courses commencing in 2011?

CRA Response:

CRA has recently released Income Tax Folio **S1-F2-C2: Tuition Tax Credit** which may be found at http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/f2/s1-f2-c2-eng.html. Paragraph 2.31 of that folio reflects CRA's interpretation of the recent legislative amendment to subparagraph 118.5(1)(b)(i) of the *Income Tax Act*. It states:

2.31 Where a student is in full–time attendance at a university outside Canada, the tuition fees paid in respect of a course will be eligible for the tuition tax credit under paragraph 118.5(1)(*b*), if the duration of the course is at least:

a) 13 consecutive weeks, for each course within a program of study taken in the **2010 and earlier tax years**; and

b) 3 consecutive weeks, for each course within a program of study taken in the **2011 and subsequent tax years**.

8. Processing Delays

Part I: In a recent letter issued by the CRA acknowledging receipt of CRA form TX19 "*Asking for a Clearance Certificate*" from a particular taxpayer, it was stated that it would be at least 12 months before the request would be looked at. If that processing timeframe is accurate, are any steps being taken to shorten the wait period?

Part II: Similarly, with respect to Objections and estate returns (final T1 and T3 returns), a suggestion to help speed up the process might be to segregate simpler submissions from more technically complex ones. Prior Roundtable discussions have noted that there appears to be increased processing times and we would appreciate receiving information advising as to the steps being taken or considered to address these concerns.

CRA Response:

Part I: CRA's services standard is to address 80% of the TX19 Clearance Certificate requests within 120 days of receipt. However, processing timeframes can vary due to circumstances such as the number of incoming requests, complexity of the requests and staffing.

To help with the timely processing of these requests, please ensure that your clients have included all required documentation applicable to your situation. The list of documents to be submitted is available on the CRA website.

Part II: The Estates and Trusts sections of the TSOs already segregate simpler submissions from more technically complex ones. The Appeals Division has set up the central intake system to enable allocation of Objections to offices where more capacity is available, and is not limited to geographical location. Any additional suggestions from the tax practitioners' community to improve this process will be considered seriously in transparent fashion.

9. Filing of Trust Returns

Paragraph 150(1)(c) of the *Act* sets out when a trust must file an income tax return. Subsection 150(1.1) sets out the exceptions to the requirements to file a tax return under subsection 150(1). In addition, the CRA's T3 Guide sets out the CRA's position on when a trust must file a T3 return. It states that a trustee has to file a return if income from the trust property is subject to tax, and in the tax year the trust:

- has tax payable;
- is a Canadian resident and has either disposed of, or is deemed to have disposed of, a capital property or has a taxable capital gain;
- is a non-resident throughout the year, and has a taxable capital gain or has disposed of taxable Canadian property;
- is a deemed resident trust;
- holds property that is subject to subsection 75(2) of the *Act*;
- has provided a benefit of more than $100 to a beneficiary for upkeep, maintenance, or taxes for property maintained for the beneficiary's use (for more information, see "Line 43 – Upkeep, maintenance, and taxes of a property used or occupied by a beneficiary" on page 21); or
- receives from the trust property any income, gain, or profit that is allocated to one or more beneficiaries and the trust has:
  - total income from all sources of more than $500;
  - income of more than $100 allocated to any single beneficiary;
  - made a distribution of capital to one or more beneficiaries; or
  - allocated any portion of the income to a non-resident beneficiary.

a) We note that the above list is not consistent with subsection 150(1.1). For example, subsection 150(1.1) does not have a requirement to file a T3 return if subsection 75(2) has applied to trust property. Can the CRA please comment on the reasons for some of its administrative positions above that a trust must file a T3 return when such conditions are not in section 150?

b) It has been our members' experience for many years that if a trust does not meet the above conditions, a letter to the Agency advising they meet the exceptions for filing and will not be filing a trust return has been acceptable. In the past year we have had a number of calls from certain Tax Services Office demanding that nil T3 returns be filed. We have discussed this with the persons making the demands to ask if, notwithstanding the information in the T3 Trust Guide, there has been a change in the administrative policy of the Agency. We have not been provided with a response other than it is the Minister's right to demand a return (pursuant to subsection 150(2) of the *Act*). We appreciate that the Agency can at any time demand a return be filed, but wish to know if there has been a change in the Agency's administrative policy set out in its T3 Guide that if here has been no return filed for a particular year that the Minister will demand one. If it is a change in policy, why? And will the T3 Trust Guide be updated to reflect this?

CRA Response:

There are a number of factors outlined in subsection 150(1.1) indicating the circumstances under which a taxpayer would be required to file. If during the review of a file an officer believes that any of the conditions outlined in subsection 150(1.1) exist that would require a return to be filed, it is incumbent on that officer to request that a return be filed. Generally speaking, a communication outlining that the conditions are not met would be sufficient. However, it is not possible to issue a blanket statement on this topic, as each case must be dealt with individually.

We agree that the conditions requiring a return be filed outlined in the T3 Guide do not parallel those in the T1 Guide. This has been noted, and will be reviewed by the program responsible for its publication and amended as required.

10. Balances Due to Trust Beneficiaries

It is fairly common for Trustees of a trust to declare income payable to Trust beneficiaries. As a result, the Trust becomes indebted to the beneficiary for the income payable, but not yet paid, to each beneficiary in order to comply with the conditions for a deduction from trust income pursuant to paragraph 104(6)(b) in conjunction with subsection 104(24). Question 6 of the T3 Trust Return reads *"Did the trust borrow money, or incur a debt, in a non-arm's length transaction since June 18, 1971?"* and requests details of such loans incurred in the year. It seems unlikely a Trust acts at arm's length with its beneficiaries. Does the Agency expect this question to be answered "Yes" for each year in which income in excess of that paid to a beneficiary is payable to them? If not, will CRA modify the return to clarify the specific types of indebtedness they wish to capture?

CRA Response:

The CRA does not expect the Trustee to answer yes to this Question 6. The Agency will consider a modification to the T3 Return when it is next reviewed.

11. Those Old Familiar Favorites

(a) On November 9, 2010, The Taxpayers' Ombudsman made the following recommendation as it relates to the CRA's Appeals process:

> *Once the Appeals Branch has reviewed a taxpayer's objection or appeal and made a decision to confirm, vary, or reverse the CRA's original decision, it should provide the*

taxpayer with the reasons for its decision in writing. These reasons need not refer to every factor or conclusion in the process of reaching the decision, but should be sufficient, when read in context, to show why the Appeals Branch made the decision it did.

Providing reasons means providing basic information about the decision, including a description of the decision, the authority under which the decision was made, a description of the main steps in the decision-making process, and reference to the main factual basis for the decision.

We recommend that CRA either provide these reasons in the body of the decision letter to the taxpayer, or institute a policy that the Report on an Appeals or Summary Report is enclosed with every decision letter.

Can the CRA please provide an update as to whether or not progress has been made towards implementing the above recommendation?

CRA Response:

In response to the Ombudsman's report, effective October 3, 2011 Appeals Officers are required to prepare a detailed final letter to advise objectors of the decision. The letter must provide the reasons for the decision and the authority under which the decision is made.

Specifically, the letter will contain the following 5 elements:

- A standard opening paragraph identifying the assessment under Objection.
- A standard second paragraph stating that the minister has considered the assessment taking into account the representations raised in the Notice of Objection.
- A standard third paragraph stating the overall decision of the Appeals Officer to confirm, vary or vacate the assessment. If the Objector agrees with the decision, it will be stated in this paragraph.
- A brief summary of the Objector's position and reasons for each issue under objection, including the disputed amount.
- The Minister's response to those reasons, which will include the rationale for the decision with reference to the main factual basis and the legislative reference under which the decision was made. The explanation should be sufficient to show why the Appeals Division made the particular decision and should provide enough details to allow the objector to make an informed decision on whether to accept the decisions or to appeal to the Tax Court of Canada.

If the Objector does not agree with the decision, a paragraph will be added stating that an appeal may be made to the Tax Court of Canada within 90 days from the date of the Notice of Confirmation or Notice or reassessment (as the case may by). The letter will also include an enclosure of form RC4443-2 - Appealing Income Tax Assessments to the Tax Court of Canada.

If the Assessment is to be confirmed, the letter will be titled "Notice of Confirmation." The date of this letter will be the start of the 90 day appeal period mentioned above.

If the Assessment is a 'vary' or 'vacate', the 90 day appeal period will start from the date of the Notice of Reassessment.

Letters will have both the Appeals Officer's name and phone number as well as the Team Leader's name and signature, should the Objector have any further questions.

(b) Could the CRA provide an update on the Agency's application of the third party civil penalties provided for under section 163.2 of the *Act*. We would be especially interested in the number of occasions on which the penalties have been considered, the number in which they have been assessed, statistics on any appeals of such penalties and, of course, the circumstances under which such penalties have been applied.

CRA Response:

Here are the statistics as of April 1, 2012:
Total number of cases considered: 181

Assessed:	
Promoters	28
Preparers	36
	64
Inventory:	
Promoters	44
Preparers	27
	71

Closed with no penalty: 46

Assessed Amount: $73.8 million

Statistics from Appeals are not available at this time.

(c) Please provide us with the CRA's latest statistics on the application of the General Anti-Avoidance Rule.

CRA Response:

GAAR Stats at March 30, 2012:

GAAR applied:

Primary position	358 cases	47%
Secondary position	411 cases	53%
Total GAAR Applied:	769 cases	75%
GAAR not applied:	258 cases	25%

Total referrals: 1027

The total does not include:

Project files: 1,363 RRSP strip cases & 78 Barbados Spousal Trust cases.
More than 300 cases to which Provincial GAAR applied.

12. Assisting Foreign Countries' Tax Administration

Foreign countries from time-to-time change the filing requirements of, or the enforcement of filing requirements of, non-residents. Two examples of these changes would be the IRS non-filer compliance initiative aimed at non-resident US citizens and Germany's requirement that all persons receiving social security pensions from Germany file a tax return in Germany, commencing with the 2005 taxation year. As Canada has tax treaties with both the US and Germany, what is the CRA's position with respect to such countries with the identification of Canadian residents targeted by these enforcement initiatives and cooperating with the foreign countries in the collection of any income tax, interest and penalties that may be assessed by the foreign country against Canadian residents? We assume that the answer to this question is that the CRA is bound to follow the terms of the relevant tax treaty. However, can the CRA provide any other additional insight to this matter?

CRA Response:

It is correct that the Canada Revenue Agency (CRA) is required to follow the terms of a relevant tax treaty. We can provide the following additional information with respect to requirements in Germany and the United States:

Germany:

Under the Canada-Germany Income Tax Agreement (the "Agreement"), Germany has the right to tax any benefits paid by the social security legislation of Germany to Canadian residents. The Agreement also provides that any benefits paid by Germany that are exempt from tax in Germany according to their domestic law must also be exempt from tax in Canada.

Effective January 1, 2005, Germany began taxing social security pensions paid to non-residents. The taxation of these payments is being phased in depending on the year the pensioner became entitled to the pension (for further information refer to: http://www.cra-arc.gc.ca/tx/nnrsdnts/ntcs/grmny2005-eng.html). Germany does not withhold tax at source on these pensions, but non-residents of Germany are required to file a tax return in Germany in order to determine their tax liability. Germany is able to identify recipients of German social security to ensure that they are filing tax returns in Germany as required under their law because these payments originate in Germany.

There is an "assistance in collection" provision in the Canada-Germany Income Tax Agreement that would require the CRA to assist in the collection of German tax debt if requested to do so. However, in the case of social security pensions Germany has the ability to recover outstanding taxes by withholding tax at source from the payments.

The German tax administration is working to find ways to simplify compliance with their tax laws regarding social security pensions, and the CRA is cooperating in these efforts. We recommend consulting the CRA website for further information: http://www.cra-arc.gc.ca/tx/nnrsdnts/ntcs/tx-gssp-eng.html regarding the current requirements. The German Embassy has also posted information at: http://www.canada.diplo.de/Vertretung/kanada/en/02/pension/pension-taxation.html.

United States (U.S.):

The U.S. government has the authority to tax its residents and its citizens no matter where they reside and to require that they provide information it considers necessary to verify the amount of tax they owe. The U.S. government also has the authority to charge penalties if an individual does not comply with the filing requirements. Many U.S. citizens residing outside of the U.S. were unaware of their U.S. reporting obligations until recent media coverage; however, the U.S. requirements for filing annual tax returns and other forms, including the Report of Foreign Bank and Financial Accounts (FBAR), have been in place for many years.

The Canada–United States Tax Convention ("the Convention") allows the U.S. to tax its citizens and residents. However, like other tax conventions, it is designed to avoid double taxation when both countries have the right to tax the same income. With respect to the collection of U.S. taxes and penalties, although there is an assistance in collection provision in the Convention, that provision does not allow the CRA to assist the U.S. in collecting tax debts or related penalties that arose when the debtor was a citizen of Canada, or any FBAR penalties.

The U.S. *Foreign Account Tax Compliance Act* is intended to improve U.S. tax compliance involving foreign financial assets and offshore accounts. This act will require financial institutions outside of the U.S. to report directly to the IRS information about financial accounts of U.S. taxpayers or of foreign entities in which U.S. taxpayers hold a substantial ownership interest.

13. Prohibited Investments in an RRSP or RRIF

The March 22, 2011 Budget implemented a complex tax regime for "prohibited investments" held within an RRSP or RRIF. For investments held within such plans prior to the Budget date, transitional rules apply until 2022 to mitigate these issues for affected taxpayers. Assume that a prohibited investment is held in an RRSP or RRIF on March 22, 2012, and therefore qualifies for this transitional relief. If the holder of the plan dies, and the plan assets, including the prohibited investment, is transferred to an RRSP or RRIF of a surviving spouse (or of a disabled child) as provided for under the *Act*, will the transitional relief remain available, or will this new plan be considered to acquire the prohibited investment subsequent to March 22, 2012, with no further relief available?

CRA Response:

The Income Tax Rulings Directorate ("ITRD") of the CRA is currently reviewing certain questions of interpretation concerning the application of the transitional relief available for prohibited investments held on March 23, 2011, including issues that arise upon the death of the individual who made the election under subsection 207.05(4) of the Act. We will publish the results of our review of these questions when it is completed.

14. Partnership Reporting

We have encountered a number of technical issues in preparing T5013 forms for partnerships, limited partnerships in particular.

a) To what extent does the CRA believe the partnership is required to determine the terms of transactions between individual partners? Schedule 50 requires disclosure of the ACB of partnership interests, and the at-risk amount where applicable. Where a partnership interest is transferred between partners, there is no reason the partnership would have access to the details of such a sale. Without knowing the purchase price, how is the partnership expected to compute the new partner's ACB or at-risk amount? If the CRA believes the partnership is required to maintain such records, please comment on how they believe this can be enforced by the partnership and please consider privacy legislation in your response.

CRA Response:

Partnerships and preparers are not responsible for obtaining and reporting private taxpayer information. CRA expects partnerships and preparers to be responsible only for information that is in their possession.

Preparers and nominees should use only the information available in their books and records and adjusted for tax; i.e. amounts allocated in the T5013 slips.

b) Assuming the CRA believes partnerships are required to maintain records of partners' ACB, would the Agency consider applying similar disclosure requirements to corporations for their shares, including public corporations, and trusts, including income trusts and mutual funds, and debt instruments issued by all entities (such as Government of Canada bonds) as well? While those of us who act for corporations, partnerships and trusts will, no doubt, find this added disclosure onerous, those of us preparing tax filings for investors in such entities will find their work alleviated considerably by receiving ACB information directly from the issuer of the investments.

CRA Response:

No similar disclosure limits for corporations are under consideration. The interaction of a partner's ACB with the partnership is more fluid than that of a shareholder with the corporation. This is to say that when a person buys a share of a corporation, the ACB of that share does not generally change. A partnership interest on the other hand is affected by transactions with and allocations to the partner, as well as transactions only known to the partner. We expect the partnership to calculate a partner's ACB based only on the information the partnership has in its books and records.

The ACB is necessary calculation for a limited partnership to determine what losses to allocate to a limited partner. It is the amount from which the calculation of the at-risk amount (ARA) begins. Therefore, a limited partner must calculate the ACB and ARA to determine the amount of losses that can be allocated. The partner is responsible to assure him/herself that the amounts are correct and make whatever adjustments are necessary.

c) Where a limited partner disposes of his interest, it would have no ACB after that date. Assuming the partner was allocated a share of the loss of the partnership in the year of disposal, does the CRA consider that:

   i. The interest lacks an at-risk amount at year end, such that any loss is denied as a limited partnership loss?
   ii. The loss is deductible to the extent of the at-risk amount immediately prior to the sale?
   iii. Some third possibility not addressed above?

CRA Response:

Proposed subsection 96(1.01) deems a taxpayer who is a former member of a partnership to be a member at the end of the fiscal period in which the taxpayer ceased to be a member, for the purpose of allocating partnership income or loss for that period. This proposed provision clarifies that, although a taxpayer may have ceased to be a member of a partnership before the end of the partnership's fiscal period, an amount of the income or loss of the partnership is allocable to the taxpayer under subsection 96(1). Further, proposed paragraph 96(1.01)(b) specifically provides that for the purposes of the application of paragraph 96(2.1)(b) [i.e., the "at-risk rule"], the fiscal period of the partnership is generally deemed to end immediately before the time that is immediately before the time that the taxpayer ceased to be a member of the partnership. Accordingly, the taxpayer's at-risk amount (as determined under subsection 96(2.2)) in respect of the partnership shall be calculated as at that time; therefore, the limited partner would be able to claim the limited partner's share of the partnership loss to the extent of that limited partner's at-risk amount (subject to certain adjustments).

Proposed subsection 96(1.01) will generally apply to the 1995 and subsequent taxation years. It is the CRA's longstanding practice to ask taxpayers to file on the basis of proposed legislation.

15. Cosmetic Expenses

Notwithstanding subsection 118.2(2.1)—which is only relevant when computing medical expenses—can a professional dancer/performer/actor who relies on appearance to earn business income claim cosmetic surgery costs related to their physical appearance as either a deduction from profits or consider such expenditures to be an eligible capital expenditure and make appropriate deductions against business income if this surgery is relevant to their performances?

CRA Response:

Cosmetic surgery expenses have a significant personal component and are more in the nature of “personal or living expenses” which would not be deductible for income tax purposes.

Paragraph 10 of the CRA Interpretation Bulletin *IT525R-CONSOLID Performing Artists* (available on the CRA web site at: http://www.cra-arc.gc.ca/E/pub/tp/it525r-consolid/README.html) provides examples of expenses which may be deductible by self-employed artists. You will note, for example, that the cost of beauty-related items such as makeup and hair styling is only deductible when it is specifically required “for public appearances.”

Generally, if a person would have incurred a particular expense even if he or she had not been working, there is a strong inference that the expense has a personal purpose. A “but for” test can be applied to the need which a particular expense meets. Specifically: Would the need exist apart from the business? If a need exists even in the absence of business activity, then an expense to meet that need would traditionally be viewed as a personal expense.

There have been several court cases which addressed a variety of expenses which are, or are not, deductible by performers. For example, in the court case *Arthurs v The Queen (TCC) 2003 TCC 636,* many of an actor’s claimed expenses were disallowed on the basis that they were of a personal nature. The courts specified, for example, that “…the cost of attending fitness classes and fitness club membership costs” was “of a personal nature” and not related in the earnings process.

In a previously issued Interpretation issued by Income Tax Rulings (2010-0387551I7), we expressed the view that expenses incurred with respect to a fitness centre membership, breast implants, and cosmetic treatments were not deductible in computing income earned from operating an erotic web site business since we considered these expenses to be of a personal nature.

It seems likely that many individuals would incur the expenses listed even in the absence of the described business activity; therefore these expenses would most likely be considered personal and would probably not be deductible for income tax purposes.

16. Taxpayer Information Exchange Agreements

Can CRA give an update on their progress with respect to exchanging information on Canadian taxpayers in accordance with the Tax Information Exchange Agreements that have now been passed into law?

CRA Response:

Canada has 13 Tax Information Exchange Agreements (TIEAs) in force, three that are signed but not yet in force and 14 under negotiation. This information can be found on the Department of Finance Website:
http://www.fin.gc.ca/treaties-conventions/tieaaerf-eng.asp

Canada’s TIEAs are generally only effective retroactively for criminal tax matters, so we have not yet had the opportunity to make extensive use of them. Where the CRA has been able to request information we have had good results. We expect to make much more significant use in the years to come when our TIEAs are fully effective.

17. Non-resident Remittance Accounts

a) Will non-resident remittance accounts eventually be consolidated with the business number? It seems they are the last accounts with separate numbering.

CRA Response:

Preliminary investigation into this possibility has been undertaken. However, a change will not likely be implemented in the near future. Non-resident and business accounts are managed by different systems and consolidation of the two has been proposed, but it is unlikely that this will be done in the near future.

b) How does a remitter of non-resident withholding tax authorize access to information regarding such accounts (similar to the T1013 and RC59)?

CRA Response:

To authorize access, a client can submit a letter and Form T1013, or RC59 is acceptable if the non-resident account number is included in forms.

c) Would CRA consider making information on these accounts available through the My Business Account and Represent a Client system?

CRA Response:

Similar to the consolidation of the NR account and the BN account, the data on non-resident accounts is housed on a separate system, so making these accounts available through My BA and Represent a Client is not possible at this time.

18. Estate and Trust Accounts

Likely because there are far fewer filings for Estates and Trusts than for individuals or corporations, CRA's systems for handling Estate and Trust related matters often seem less clear than their processes for handling these more common returns. Our members have a number of questions in this regard:

a) At present, it is not possible to contact a CRA representative by telephone in respect of such clients. Instead, a call to the general enquiries line must be made, resulting in transfer to the Trusts and Estates section. When that internal transfer rings busy, we receive the suggestion to call back later, or leave a message. The return caller cannot leave a call-back number, so the process often must begin again. This seems like the kind of ineffective process the 2012 Budget comments indicate CRA wishes to "leverage the expertise of tax professionals to improve." Would CRA consider providing a means to directly contact the Trust and Estate section for enquiries related to T3 filings, account balances and similar matters?

CRA Response:

The CRA has made significant enhancements to our call centre operations in recent years to better serve all Canadians, including third party representatives. One of these enhancements was the development of the Centres of Expertise (CoE), which has helped the CRA to better manage more complex enquiries by directing these to a group of subject matter experts. Financial investments were made to improve accessibility by adding additional agents. In an environment that deals with over 18 million calls per year, front line agents play an important role in the organization by ensuring proper call routing to the appropriate business lines, while also dealing with the less complex enquiries. This also ensures that the other tiers of resources are utilized efficiently. This call routing mechanism is done in a controlled environment and cannot be left to the discretion of the caller without impacting current resources. Within the current resource allocation, the CRA cannot provide an external access and dedicate additional resources to their CoE line without shifting resources from existing lines, which would have a negative impact on service to the general population.

In managing these resources effectively, the Centre of Expertise (CoE) agents are accessible by either a direct transfer from a front line agent or, on an exception basis, a call-back is offered based on the caller's availability. The caller may be offered a call-back in cases where the CoE line is busy or the call is complex and requires research to accurately address the enquiry. When the CoE agent attempts to call the representative back they will make three attempts to reach the representative. If there is no answer, the CoE agent will try again within two days at different times of the day and notes are put on file for follow up if required.

b) For other taxpayers, information is accessible through Represent a Client. We understand from previous Roundtables that extending this to Estates and Trusts is not a high priority, due to the smaller number of files affected. However, it seems consistent with CRA's objective of providing service electronically to enhance efficiency. Can CRA provide us with an update of the status of this initiative?

CRA Response:
The CRA is aware of the increasing interest in electronic services for the administration of trusts. In this regard, the CRA is reviewing the electronic services available to other business lines to determine the most efficient way to extend these electronic services for the administration of trust returns.

c) Some members report apparent inconsistencies with respect to acceptance of T1013 forms for estates, specifically with regard to how many executors must sign the T1013. Some CRA representatives advise by telephone that the signature of any one executor is sufficient, much like a single director may authorize access to corporate information. However, we have been advised that a T1013 not signed by all executors is invalid. Can CRA please comment on the following:

i. Does CRA in fact require all executors or trustees to sign a T1013?

CRA Response:
Yes, all executors named in the will as joint executors must sign the T1013 and all subsequent requests prior to the CRA being able to divulge any information.

ii. If so, why does this differ from corporate authorizations? Where executors reside in different locations, multiple signatures are exceptionally problematic logistically. Executors and trustees commonly select one of their number to handle issues with CRA.

CRA Response:
The terms of the will dictate the proper authority for signing documents on behalf of the estate. For instance, the will may state that "the executors must act jointly and severely" and the CRA abides by that authority, as the will is a legal document, the terms of which must be respected.

iii. Can CRA take steps to ensure that their representatives are aware of the actual policy, whatever it may be, so that conflicting advice will not be provided to practitioners and their clients?

CRA Response:
Yes, this will be communicated to the General Enquiries phone line staff immediately. We apologize for any confusion this may have caused.

iv. If a T1013 form for an estate (or for any other taxpayer) is considered deficient, why does CRA not send the form back, or otherwise advise the representative and/or the taxpayer of the fact that the form cannot be processed, and indicate the requirements to provide appropriate authorization?

CRA Response:
The T1013 is undergoing a re-write and the new form will be available this fall. The form clearly states that all information must be present or it cannot be processed. There is an instruction page included to assist in the completion of each field. Often it is not possible to identify who to send a form back to, as the information provided does not match with what is in our system, making locating a mailing address impossible. In large part, the use of fax machines has contributed to the T1013 being illegible when received; for this reason, we have had to ask that reps do not fax the T1013 but use traditional mail until we move to electronic submission through the My Account portal, which is in the works for the future. Also, we are looking at using the 2D Barcode technology for the T1013 for the 2013/14 year and the use of a fax machine renders the barcode illegible.

v. Can CRA provide us with a contact number to resolve matters such as this? We assume these issues would not be addressed by trust assessors, even if contact information for them were available.

CRA Response:
We are adding additional information to the CRA web site to highlight further the T3 representative role and responsibility, as well as adding FAQ's and information to assist the representative. We recognize that there is a lack of detailed information for the T3 representative, and are taking steps to address this in the near future. The following link may be of assistance: What's new for trusts?, available at http://www.cra-arc.gc.ca/nwsrm/txtps/2013/tt130425-eng.html?utm_source=mediaroom&utm_medium=eml. If specific questions have not been addressed, you may contact Lori.Hindy@cra-arc.gc.ca.

19. Basis for CRA Positions

We often see proposal or final assessment letters which do not clearly set out the basis for CRA's position. For example, the facts leading to CRA's conclusions or the technical basis (eg. a legislative reference) are not provided. If the basis were clear, the taxpayer or their advisors could often respond much more readily, whether being able to conclude CRA is correct or being able to address the specific issues leading to any disagreement. The inability to focus any response on the reason(s) for CRA's interpretation significantly reduces efficiency for both the taxpayer and CRA, often resulting in an erroneous assessment later reversed on Objection, rather than a resolution at the assessing or audit stage. This issue has also been raised by the Taxpayer's Ombudsman in his report *The Right to Know*, in the context of CRA's response to Notices of Objection.

We recognize that a research paper, legal treatise, or Supreme Court brief for each item proposed is neither practical nor desirable. At the same time, CRA's (re)assessment decisions are made on some rational basis. Understanding that basis is critical to the taxpayer's decision to accept the proposal and their ability to identify relevant representations. Even knowing that a specific interpretation is CRA policy can enhance efficiency—the taxpayer can decide whether they are prepared to take the matter before the Courts, knowing that there is no room for negotiation of CRA's interpretation.

How are CRA representatives instructed to communicate with taxpayers, whether initially or in response to a request for the basis of CRA's proposals or conclusions? What steps can the taxpayer, or their advisor, take to obtain the basis for a CRA proposal or reassessment as early as possible in the process? Would CRA consider reviewing their processes in this regard, and perhaps standardizing a format of communication which highlights the basis of their proposals or assessments?

CRA Response:

At the CRA, our goal is an open and transparent audit process. It is essential that taxpayers and their representatives understand the basis of any proposed reassessments in order that they may make appropriate representations and make informed decisions on next steps in their files. Our Audit Manual includes guidelines with regard to communicating with taxpayers during audits. Auditors are advised that taxpayers are to receive a full explanation of proposed adjustments, and be given adequate opportunity to respond.

Our quality assurance process includes a review of correspondence for detailed information concerning the tax issues and adjustments noted during the audit. Quality Assurance assesses the content of the correspondence to ensure that it is clear, concise, and complete. Where necessary, feedback is provided to ensure that future correspondence is more detailed, addresses the taxpayer representations, and explains the audit adjustments.

You have asked what steps can be taken to obtain the basis for a CRA proposal or conclusion. We recommend contacting the auditor and, if satisfactory information is not obtained, contacting the auditor's team leader. If the information is not forthcoming, you would go up the line to the team leader's manager or to the Assistant Director, Audit.

20. Matching Program and Other Review Processes

CRA's "Taxpayer Bill of Rights" includes "the right to have the costs of compliance taken into account when administering tax legislation." Previous Roundtables have consistently discussed aspects of the matching program, which our members continue to perceive as imposing costs on their practices and thus on their clients, which are disproportionate to the amounts of tax addressed. While different examples seem to arise every year, the underlying issue is unchanged. CRA has a responsibility to review tax filings, and the matching program is an effective component of their review strategy.

While we expect some degree of enquiry from CRA, we also must manage our own businesses in an efficient and profitable manner. Despite repeated expression of CRA's commitment to enhancing the program's efficiency, the additional costs and frustrations to tax preparers and their clients go unresolved. This erodes the willingness of practitioners to continue supporting EFILE and similar initiatives, rather than filing paper returns with supporting documents to reduce the incidence of such enquiries. Faster refunds and reduced keypunch errors are insufficient to offset the increased costs imposed on taxpayers and tax preparers by later CRA information requirements.

Enquiries on 2009 returns seemed to be handled largely by telephone, but 2010 returns seem to have returned to automatic reassessments. Despite statements that CRA maintains a record of prior assessments and reversals, included in the response to a question on this issue last year, we continue to see the same clients reassessed for the same issues year after year.

a) Under what circumstances will CRA initiate contact with the taxpayer's representative before issuing a reassessment? Would CRA consider expanding contact with authorized representatives, ideally via letter or facsimile rather than by telephone, to minimize unwarranted reassessments? While undertaking and responding to such inquiries carries a cost for both CRA and practitioners, the process to reverse an inappropriate reassessment is much more expensive.

CRA 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 (close to 2 million), it is impossible to contact every taxpayer and/or representative before proceeding with a reassessment. Please note that statistics show that less than 3% of the Matching reassessments are subsequently reversed or partially reversed and that we do have a service standard stating that all request for reversals should be answered within 30 days.

For the Processing Review and Pre-assessment Review Programs, contact is made by letter with the tax preparer if the taxpayer has indicated this as their preference.

b) What are CRA's policies and procedures with respect to review of prior years to identify issues which have been addressed and resolved previously? Is compliance with these policies monitored to ensure assessors' awareness and compliance?

CRA Response:

As mentioned earlier for Matching, staff are instructed to review the taxpayer's and/or the spouse or common-law partner's return, attachments, historical notes and documents, and prior-year files to determine if a reassessment is warranted before contacting the taxpayer or representative or reassessing a return. Monitoring is done by local management to ensure that their staff follow these instructions and that reminders are sent. However, due to the high number of files reviewed, mistakes may happen on occasion.

For the Processing Review and Pre-assessment Review Programs, claims are either selected at random or by a sophisticated scoring system which considers information such as prior year review results.

c) We recognize that our understanding of CRA's processes is far from complete. We suggest CRA similarly lacks a full understanding of the issues faced by practitioners. The comments in the 2012 Budget indicate that CRA "will leverage the expertise of tax professionals to improve the effectiveness of its operations." How will CRA consult with practitioners to seek solutions that enhance everyone's efficiency?

CRA Response:

A formal response to this query will not be issued at this time. Nonetheless, the CRA will comment that we are open to any suggestions from the tax professionals' community which would help enhance everyone's efficiency.

21. Moving Expenses

There have been a number of recent Tax Court cases, most or all under the Informal Procedure, dealing with moving expenses, such as *Wunderlich* (2011-386(IT)I), *Dierckens* (2010-1747(IT)I), *Myles* (2009-2472(IT)I), *Trigg* (2008-2473(IT)I) and *Gelinas* (2008-2748(IT)I). These cases seem to cast doubt on some of the fundamental assumptions historically applied to moving expenses. As they are all informal procedure cases, we recognize they are not binding precedents; however, we would suggest they are indicative of the judiciary's interpretation of the law.

Can CRA comment on its current views regarding the following, and especially on any changes to their interpretation of the law arising from recent cases such as these? We would specifically ask the Agency to comment on the following:

a) Wunderlich and Dierckens noted that there is no reason to read into the definition of eligible relocation that the person must move within a certain amount of time after commencing employment at a "new work location." Does CRA accept that a move some time after commencement of employment, perhaps even years later, can qualify for deductible moving expenses?

b) Does CRA accept that a new work location could be a different position in the same location of employment, as was the case in Gelinas? Does CRA consider some change in the working arrangement to be required in cases where a significant period of time elapses between initial acceptance of employment and the relocation?

c) Myles addressed a taxpayer who undertook his move in two stages, first into an apartment at his new work location and later into a house. Does CRA accept the view that a relocation could be made up of a series of new residences in reaching the ultimate destination, where the facts support this conclusion?

d) The Trigg case notes that the list of moving expenses in S 62 is not exhaustive. Does CRA accept that other expenses incurred in order to relocate are deductible as moving expenses? Can CRA offer any examples of items they have accepted or rejected in this regard?

CRA Response:

A formal response to this query will not be issued at this time.

22. Appropriation of Payments

Subsection 221.2(1) reads as follows (emphasis added):

> Where a particular amount was appropriated to an amount (in this section referred to as the "debt") that is or may become payable by a person under any enactment referred to in paragraphs 223(1)(*a*) to (*d*), the Minister may, on application by the person, appropriate the particular amount, or a part thereof, **to another** amount **that is or may become payable under any such enactment** and, for the purposes of any such enactment,
>
> a) the later appropriation shall be deemed to have been made at the time of the earlier appropriation;
> b) the earlier appropriation shall be deemed not to have been made to the extent of the later appropriation; and
> c) the particular amount shall be deemed not to have been paid on account of the debt to the extent of the later appropriation

It does not appear that the liability against which the particular amount is applied is required to be payable by the person who applies for the re-appropriation. We appreciate, however, that any such re-appropriation is subject to ministerial discretion. Does CRA concur that such re-appropriation may be undertaken to apply the amount in question against a debt of a taxpayer other than the person making the application? For example, could a corporation request such an amount be applied against a debt of a related corporation, or a shareholder? Can CRA comment on circumstances which they would consider in assessing whether to exercise their discretion to allow such a re-appropriation?

CRA Response:

The CRA is currently in the process of developing the parameters under which the re-appropriation of statute barred credits as per Subsection 221.2(1) of the *Income Tax Act* may be applicable. It is expected that this policy will be finalized in the coming months. Any re-appropriation requests received in relation to this policy change will be addressed once the policy has been finalized.

23. Location of Filings

Some filings required under the *Act* require filing in prescribed manner. Many others provide for a filing in prescribed form (but not in a prescribed manner), or prescribe neither the form nor manner of the filing. Clearly, where the manner of filing is specified in the legislation or regulations, a filing must be made in that manner.

However, some CRA forms indicate the location at which a document is to be filed, even where there is no prescribed manner of filing presented in the legislation. For example, Form T1135 notes that on EFILED returns the Form should be sent separately to the Ottawa Technology Centre, while the T3 Guide indicates that returns for a Trust resident in Canada should be filed at the Ottawa Technology Centre, and returns for non-resident or deemed resident trusts should be filed at the International Tax Services Office.

Many practitioners forward most or all tax filings to a District Taxation Office or Tax Services Office in their local area, often so that they may obtain CRA acknowledgement that the documents they have submitted were received. Some also deposit returns in the drop boxes at the various District Offices on a timely basis.

a) Does CRA consider filings that are not required to be filed in a prescribed manner under the legislation that are forwarded to any CRA location (e.g. a District Taxation Office or Tax Services Office):

   i. on the date of mailing for filings sent by mail?
   ii. on the date of delivery for filings dropped off or couriered?
   iii. on the date deposited for filings placed in a CRA drop box?

   If not, on what date does CRA consider such filings to have been made?

b) Does CRA administratively allow the same filing methods for filings the legislation requires be filed in prescribed manner, or does CRA strictly enforce the prescribed manner be utilized?

CRA Response:

The CRA published guides pertaining to T1, T2, and T3 Returns of Income indicate where specified returns are to be sent. For example, in some cases the local Tax Services Office is indicated and for other specialized programs the Ottawa Technology Centre is indicated.

Further, our published guides indicate that when the due date falls on a Saturday, a Sunday, or a holiday recognized by the CRA, we consider your return to be filed on time or your payment to be made on time if we receive it or it is postmarked on the next business day.

Subsection 248(7) deems that anything (other than a remittance or payment) sent by first class mail or its equivalent (including Canada Post "letter mail") shall deemed to have been received by the person to whom it was sent on the day it was mailed.

CRA policy per IT-433R4 at paragraph 4 also includes couriers: Paragraph 4. reads*: "A payment made to a taxpayer by first class mail or its equivalent is deemed by virtue of subsection 248(7) to be received by the taxpayer on the date of its mailing. An item entrusted to a courier service for prompt delivery is considered equivalent to first class mail. "*

With respect to sending a return to a CRA location other than specified in the guide, the CRA is one unified organization and we would administratively accept returns received by any Tax Services Office as being on time provided they were received or deemed by the due date.

24. Principal Residence

An individual's principal residence can include land in excess of ½ hectare only where the excess is required for the use and enjoyment of the property as a principal residence. It has often been accepted that an inability to subdivide the land to a smaller parcel indicates the entire property was necessary, and is eligible for the principal residence exemption. However, there have been disagreements over whether the zoning restrictions at the time of purchase, the time of sale, or some other time are relevant. The decision of the Federal Court of Appeal in *Cassidy v. HMQ* (2011 FCA 271) indicates that the eligibility of land in excess of ½ hectare should be determined for each year in which the property is designated, on the basis of zoning restrictions in that year.

a) As Cassidy is an FCA decision, it appears to be a binding precedent. Does CRA accept that a year-by-year calculation is the correct interpretation of the law, based on this decision?

b) If the answer to (a) is negative, can CRA provide their interpretation and the technical basis for concluding the year-by-year calculation is not the correct interpretation?

c) The Cassidy decision declined to assess the status of excess land in the year in which the zoning restrictions changed, as that was also the year of sale, meaning the conclusion the entire gain was exempt could be reached without addressing that issue due to the "1+ rule." Does CRA consider that the status of the excess land is based on:

    i. the zoning restrictions at the start of the year?
    ii. the zoning restrictions at the end of the year?
    iii. some other determination?
    iv. does CRA's view change if the land is sold in the same year the zoning restrictions change, or in the immediately subsequent year?

We recognize this question may be inapplicable if CRA does not accept the *Cassidy* decision indicates a year-by-year calculation is the correct interpretation of the law.

CRA Response:

CRA has recently released Income Tax Folio **S1-F3-C2: *Principal Residence***, which may be found at http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s1/f3/s1-f3-c2-eng.html. Paragraph 2.35 of that folio has been updated to reflect CRA's application of the *Cassidy* decision. It states:

> **2.35** A municipal or provincial law or regulation may require, for example, a minimum lot size for a residential lot in a particular area that would be in excess of one–half hectare, or impose a severance or subdivision restriction with respect to a residential lot in a particular area restricting the lot from being one–half hectare or below. <u>If such a law or regulation existed in any given year during which the taxpayer owned the property, the area that is in excess of one–half hectare would normally be part of the principal residence for that particular year.</u>

GST/HST Questions

1. Non-registrant sale of taxable real property and documentary requirements

Recently, a client submitted a "section 257 rebate" application to CRA to recover the GST paid on a 2007 acquisition of real property which was subsequently sold in 2011. The 2011 sale was a taxable supply of real property made by the non-registrant.

CRA staff at the Summerside Tax Centre requested proof of:

- the 2007 vendor having reported and remitted the GST collected from our non-registrant client; and,
- the 2011 purchaser having self-reported the GST, since that purchaser was registered for GST/HST at the time of its purchase.

Our client has no way to provide this information to CRA and there is no legislative requirement to do so as the rebate entitlement is triggered when a non-registrant makes a taxable sale of real property on which that non-registrant had previously paid unrecoverable GST/HST.

Please comment on whether it is CRA policy to request this information in order to process that rebate?

CRA Response:

Without being provided with a reference number, Rebates Processing in Summerside was not able to review the particular case being referred to, and therefore can only provide generic information.

Generally, the amount of rebate available to an eligible claimant under section 257 of the *Excise Tax Act (ETA)* is the lesser of:

- the basic tax content of the property, and
- the GST/HST payable on the sale of the property

Both transactions (the acquisition and the sale) are reviewed to determine the correct amount of rebate payable to the client. During this review process, tax liability is determined based on the registration and residence statuses of the purchasers and sellers for each transaction. The RC4033 guide lists all the information required in order to determine the tax liability for both transactions including the following:

- a copy of the Statement of Adjustments from the original purchase of the property
- a copy of the Statement of Adjustments for the sale of the property
- the purchaser's full name and address, as well as Business Number if they were a registrant

If the application does not include enough information to determine tax liability for these transactions or eligibility of the rebate, CRA will contact the client for clarification and additional information. After a review of this information, if it's determined that the client is not responsible to report the tax, their application will be processed. The tax liability for the other parties will be reviewed separately, and will not affect the client's eligibility for this rebate.

Rebates Processing does not ask for anything more than what's noted in the guide; however, another reviewing area such as audit may ask for additional information in their review.

2. Retroactive change in tax status of supplies - how to deal with time travel

There are certain instances where a person requests a change in HGST status, and the result causes supplies they make to go from exempt to taxable or the reverse.

When the change is back-dated and thus effects transactions that have already occurred, what is the CRA position on how to treat the past for HGST purposes?

One example will be a "municipal determination" for a paragraph (b) municipality or "municipal designation" for property of a person providing public services, where the change is back-dated.

Another example is when a non-registered person buys taxable real property and then becomes registered to a point in time before the sale occurred.

A third example would be the acceptance of a section 211 election to make supplies of real property of a PSB taxable, where the election is back-dated.

Please indicate how the CRA will treat past transactions, both tax collectible and input tax credits, in these three examples and perhaps offer other examples that come to mind.

CRA Response:

The application of GST/HST to a particular scenario is dependent on the facts of the particular transaction and the provisions in the *ETA* that apply in that scenario. We provide the following comments with respect to the examples set out in your question.

Example 1

Retroactive approval of a request for municipal determination or designation may impact the tax status of the supplies made by the person as well as the amount, and/or the method, of recovering the GST/HST it has paid out. Where the effective date of a person's designation or determination as a municipality is back-dated, the person is generally eligible to claim a 100% Public Service Body rebate of the GST and the federal part of the HST for its non-creditable tax charged and, if the municipality is resident in a participating province, a partial rebate of the provincial part of the HST from the effective date of the designation or determination. In this case, the person would also be subject to the obligations arising from this back-dating. As an example, the effective date of municipal designation may be prior to a previous supply that was exempt at the time it was made, as there was a provision to exempt the particular supply. However, after the designation, the supply of the property may not be exempt as the property may be "designated municipal property," which is excluded from certain exemptions, and the person would be obligated to account for GST/HST on the now taxable supply. A person making a request for municipal designation or determination should be aware of the obligations and entitlements that will result from the designation or determination.

Example 2

We will assume that you are referring to a situation where the recipient of a taxable supply by way of sale of real property enters into an agreement of purchase and sale at a time when they are not registered for the GST/HST, but becomes registered prior to the time of "closing," i.e., the day on which possession and ownership of the real property transfer from the supplier to the recipient.
Paragraph 221(2)(b) of the *Act* provides, with two exceptions, that a supplier who makes a taxable supply of real property by way of sale to a recipient that is registered for GST/HST is not required to collect the GST/HST on the sale. (The exceptions in paragraph 221(2)(b) are for a sale of real property to a registered individual where the real property is a residential complex or is supplied as a cemetery plot or place of burial, entombment, or deposit of human remains or ashes; in these cases, the supplier is not relieved, under paragraph 221(2)(b), of their obligation to collect tax).

Under paragraph 168(5)(b) of the *Act*, tax in respect of a taxable supply by way of sale of real property (other than certain residential condominium units) is payable on the earlier of the day ownership of the property is transferred to the recipient or the day possession of the property is transferred to the recipient under the agreement for the supply. Accordingly, provided the recipient of the supply is registered at the time tax becomes payable in respect of the supply, paragraph 221(2)(b) of the *Act* will apply. In such a case, subsection 228(4) of the *Act* requires the recipient of the supply to pay the tax payable on the supply directly to the Receiver General.

Therefore, where a recipient's registration is backdated to a time at or before the time that tax in respect of the supply of real property becomes payable, the recipient would generally be required to account for

GST/HST on the acquisition of the real property pursuant to subsection 228(4).The amount of tax owing could potentially be offset, partially or in whole, by any input tax credit (ITC) or rebate to which the person is entitled.

If a GST/HST registered recipient has paid an amount as or on account of tax to a supplier in circumstances where paragraph 221(2)(b) of the *Act* applies, where certain conditions are met, the recipient may be able to claim a rebate for the GST/HST previously paid to the vendor.

<u>Example 3</u>
A public service body may file an election pursuant to section 211 of the *Act* with respect to real property that qualifies for the election. One effect of a section 211 election is to allow a public service body to opt out of the *Act's* primary use rules in regards to particular capital real property, and to possibly qualify for ITCs based on the extent of use of the property in commercial activities. A supply of real property that is the subject of an election under section 211 will be excluded from the general exemption for supplies of real property by the public service body (i.e., section 1 of Part V.1 of Schedule V to the *Act* for a supply of real property made by a charity and section 25 of Part VI of Schedule V to the *Act* for supplies by certain other public service bodies).

While a section 211 election is in place, sales, leases and other supplies of the real property that is the subject of the election do not fall under the general exemption of section 1 of Part V.I or section 25 of Part VI of Schedule V to the *Act*, since paragraph 1(m) of Part V.I and paragraph 25(g) of Part VI specifically exclude the supply. However, if a supply is exempt under a provision of the *Act* other than the aforementioned sections 1 or 25, a section 211 election does not exclude the supply from that other exemption. Therefore, where a section 211 election is back-dated, an obligation to collect tax on supplies of the property may exist. This obligation would arise for any taxable supplies made by the public service body where the tax payable on the supply becomes payable at a time when the election is in effect.

In addition, where the election is effective on a day other than on the day the person acquired the real property or becomes a GST/HST registrant, the person is deemed to have made a supply of the property and to have collected tax on the supply. The person is also deemed to have received a supply of the property and paid tax on that supply. Therefore, the filing of the election creates an obligation to account for the tax deemed to have been collected and may also give rise to an ITC or a Public Service Body rebate for part or all of the deemed tax paid. The amount of this deemed tax collected is required to be included in the net tax calculation for the reporting period of the person in which the tax becomes payable. Where this is a prior period, the person is required to amend the return previously filed to account for the GST/HST the person was deemed to have collected.

In addition, it is important to note that the *Act* differentiates between a registrant and a person who is registered. Pursuant to subsection 123(1) of the *Act*, a registrant means a person who is registered, or who is required to be registered for GST/HST purposes. Therefore, it is important to determine whether the person is a registrant and/or registered and the wording used in the applicable provision of the *Act*. As previously stated, each situation is treated on a case-by-case basis; however, a person generally requests back-dating to avail itself of some entitlement created by the back-dating. In doing this, the person must also be aware of any obligations created by the back-dating.

3. Bare trusts and registration requirements

In Canadian law there are different treatments for trust relationships. At times, a trustee is given discretion over property it holds for beneficiaries and other times it has none.

For Canadian income tax purposes, we have the concept of a "bare trust," where the trustee has no other responsibility or authority other than to hold title to the trust property on behalf of the beneficiary and to convey legal title to the trust property on demand by and according to the instructions of the beneficiary as provided within the trust instrument. The CRA's stated position on this type of arrangement is that this type of bare trust cannot register for HGST because it has no commercial activity.

However, we do have other situations, where a trustee is not a bare trust but rather has activity of its own, separate and unrelated to the holding of title to property under a trust agreement. These are often called "nominees" and the trustee is a "bare trust" in relation to the trust property but not otherwise. While they are legitimately registered for HGST in relation to their own commercial activity, they have no commercial activity in respect of the trust property.

But a bare trust is a Common Law concept that is not shared in Quebec Civil Law. In Civil Law, we have the concept of "mandatary" for the beneficiary, which is close to the idea of a bare trust but the mandatary is allowed to perform various actions as directed by the beneficiary, not only conveying title but also arranging for supplies in relation to the trust property. (In Civil Law, all trust property must be held in a separate patrimony so having title held in another entity is not permited.)

A mandatary of the beneficiaries of a trust in Quebec may be permitted QST registration but not in respect of the trust property. All QST collected and ITRs allowed in respect of the trust property is reported by the trust beneficiaries and not the trustee (mandatary).

Another issue with a Common Law bare trust is that a trustee could have discretionary power over trust property for a period, and become a strict bare trust when all duties have been performed or terms of the trust have come to fruition. It would thus remain holding title to property but with no activity other than to convey title at the discretion of the beneficiary.

Please comment on the treatment of a nominee corporation in respect of the HGST reporting of trust property to which it has no discretion: how we should deal with a trustee that becomes a true bare trust after having had discretionary powers and how mandataries in Quebec should report GST with respect to trust property?

CRA Response:

Background - bare trusts

It is the CRA’s position that a trustee vested with legal title to property but with no discretionary powers to exercise in respect of the property is generally considered as a trustee of a bare trust for GST/HST purposes. In such situations, the beneficial owner retains the right to control and direct the trustee in all matters involving the trust. On the other hand, if the trustee is given discretionary authority and decision-making powers in relation to the trust property, the trust is generally considered as an active/true trust as opposed to a bare trust.

A particular entity will be considered and treated for GST/HST purposes as an active or bare trust based on fact and principles of law. Where an active trust exists, the trustee would carry out the activities of the trust, and any supply made by the trustee, as trustee of the trust, would be considered an activity of the trust. If the trust is engaged in commercial activities, the trust may be required to register for GST/HST purposes in respect of those activities, subject to the exceptions described in section 240 (such as the small supplier rule). The trust may also be entitled to input tax credits (ITCs) for tax incurred in the course of its commercial activities, subject to section 169.

Conversely, a beneficiary of a bare trust would generally be considered to be engaged in the activities relating to the trust and would be subject to the registration requirements of section 240. If a registrant, the beneficiary would be required to account for the GST/HST to the extent of its interest in the trust assets, to file GST/HST returns, and generally to comply with the obligations placed upon registrants under Part IX of the ETA.

The above information applies equally in situations where the trustee is a nominee corporation.

1. <u>Nominee corporation</u>

As discussed above, the categorization of a person as an active or bare trust is significant as it dictates who, between the beneficiaries and the trust, will be required to account for GST/HST. If a nominee corporation has no discretionary powers or a beneficial interest in the trust assets, the trust would generally be considered as a bare trust that would not be subject to the registration and reporting obligations imposed under the *ETA*.

Further, even if a nominee performs additional duties in respect of the trust assets, it would nevertheless be considered as a bare trustee as long as it is acting strictly upon the instructions of the beneficiaries with no discretionary powers of its own. In that case, the beneficiaries would be subject to the registration requirements of section 240, would be required to account for the GST/HST on taxable supplies, and may be eligible for ITCs, subject to section 169.

2. <u>True trust becomes bare trust</u>

Where the trustee of an active trust that is a registrant has its discretionary powers revoked such that the trust is a bare trust from that point forward, CRA would consider the obligations and entitlements of the trust under Part IX of the *ETA* to revert to the beneficiaries. The trust, now a bare trust, would no longer be considered to be engaged in commercial activities; therefore, it would no longer be subject to the registration provisions of section 240. In this case, the registration would be cancelled pursuant to section 242. Upon cancellation of registration, the trust would be subject to the provisions of subsection 171(3) under which it would be deemed to make supplies of trust property. As a result of these deeming provisions, the trust, upon cancellation of its registration, may be liable to remit GST/HST in respect of the property.

We note that the nominee/trustee may be engaged in commercial activities that it carries on in its own name. For instance, the trustee may earn trustee fees, or fees for operating the trust property as agent for the beneficial owners. The trustee would have to account for GST/HST purposes in relation to such activities, unless it meets one of the exceptions from registration in subsection 240(1).

3. <u>Mandataries in Quebec</u>

The above-stated position applies only to bare trusts in common law provinces. Under an agreement between the federal and Québec governments, Revenu Québec is responsible for administering the GST/HST in Québec. For information on the reporting requirements of mandataries with respect to trust property in Québec, we ask that you contact Revenu Québec at the following address:

Direction des lois sur les taxes et l’administration fiscale
Ministère du Revenu du Québec
3800, rue de Marly
Sainte Foy, Québec, G1X 4A5

4. Please provide details of how the split of the audit function into auditors dedicated to either GST or income tax will work and the new audit structure at CRA.

<u>CRA Response:</u>

- With the addition of the HST in BC and Ontario and the major business links between Alberta and these two provinces, the two audit programs had to be split to anticipate the increased workload.

- Our audit staff must have the training to deal qualitatively with the complexity in both tax regimes. Accordingly two career paths are now the preferred approach.
- Management can now focus appropriately in its administration of both tax programs.
- Materiality in terms of dollar value demanded a separation of both audit functions to perform an effective audit for both sets of taxes. The GST/HST that is now within the Agency's mandate is now materially greater than the Corporate Tax program it administers.
- Small & Medium Enterprises Level will have their Income Tax and GST audited by separate, specially trained auditors.
- Within the Large Case audit program, the files will no longer be assigned based on a common case-load with income tax, but on the basis of audit risk and other factors and procedures now being determined by the new GST Directorate.
- Geographical limits for audit assignments will no longer necessarily be applicable.
- Calgary's GST/HST audit unit has a separate ADA at its head.

5. We are experiencing unusually long processing times for input of elections. Do the Tax Centres process all registrations and elections (for example: the section 211 election; form GST 26)?

CRA Response:

GST elections are processed in both the Tax Services Office and Tax Centre, dependent on the type of election. Both areas are completing the elections within the expected internal processing timelines. If practitioners wish to provide specific examples, we can trace the cause of any delays.

6. When calling the 1-800 information line, the CRA officer will ask for verification of the authorized person by requesting accounting and financial information related to the account. Typically the information related to the amounts that have been filed on the returns is not available by lawyers or other practitioners as the clients do their own filings. We have also encountered problems with the department asking questions for verification purposes that may related to other offices of national firms. Is there any way that the criteria can be related to "non-financial" details? Is there any way to look at considering an "identifier" for the authorized contacts (for example, a "password" or the answer to a unique question?). This could include items such as filing frequencies, addresses and the like.

CRA Response:

As part of their responsibilities, a Business Enquiries agent is required to provide CRA taxpayers with confidential information about their accounts. The information must be disclosed in a manner that respects the taxpayer's needs and CRA's legal obligation to safeguard protected taxpayer information. Only the taxpayer and persons authorized by the taxpayer (through CRA's secure online services or in writing) may receive confidential taxpayer information or manage the taxpayer's affairs with CRA.

When a request for confidential information is received over the telephone from a third party representative, the representative will be asked to provide their name and to confirm whether or not they are authorized on the taxpayer's account. If the representative indicates they are authorized, they will be asked to provide the taxpayer's business name and Business Number to allow the agent to confirm the authorization in CRA's systems.

In addition, as part of the confidentiality measures, a representative will need to be prepared to provide an address associated with the business and to respond to specific questions typically related to the account they are calling about. These questions may include financial and/or non-financial details. Business Enquiries have a list of alternative account questions at their disposal to use in the event the representative is not able to provide specific financial information.

Due to the inherent risk associated with the use of passwords, CRA is not prepared to entertain their use at this time. There have been instances of companies calling CRA and attempting to obtain confidential information by pretending to be the taxpayer. Since these callers have some of the information that CRA uses to verify the identity of taxpayers, we must consciously consider the protection of information in every transaction we participate in. The Business Enquiries Agent has the responsibility to ask for very specific information in order to protect that information from unauthorized callers.

7. We are seeing CRA raise audits on one entity where it is clear that tax has already been reported on the transaction by another entity. What is the Minister's position on back-dating the election under 177 (1.1)? Would CRA apply the policy in P131 where the tax has already been reported on the transaction?

CRA Response:

Scope of the Third Party Remittance Policy: P-131R

Policy Statement P-131R, *Remittance of Tax Collected by a Person Other Than the Supplier in Limited Circumstances*, does not apply where a person acts as an agent in making a supply on behalf of a principal.

Policy P-131R discusses the remittance of GST/HST collected by a person other than the supplier in limited circumstances. As stated therein, the policy statement does not apply where:

- a person acts as agent in making a supply on behalf of a principal—in these situations, the principal is considered to have charged and collected the tax and is required to account for that tax in its net tax calculation; and

- a registrant acts as agent of a supplier in charging and collecting the consideration and GST/HST payable in respect of a taxable supply made by the supplier (i.e., the registrant acts as the supplier's billing agent) and the billing agent and supplier have jointly made an election under subsection 177(1.1) of the *ETA*—in these situations, the billing agent is considered to have charged and collected the tax and is required to account for that tax in its net tax calculation.

Where a billing agent and a supplier have not jointly made an election under subsection 177(1.1) of the *ETA*, the parties may opt under Policy P-131R to have the billing agent account for the tax collected (i.e., the tax collected on the taxable supply made by the supplier) in the billing agent's net tax calculation.

Back-dating Election under Subsection 177(1.1)

The CRA will accept, retroactively, a joint election made under subsection 177(1.1) of the *ETA*, provided the parties qualify to make the election and they have acted as if the election was in force since its effective date.

Subsection 177(1.1) of the *ETA* provides for an election in cases where a registrant acts as agent in making a supply (otherwise than by auction) on behalf of a principal who is required to collect tax in respect of the supply. Subsection 177(1.1) allows the agent and the principal to elect jointly to have the agent account for the tax collectible on the supply as if it were collectible by the agent. Where this election is made, the agent and the principal are jointly and severally, or solidarily, liable if the agent fails to account for the tax.

Agency Relationships

For subsection 177(1.1) of the *ETA* to apply, the registrant must be acting as agent in making the supply on behalf of the principal. Policy Statement P-182R, *Agency*, explains how the CRA understands the law that would apply in determining whether an agency exists.

8. An individual works as an employee of a trucking company and the employer is registered for HGST, but any allowance paid to the individual is not reasonable (i.e. is included in the person's T4 income). The individual chooses to use the "simplified method" for claiming a deduction for meals ($17 per meal) instead of using the detailed calculation.

Can the individual claim a GST/HST rebate using GST Form 370 and if so do they have to produce documentary support (receipts and invoices) for all amounts claimed on the GST 370?

CRA Response:

Under T4044 *Employment Expenses Guide*, transport employees are allowed to use the “simplified method” ($17 per meal) to claim meals. This amount must be reported on form TL2 E. Meal receipts are not required but a log of the trips taken should be maintained. The meal allowance is eligible for an employee rebate to be claimed on GST Form370. Chapter 10 in Guide 4044 provides more of the details of claiming this rebate.

9. Early in 2012, some CRA Business Window officers were refusing to back-date a **voluntary** HGST registration without proof that GST or HST **had been collected on prior transactions**. This may have been a reaction to the fact that many registrants were taking advantage of the 30 day back-dating policy that was administratively granted in the past.

We understand that the CRA has formally changed this restriction as evidenced by the revision to its website on the "Effective date of registration" page:

"For a voluntary registration, the effective date of registration is usually the date you applied to be registered. However, CRA will accept an earlier effective date, provided that the date is within 30 days of the date when the registration was made, regardless of the method of registration (online, telephone, or paper)." (as of April 5th of 2012)

Can you please confirm that we now have up to 30 days to back-date a registration, with no requirement to prove tax was collected or that registration was required?

CRA Response:

Our reply to this question is in the affirmative. For a voluntary registration, the account can be back-dated for up to 30 days from the date the application is received, if the date on the RC1 Form that the registrant requests is within 30 days. For example: RC1 is received March 15, 2012. Registrant asks that the registration be effective March 1, 2012. Since March 1 is within 30 days, the registration would be back-dated to March 1, 2012. If the registrant had requested a registration effective February 1, 2012, that would be a date exceeding 30 days and therefore the effective date of registration would be the date application was received, i.e., March 15, 2012. A letter would be sent to the registrant asking for documentation to support the reasons to further back-date the GST Account’s registration to February 1.

10. If a pension plan has just determined that it is subject to the new GST/HST rules relating to pension plans and is a selected listed financial institution (SLFI) as a result of these new rules, will the CRA still allow that pension plan to retroactively register effective July 1, 2010, so that it will only be required to file the GST494 returns on an annual basis, rather than a monthly basis (as would be required by a non-registrant)? Or will the pension plan be required to file monthly GST494 returns up to the current date in order to become compliant and only then be eligible to apply for registration on a go-forward basis?

CRA Response:

All legislative references are to the *ETA*.
In responding to this question we have assumed that the pension plan is registering voluntarily for purposes of the GST/HST and is not required to register because of its taxable supplies or because it has made a reporting entity, consolidated filing and/or tax adjustment transfer election.

For voluntary registration, the effective date of registration is usually the date the person applies to be registered. However, the CRA will accept an earlier effective date, provided that the date is within 30 days of the date when the registration was made, regardless of the method of registration (online, telephone, or paper).

A selected listed financial institution (SLFI), including an SLFI that is a trust governed by a registered pension plan, that is a non-registrant would have a calendar month as its reporting period pursuant to subsection 245(1). Unlike other non-registrants that would only be required to file a GST/HST return when the person has net tax owing, pursuant to subsection 238(2.1), a non-registrant SLFI would have to file:

- the required interim returns (GST62 return) for each calendar month, within one month after the end of the month, whether or not net tax is remittable, and
- the GST494 final return, which must be filed within 6 months of the fiscal year end.

To reduce the administrative requirements for a non-registrant SLFI, in certain circumstances, the CRA will register an SLFI that is registering voluntarily effective the first day of the reporting period in which the registration application is received, if that effective date is requested by the SLFI on its registration application. The registration application must be made using Form RC1 or Form RC1A. In addition, a letter from the SLFI should be attached to the registration application including confirmation in writing that in the particular reporting period: (i) it is an SLFI; (ii) it did not make any taxable supplies; and (iii) it did not file any rebate applications. These documents should be sent to:

Canada Revenue Agency
Summerside Tax Centre
275 Pope Road
Summerside PE CIN 6A2

An SLFI that is a registrant would generally have a reporting period that is a fiscal year, under subparagraph 245(2)(a)(iv), unless it has made an election to have a reporting period that is a fiscal month, under section 246, or a fiscal quarter, under section 247.

Based on the information provided, the CRA would not register the pension plan described in the question effective July 1, 2010 where its application is made in May 2012. However, in certain circumstances the pension plan may be able to apply for and receive an effective date of registration that is earlier than the date the registration application is made.

For example, if the pension plan described in the question has a fiscal year that is a calendar year and applies for registration effective January 1, 2012 on June 10, 2012, the registration could be effective as of January 1, 2012, provided the request for registration is accompanied by confirmation, in writing, of the following information: (i) the pension plan is an SLFI for the fiscal year; (ii) it did not make any taxable supplies during the particular fiscal year; and (iii) it did not file any rebate applications during the particular fiscal year. If, on the other hand, the pension plan applies for registration effective April 1, 2012 on June 10, 2012 and elects to have quarterly reporting periods, the registration could be effective April 1, 2012 if the application includes confirmation in writing that (i) the pension plan is an SLFI for the fiscal quarter; (ii) it did not make any taxable supplies during the particular fiscal quarter; and (iii) it did not file any rebate applications during the particular fiscal quarter.

It is important to note that the CRA will also consider other written requests from SLFIs to make the effective date of a voluntary registration earlier than the date that the registration application is made where exceptional and/or unusual circumstances exist. The written request should include details regarding the exceptional and/or unusual circumstances that exist which would support making the effective date of registration earlier than the date that the registration application is made, and be sent with the related Form RC1 or RC1A to the above address. The determination of whether a particular request will be granted will be made on a case-by-case basis.

11. We do understand that CRA is not planning to come up with an exception for pension plans that have most of their members in the harmonized provinces from completing GST494 if they technically meet the definition of an SLFI under the SLFI regulations. However, we have seen many cases where not providing an exception for these pension plans is not workable. This is based on the facts of a specific client: a pension plan and its participating employer are resident in an HST province. The majority of the pension plan's members are also resident in that same HST province, but the plan also has a very small number of retired plan members residing in a non-HST province. When calculating its Provincial Attribution Percentage (PAP), the pension plan finds that its PAP for the HST province is 99.993% and its PAP for the non-HST province is 0.007%. On this basis, technically, the pension plan appears to be a selected listed financial institution (SLFI) and thus required to file a GST494 return, even though, in this case, the SAM calculation is likely to result in very little change to the plan's net tax due to the very small PAP for the non-HST province. In such a case, is the plan really required to complete the SAM and file a GST494 or is there some type of minimum threshold for PAPs that must be crossed before being required to file the GST494? What if the PAPs were 99.9993% and 0.0007%, respectively?

CRA Response:

All legislative references are to the *ETA* unless otherwise specified, including the proposed amendments to the GST/HST legislation (*ETA*) and the draft *Selected Listed Financial Institutions Attribution method (GST/HST) Regulations* (the draft Regulations) released on January 28, 2011.

Pursuant to the definition in subsection 123(1), a person would be an SLFI at any time if meets the criteria set out in proposed subsection 225.2(1): (i) it is a listed financial institution described in any of subparagraphs 149(1)(a)(i) to (x) at any time during the taxation year, and (ii) it is a prescribed person. Pursuant to section 11 of the draft Regulations, a prescribed person generally includes a listed financial institution such as a trust governed by a registered pension plan (a pension entity) which has, at any time in the taxation year, a permanent establishment in a participating province and in any other province. According to paragraph 4(f) of the draft Regulations, where a pension entity has **one or more** plan members residing in a province it is considered to have a permanent establishment in that province.

There are certain exceptions to the general rules provided in section 11. Pursuant to section 14 of the draft Regulations, a pension entity will not be a prescribed person and therefore not an SLFI where less than 10% of the total plan members of the pension entity are resident in **participating** provinces and, generally, the total value of the actuarial liabilities of a defined benefits plan or the total assets of a defined contribution plan attributable to plan members resident in the participating provinces is less than $100 million. There is currently no similar proposed provision that would apply where a pension entity has a very small percentage of plan members resident **in non-participating** provinces and the remainder of the plan members are in a single participating province, and which would deem it not to be an SLFI.

A similar provision to section 14 of the draft Regulations that would apply where almost all of the plan members of a pension entity are resident in a single participating province would require an amendment to the draft Regulations, which is the responsibility of the Department of Finance. It is our understanding that the Department of Finance has indicated publicly that it is not currently considering adding this type of provision.

It should be noted that there is another exception to the general rules provided in section 11. A qualifying small investment plan (QSIP) is generally not a prescribed person and therefore not an SLFI unless it makes an election under section 15 of the draft Regulations. Where section 14 of the draft Regulations does not apply to a pension entity, the pension entity should also determine whether it is a QSIP and, if it is, whether it is still a prescribed person. Even if the pension entity is an SLFI, if it is a QSIP it could apply to not be considered an SLFI by filing with the Minister GST/HST Form RC4612, *Application to not be considered a Selected Listed Financial Institution*. For more information regarding the definition of a QSIP and determining whether a person is an SLFI, see GST/HST Technical Information Bulletin B-107: *Investment Plans (Including Segregated Funds of an Insurer) and the HST*. Where none of the exceptions noted above apply and a pension entity is an SLFI, it is required to file the GST494 return, even where it may have less than 10% of its members residing in a **non-participating** province and the remainder of the members in a single participating province. Furthermore, the SAM calculation and resulting adjustments to net tax must be made by SLFIs even where the application of the provincial attribution percentage for a particular province results in a very minimal adjustment or minimal amount of net tax owing by the SLFI.

12. What is CRA's view on the definition "in relation to" in the context of the place of supply rules for services "in relation to" tangible property and real property? For example, will an engineer that provides services in Alberta with respect to a specific site in British Columbia to an Alberta company (i.e., the contracting address of the corporation is Alberta) be considered a "service in relation to real property" or a general service? For example, the engineer designs a building in British Columbia for an Alberta company, and most of the work is done in Alberta.

What is CRA's view on the definition "in relation to" in the context of the place of supply rules "in relation to" intangible personal property "in relation to" real property? For example, does CRA consider seismic data an intangible "in relation" to real property?

CRA Response:

Services "in relation to" real property is a description used in HST place of supply rules (TIB B-103)
Services "*in respect of "real property* is a description used in the context of zero-rated supplies.
P-169R defines "in respect of" quite fully.

The definition of "in relation to" is not specifically defined in the *Excise Tax Act*. As such, we cannot respond directly to this question. We can only state that every situation is considered on a case-by-case basis.

13. PSB-A ("A") is a not-for-profit entity that produces and performs an annual cultural show. It enlists young people to perform in this show, and provides them with extensive training for this show, particularly in music and dance.

A has entered into an agreement with "School Authority B" whereby if a young person completes the training, B will accept the training provided by A as the equivalent of some (but not all) of the courses that meet the requirements of that provinces' high school diploma. In order to be considered a "School Authority," subsection 123(1) of the *ETA* provides that an entity must

(a) be an elementary or secondary school; and

(b) provide education that meets the educational standards of the province in which the instruction is given.

For purposes of this question, "secondary school" is not defined in the *ETA*, but the common interpretation of the term is that a secondary school is a place of learning for people between 13 and 18 years of age. Thus, criterion (a) appears to be met. Where instruction is accepted as an equivalent of a course that meets the provincial high school standard, the criteria to provide instruction accredited by that province appears to be satisfied.

In this scenario, would A meet the definition of a school authority in respect of the training it provides and be entitled to claim a 68% PSB rebate in respect of this training provided?

CRA Response:

Would PSB-A meet the definition of a school authority?

- Definition of school authority is "an organization that operates an elementary or secondary school…"
- This definition states that the organization operates "a" not "as a"
- Definition of NPO excludes a public institution that is a registered charity
- Definition of public institution includes a school authority
- Definition of PSB includes NPO, school authority,…
- Does A operate a secondary school? Probably not. They operate an annual cultural show.
- Can an entity that provides only music and dance training be considered to be a secondary school? A secondary school is required to offer a full complement of courses; math, language arts, social studies, science, etc
- A school authority must provide instruction that meets the standards of educational instruction established by the government of the province. Does the province provide the approval to School Authority B or to PSB-A? The provincial approval would be to School Authority B, not PSB-A.
- Conclusion: PSB-A is not a school authority and is not entitled to a 68% PSB rebate.

14. When a receiver is Court-appointed for a company that has gone into receivership, there is a deemed reporting period end for the pre-receivership period of the company occurring on the day before the Court-appointment and another reporting period commencing the day of appointment for the post-receivership period. In order to separate the post-receivership GST/HST periods from the pre-receivership periods, it is common practice for an additional GST/HST account to be added to the operating company's business number, typically denoted as "RT0002." Since the company's activities under receivership are not part of the pre-receivership activity, the receiver is permitted to recover any excess of input tax credits (ITCs) over GST/HST collectible through an ITC refund claim. CRA is not permitted to off-set these post-receivership GST/HST refund claims against any pre-receivership GST payable from activities during the pre-receivership period.

Despite this, we note that administratively these off-sets by CRA often occur. It is our experience that the off-sets occur more frequently when the additional GST/HST accounts are not created by senior business window agents or similarly knowledgeable CRA representatives. Therefore, is there a method, procedure, or similar process that could be followed by us so that a separate receivership GST/HST account can be set up properly in every instance and avoid these improper off-sets by CRA?

CRA Response:

Information Circular IC12-1 *GST/HST Compliance Refund Holds*, issued on May 18, 2012, deals with CRA's administrative policy on release of post-insolvency GST/HST refunds that are being held due to outstanding pre-insolvency corporate income tax returns. The policy provides relief to the insolvency practitioners in such cases when they are unable to file the pre-insolvency corporate income tax returns. However, if there is non-compliance in the post-insolvency period, this may affect release of the post-insolvency refunds.

An administrative procedure to deal specifically with the off-set of refunds that may be due to the Receiver on a post receivership GST filing could not be found. All the Receivership accounts are dealt with by the Insolvency Teams and routing the documentation to the Regional Intake Centres for Insolvency is the current procedure. This information has been provided to the insolvency community and is posted on the OSB website.

In respect to the creation of the appropriate division account for GST (i.e., RT0002) to avoid processing delays, insolvency professionals can forward the necessary documentation to the Regional Correspondence Centre. In the case of the Prairies, the correspondence should be forwarded to:

Prairie Regional Correspondance Centre
PO Box 557
Regina, SK S4P 3A3

Fax 1-306-757-1412.

The Correspondence Centre also has a toll free number to contact if it is believed undue delays in processing are being experienced.
TOLL FREE: 1 - 866 - 218 - 4847.

15. Where a registrant fails to collect sufficient tax from their customer (i.e., applies 5% GST rather than 12% HST to the transaction) for a sale, and later recognizes the error and issues a "catch-up" invoice for the previously uncollected tax, what invoice date should be used for the catch-up invoice? For example, if the original sale invoice (with insufficient tax) was dated December 15, 2011 and the catch-up invoice is generated on January 25th, 2012, should the date reference the original transaction December 15th 2011, which would entitle the customer to claim the additional tax on their December 2011 GST return, or should it be dated January 25th, 2012, such that the customer must wait to claim the input tax credits on their January return?

CRA Response:

In accordance with subsection 168(1) of the *ETA*, tax is payable by the recipient of a taxable supply on the earlier of the day the consideration for the supply is paid and the day the consideration becomes due.

Subsection 152(1) of the *ETA* provides that consideration (or a part thereof) for a taxable supply is deemed to become due on the earliest of:

- The earlier of the day the supplier first issues an invoice in respect of the supply for that consideration or part and the date of that invoice;
- The day the supplier would have, but not for an undue delay, issued an invoice in respect of the supply; and
- The day the recipient is required to pay consideration or part to the supplier pursuant to an agreement in writing.

A response should also consider subsection 169(4) and paragraph 169(4)(a), which states that "a registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed, (a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed" (by the regulations).

In our scenario, the registrant was the recipient of the property or service in December 2011 and was incorrectly invoiced at 5% in the same period. The recipient's GST/HST return for the reporting period ended December 31, 2011 had to be filed with the Minister not later than January 31, 2012. The error was adjusted by the supplier on January 25^{th}, 2012. Therefore, the recipient registrant had sufficient time and sufficient evidence to determine the Input Tax Credit before filing the GST/HST return with the Minister. Consequently, assuming that all of the prescribed conditions were appropriately met, this registrant could claim the full 12% ITC on the return for the period ended 2012-12-31.

16. With respect to the zero-rating of domestic passenger transportation services where they are part of an international inbound or outbound continuous journey for the purpose of calculating the blended rate of tax due on a tour package: does the purpose of the transportation service affect whether or not it is eligible for zero-rating? For example, where a passenger embarks a conveyance for the purpose of sightseeing only (such as a day tour) and their luggage does not travel with them because it stays behind at the hotel, is this passenger transportation service still eligible for zero-rating if it is part of a zero-rated inbound or outbound continuous journey?

CRA Response:

No. The purpose of a passenger transportation service does not affect whether or not it is eligible for zero-rating. What is key is whether the passenger transportation service is part of a continuous journey. A passenger transportation service is any mode of transportation available to the public, such as transportation by bus, taxi, train, aircraft, or boat, as long as there is:

- a mode of conveyance;
- an operator of the conveyance independent of the traveller; and
- an itinerary.

Generally, an itinerary describes all elements of a journey, including origin, termination, stopovers, dates and times of arrivals and departures, and all modes of conveyance throughout the journey. If it is established that the transportation services in question constitute passenger transportation services, then consideration must be given to whether the passenger transportation services form part of a continuous journey before ascertaining whether the continuous journey meets the criteria to be zero-rated under sections 2 or 3 of Part VII of Schedule VI to the *ETA*.

Generally, a continuous journey of an individual or group of individuals means the set of all passenger transportation services provided to the individual or group as part of the same journey. However, certain conditions must be met before a journey is a continuous journey. These conditions depend on whether all of the passenger transportation services in the journey are provided on a single ticket or voucher, or on two or more tickets or vouchers.

When a single ticket or voucher is issued for one or more passenger transportation services, all of the passenger transportation services on that ticket or voucher are treated as part of one continuous journey. Where an itinerary is the only travel document issued to the traveller, the CRA considers an itinerary to be a ticket or voucher so that all of the items included on the itinerary would be on a single ticket or voucher.

When more than one passenger transportation service is provided and separate tickets or vouchers are issued for the different legs of the journey of the individual, all of the legs may be part of one continuous journey if all of the following conditions are met:

- all of the tickets or vouchers are issued by a single supplier, or by an agent acting on behalf of all of the suppliers;
- all of the tickets or vouchers are for the same individual;
- there is no stopover between any legs of the journey for which separate tickets or vouchers are issued; and
- the supplier or agent can show CRA that it has met all of the above conditions.

A stopover means any place at which the individual or group embarks or disembarks a conveyance for any reason other than transferring to another conveyance or to allow for servicing or refuelling of the conveyance.

A stop between two legs of a journey that is 24 hours or less is not considered to be a stopover and will not affect whether the legs are part of a continuous journey. A stop of more than 24 hours between the two legs of a journey will generally be considered a stopover where two or more tickets or vouchers are issued for the legs of the journey. However, if the supplier or agent can prove that a stop of more than 24 hours is for servicing or refueling the conveyance, or for the individual to transfer to another conveyance, the stop will not be considered a stopover and the continuous journey status will be unaffected.

17. Where an employer pays a flat rate allowance for use of a vehicle and a per km mileage allowance for use of the same vehicle, is CRA of the view that the per km allowance is reasonable (assuming reasonable rate) and eligible for ITC (and subject to recapture in BC and ON) or is the entire allowance amounts unreasonable for this purpose?

CRA Response:

In order for a person paying an allowance to be entitled to claim an input tax credit or rebate in respect of an allowance, the person must first satisfy the conditions set forth under section 174 of the *ETA*. In the case of an allowance to which subparagraphs 6(1)(b)(v), (vi), (vii) or (vii.1) of the *Income Tax Act (ITA)* apply, these allowances have to be reasonable for section 174 of the *ETA* to apply.

Subparagraphs 6(1)(b)(x) and (xi) of the *ITA* consider an allowance paid to an employee for using a motor vehicle in connection with the activities of the employer to be reasonable only if the following conditions apply:

- The allowance is based **only** on the number of kilometres driven in a year;
- The rate per kilometre is reasonable; and
- The employee is not reimbursed for expenses related to the same use of the motor vehicle, other than a reimbursement for supplemental business insurance, toll or ferry charges, not already included in the allowance.

A flat rate motor vehicle allowance paid to an employee is not considered to be a reasonable allowance for the purposes of subparagraph 6(1)(b)(vii.1) of the *ITA* by virtue of subparagraph 6(1)(b)(x) of the *ITA*. Furthermore, where an employee receives both a monthly flat rate amount and a cents per kilometre rate allowance from an employer for the same use of that individual's motor vehicle, the total combined allowance is not considered "reasonable", because it is not based **solely** on the number of kilometres for which the vehicle is used. In these circumstances, no tax is deemed to have been paid by the employer under section 174 of the *ETA* in respect of the allowance and the employer will **not** be entitled to claim an input tax credit or rebate in respect of the allowance.

An employer that is not eligible to claim an input tax credit in respect of a motor vehicle allowance also is not subject to the recapture requirements under section 236.01 of the *ETA* (i.e., recapture of the input tax credit that is attributable to the provincial part of the HST paid or payable on specified property or service that is acquired or brought into British Columbia or Ontario by a large business for consumption or use by that business in those provinces).

Further information and examples on whether a motor vehicle allowance is reasonable is provided in income tax guide T4130, *Employers' Guide: Taxable Benefits and Allowances* (Guide T4130).

18. There appears to be an increase in the number of occurrences where an assessment has been raised, an objection filed, and then another assessment raised with additional periods, which nullifies the objection. Can the CRA explain the process and why not raise separate assessments for the additional periods? There is always a risk of the taxpayer thinking an objection is properly filed and not fully realizing it has been nullified by a new assessment.

CRA Response:

The TSO's audit division would not usually reassess a previously assessed period unless significant information has come to light to justify such a reassessment. This can happen in a situation such as a pre-payment or credit return instance where **a restricted audit or review** has been carried out on a monthly or quarterly reporting period and factors subsequently surface to require a full audit on an entire fiscal year. As this should be a transparent process, the auditor should apprise the registrant accordingly and explain the circumstances.

In addition to reassessing, the Minister can also issue an additional assessment for a tax year or period that has already been assessed. While the *Act* does allow for additional assessment, in practice the CRA rarely issues an additional assessment; they are always reassessments.

Objections may be recognized as invalid by a **subsequent reassessment** at any time during the objection process.

A **subsequent reassessment** is a reassessment that is issued **after** an objection is mailed or filed. This reassessment nullifies both the previous assessment and any related objection for the tax year or period.

As part of the screening process when a Notice of Objection is filed with one of the national intake centres, an **Appeals Account code** is set for each year/period for which an objection or appeal has been filed. An **Appeals Reassessment Inhibit** is set in the relevant processing system to prevent the issuance of a non-Appeals reassessment while an objection is outstanding.

In order for a subsequent assessment to be issued, the Appeals Division must remove the **Appeals Reassessment Inhibit.**

As stated above, subsequent reassessments may be issued at any time during the objection process; consequently, both screeners and appeals officers should keep objectors and their representatives informed.

19. CRA rulings has verbally stated that there are a number of "technical" interpretation discrepancies between the department's position on technical issues and the details that are noted in the Audit Manual. What is the current status on correcting the Audit Manual to reflect the department's position on these technical differences? What time frame is anticipated on these changes? Are audit staff being made aware of these discrepancies?

CRA Response:

The mandate of the Legislative Policy & Regulatory Affairs Branch (LPRAB) of the CRA includes acting as the ultimate authority for interpreting tax legislation. The Excise and GST/HST Rulings Directorate of LPRAB has the responsibility for the interpretation and application of the *Excise Tax Act*, its regulations, departmental policies and administrative procedures.

The Audit Manual is an 'ever-green' document which is constantly being updated to reflect the Agency's position on any technical differences which may arise. The training teams within the TSOs are constantly running workshops to keep the audit staff updated, and internal newsletters are used for this same purpose. In addition, LPRAB may issue e-mail notices and Audit may issue Communique's from time to time dealing with these differences and any major questions which may arise.

20. In the past 6 to 8 months there has been a noticeable increase in "proposed" assessments on issues whereby the auditor and the technical advisors have not considered or provided explanation as to why they have chosen to ignore the department's position on issues that are clearly addressed in their Memoranda and other publications. Is there a reason for this? Has there been a shift in the audit policies surrounding these matters?

CRA Response:

The tax liability is established by the legislation and not by CRA policies and publications. The policy statements are developed by CRA for use as an expression of the CRA interpretation of the laws dealing with specific issues. Thus, the taxpayers/registrants cannot rely conclusively on a relieving policy in CRA publications.

The CRA is obligated to apply the policies in a fair and even-handed manner and assess a taxpayer/registrant according to the law. The CRA is not stopped from assessing in a manner not consistent with one of their publications. The principal purpose of the CRA publications is to inform the public of policies which the CRA has adopted for the administration of legislation as broad and complex as the *Income Tax Act* or *Excise Tax Act*. The assessment is made because it is based on the law, whereas a policy statement is sometimes based on administrative convenience or what is practical in a particular situation.

Furthermore, noting that the facts of each case are different, the CRA officials are generally obligated to follow the policy in dealing with a similar fact situation addressed by the policy. Broad policies are not applicable in all circumstances.

In the event that a type of situation is not meant to be addressed by the policy, the CRA officials are not required to follow the policy.