TAX EXECUTIVES INSTITUTE, INC.

INCOME TAX QUESTIONS

Submitted to

CANADA REVENUE AGENCY

DECEMBER 6, 2011

Tax Executives Institute welcomes the opportunity to present the following comments and questions on income tax issues, which will be discussed with representatives of the Canada Revenue Agency (hereinafter "CRA" or "the Agency") during the December 6, 2011, liaison meeting. If you have any questions about the agenda in advance of the meeting, please do not hesitate to call David V. Daubaras, TEI's Vice President for Canadian Affairs, at 905.858.5309 or, Carmine Arcari, Chair of the Institute's Canadian Income Tax Committee, at 416.955.7972.

1. Follow-up Questions from Prior Years

a. *International Tax Forms Simplification*

In response to Question 6 of the 2009 liaison meeting agenda, CRA said that it was reviewing the scope and content of various forms, including Forms T1134A and B. In a follow-up question during the 2010 liaison meeting, CRA said that consultations with stakeholders about potential changes to the forms were continuing. We invite an update on the status of CRA's review and a discussion of potential revisions to various forms, especially Forms T1134A and B.

b. *Advisory Panel on Canada's System of International Taxation — Large Corporations and Double Taxation Cases*

Paragraph 7.24 of the *Report by the Advisory Panel on Canada's System of International Taxation* states:

> Rules regarding tax prepayment or security and deficiency interest in transfer pricing cases should differ from the general rules applying to other tax cases because, in double taxation cases, tax has already been paid to another government in respect of that amount.

In Question 11 of the 2009 liaison meeting, TEI observed that CRA's Legislative Policy and Regulatory Affairs branch was understood to be reviewing the Advisory Panel's recommendations, including the requirement to prepay 50 percent of the disputed tax prior to

seeking competent authority relief. In response, CRA said its working group's deliberations were "ongoing." In response to a follow-up question last year, CRA reported that its deliberations had not yet concluded. Would CRA (1) update TEI on the working group's status and its current thinking (especially about the requirement that large corporations prepay 50 percent of the disputed tax prior to seeking competent authority relief) and (2) comment on CRA's next steps in the evaluation of the administration of the current system of international taxation?

c. *Partnership Returns*

In Question 5(c) of the 2010 liaison meeting, TEI inquired whether CRA kept a log of return filings so that a partnership can obtain an acknowledgement of the fact of filing its return. CRA advised that it would "consider a paper notification process as part of the on-going development of Information Returns" in order to advise when a partnership return had been received and processed. We invite an update on the status of CRA's efforts to provide a notification process for partnership returns.

d. *My Business Account*

In response to Question 14 about "My Business Account" in the 2008 liaison meeting, CRA acknowledged that the system was designed with small business users in mind and that it was working on system enhancements for large businesses. In a follow-up meeting between representatives of CRA and TEI, a number of issues were discussed, including the need to balance proper authentication controls for users (including who within a corporate tax department should be able to access or view what information) with safeguards for the taxpayer and CRA (especially around transfers of funds among accounts); CRA said that making the system changes envisioned might require several years. TEI invites a discussion on the progress CRA has made in making "My Business Account" more usable by large file taxpayers.

2. EFILE and Form T106

Taxpayers generally use certified software packages listed on the CRA website to prepare their corporate income tax returns. Such software generally permits data entry for Form T2 (*Corporation Income Tax Return*) as well as other schedules, annexes, and forms, including information and data in respect of Forms T106 (*Information Return of Non-Arm's Length Transactions with Non-Residents*). The EFILE section of the CRA website, however, does not alert taxpayers to the separate paper filing requirement for Forms T106. Indeed, the only website reference to separate paper filing requirements is the following statement:

> Inform your client that elections, designations, agreements, waivers, and special elective returns must be submitted on paper by the appropriate due date, as established in the *Income Tax Act*.

Form T106, however, is not an "election, designation, agreement, waiver or other special elective return."

Some companies that employed the EFILE option for their T2 returns have been assessed late filing penalties and interest on the grounds that Form T106, which was included with the electronically filed return, must be filed in paper format even where the taxpayer uses the EFILE option. The affected taxpayers have filed requests for relief arguing the penalties and interest were unfairly assessed since (1) electronic returns prepared with certified software were accepted as filed and (2) there are no EFILE website instructions alerting taxpayers to file Form T106 separately on paper. Without regard to how CRA will resolve pending requests for relief, we invite a discussion of the following issues:

a. Will CRA consider expanding the EFILE process to include Form T106 in order to eliminate the separate paper filing requirement? If so, when might the system be updated to permit this?

b. Will the EFILE process be expanded to facilitate electronic filing of other forms, such as Forms T1134A, T1134B, and T5013? Is there a timetable for facilitating electronic filing of such forms and eliminating paper filing?

c. To minimize confusion about Form T106 filing requirements, will CRA update the electronic filing instructions on its website to clarify and confirm that Form T106 must be filed on paper even where EFILE is employed?

3. Details of Part XIII Reassessments

Many taxpayers receive Part XIII tax reassessments as a consequence of Part 1 tax adjustments made by CRA's international tax directorate. The documentation CRA issues to the taxpayer, however, lacks detail making the account analysis and reconciliation of Part XIII tax difficult and time consuming. Unlike account statements issued by TSOs where account balances are segregated by taxation year, accounts coded "NR" lump all "non-current" year balances into a single "bucket." Does CRA plan to upgrade its accounting for "NR" accounts in order to mirror the detail provided for accounts coded "RC"? If not, how should taxpayers obtain the details underlying Part XIII reassessments?

4. Functional Currency Reporting Rules

The technical notes to subsections 261(20) and (21) state that they are intended to prevent abuses of the functional currency tax reporting regime. At the May 2011 International Fiscal Association (IFA) roundtable, CRA was asked to provide scenarios where it would apply the anti-avoidance rule in subsection 261(21). The facts of the example CRA provided were, as follows:

1. Canadian dollar functional currency parent lends to U.S. dollar functional currency subsidiary.
2. The loan is denominated in Canadian dollars.
3. On repayment of the loan, the subsidiary incurs a foreign exchange loss.
4. The foreign exchange loss in the subsidiary is denied.

Why does CRA consider this scenario to be abusive and subject to the anti-avoidance rule? The impetus for a taxpayer to make a functional currency election for tax purposes is that Canadian generally accepted accounting principles may require a taxpayer to maintain one or more (but not all) of its corporate accounts in the foreign currency. By making the election, the taxpayer is endeavouring to save the time and expense of maintaining two sets of books of original entry for the affected accounts. We invite CRA to elaborate on its response at the IFA roundtable.

5. Distributions from Foreign Affiliates

At the May 2011 IFA roundtable CRA was also asked whether Technical Interpretation 2004-006013117 (October 21, 2004) continues to apply to distributions of the share premium of a foreign affiliate. CRA confirmed its position in the interpretation and added that subsection 15(1) also applies to distributions. Under what circumstances will CRA apply subsection 15(1) to distributions of share premium? Assuming the August 19, 2011, foreign affiliate legislative provisions are enacted, would CRA still apply subsection 15(1) to distributions covered by the return of capital provisions?

6. Advance Pricing Agreement Program

The APA program is highly valued by taxpayers because it provides certainty about the taxation of intercompany transactions. We understand that there has been a marked decline in the rate of acceptance of applicants into the APA program by the Competent Authority Services Division. We invite CRA's comments on whether there has been a change in its policy on the availability of the APA Program or changes in the criteria for acceptance into the program.

7. Risk-Based Audit Approach

HM Revenue & Customs in the United Kingdom has published substantial guidance about its risk-based audit approach for large businesses.[1] The guidance affirms HMRC's publicly stated goal of having a large business framework produce a robust, externally auditable measure of the number of low-risk large business customers. To satisfy its goal HMRC has taken a number of steps, including:

- Publishing the criteria for risk evaluation;
- Asking for an independent review of the application of the criteria to ensure that they are being applied on a uniform basis across the large business taxpayer community;
- Sharing the results of the review with the large business taxpayer community, including the finding that criteria in the program were not applied consistently; and,
- Remedying inconsistent application of the criteria.

[1] *See, e.g.*, http://www.hmrc.gov.uk/manuals/tcrmanual/index.htm.

Since CRA has also implemented a risk-based audit approach for large business taxpayers, we invite CRA's comments on the following questions:

1. Will CRA disclose the criteria used in evaluating the risk of a particular taxpayer, and, if so, supply that information to the taxpayer?

2. Will CRA identify which of its personnel are involved in a particular taxpayer's risk evaluation? For example, in addition to personnel from the local TSO are others from regional offices or headquarters involved in the risk-evaluation process for specific cases? When will taxpayers be informed of the identity of all the CRA individuals making the risk-assessment?

3. Will CRA share the outcome of the risk-based evaluation with specific taxpayers? Does CRA have any reports or statistics compiling and reporting how many taxpayers have been advised of the outcome of their evaluation?

4. Is CRA implementing a process to ensure consistent application of its criteria across all large business audit teams, TSOs, and, to the extent they are involved, Headquarters personnel?

5. Will CRA conduct a post-evaluation review of the consistency of the application of the criteria for its program?

6. Is CRA considering any steps to improve the transparency of the program to taxpayers?

In addition to responding to these questions, we invite comments CRA may wish to make about its risk-based audit approach.

8. Tax Earned by Auditor (TEBA)

Organizational behaviour theory posits that the behaviour of individuals and groups is strongly influenced by the metrics used to measure performance. In other words, "you get what you measure." TEBA is a metric used by CRA to evaluate and allocate audit resources to individual Tax Services Offices (TSOs). TEI questions whether TEBA is an appropriate metric to motivate auditors and TSOs to perform in the best interests of the Agency.

TEI members have reported the following experiences recently:

- Adjustments have been made at the audit level that are clearly unsustainable at Appeals. Specifically, the audit group at a TSO will make the same adjustment year after year even though the adjustment is overturned repeatedly by the Appeals Division. In one instance, the Audit Division made adjustments in five consecutive years after the matter was first overturned by Appeals. (None of the subsequent adjustments were sustained by Appeals.)

- A request for a legitimate taxpayer-requested adjustment was denied because, as the Large File Case Manager put it, "We have to manage our revenue too."

- A consequential adjustment, which would have resulted in a reduction of taxable income and which arose as a result of an earlier audit adjustment, was denied by the CRA auditor because he did not want TEBA affected.

Although such adjustments might improve the TEBA metric for the audit team, they would not represent a good use of CRA and taxpayer resources. TEI submits that a metric incorporating the sustainability of adjustments would be a better measure of auditor performance, lead to higher quality audits adjustment, and ensure better use of resources by both CRA and taxpayers. We invite CRA's views on (1) its use of TEBA and (2) whether the measurement criteria should include a sustainability factor.

9. Advance Deposit Accounts

a. *Transfers to Payroll Accounts*

In large corporations with multiple payroll processing and disbursement centres and multiple tax accounts across the country, unintentional mistakes in payroll tax remittances can occur for a variety of reasons. In such cases, the application of advance deposit amounts to payroll tax obligations to mitigate penalties would be beneficial.

In its Fact Sheet on *Making and Managing Advance Deposits,*[2] CRA states that an advance deposit on reassessments may be transferred and used as a remittance on a payroll account. In addition, the response to question 6 of the Question and Answers of the publication reiterates that taxpayers may transfer an advance deposit as a remittance on a payroll account.

While some TSOs routinely permit transfers from the advance deposit account and do not assess a penalty for the late remittance where such an amount is used to satisfy a payroll tax obligation, TEI members report that at least one TSO requires a written request for the transfer of the advance deposit *before* the due date of the payroll remittance. By imposing such a requirement, the TSO is effectively vitiating the relief the advance deposit mechanism is intended to afford to taxpayers. Since CRA has the funds in the advance deposit account, a written request before the payroll deposit due date should not be required. Would CRA please clarify the procedure for transfers of advance deposits to payroll accounts?

b. *Advance Deposits Must Be Assigned to a Specific Tax Year*

As discussed in connection with Question 13 during last year's liaison meeting, TEI believes CRA's current approach to the administration of advance deposits and prepayments for tax reassessments is cumbersome. With the recently enacted reduction in the interest rates paid on refunds, would CRA reconsider its administrative requirement that taxpayers allocate prepayments to specific tax years, revert to its prior process of holding taxpayer funds in an

[2] Available at http://www.cra-arc.gc.ca/whtsnw/tms/dvncdpsts-fs-eng.html.

undesignated account as of the effective interest date, and apply the funds when and as reassessments are made? Properly administered, the advance deposit mechanism protects corporate taxpayers from onerous, non-deductible interest charges on deficiencies. By reducing the after-tax cost of settling disputes, the mechanism also reduces the scope and degree of controversies between CRA and taxpayers.

c. *Lack of Documentation regarding Related Party Transfer Guidelines*

While CRA has provided guidelines for transferring advance deposits between different years and different types of accounts (*e.g.*, between an income tax account and a GST/HST account) there is no guidance on transferring amounts between related entities in large corporations. Previously, related party transfers were permitted. Would CRA confirm whether transfers are permitted among related parties in a corporate group? In addition, would CRA confirm that the transfers are permitted between corporate entities and partnership entities?

d. *Automatic Settlement of Offsetting Tax Liabilities by CRA*

CRA will occasionally, without consulting with the affected entities or taxpayer, transfer tax deposits intended to cover a particular tax year or tax type to offset other unpaid tax liabilities from other years or tax types. Thus, the unilateral transfers are between different tax years of the same tax types as well as different types of tax accounts (*e.g.*, between an income tax account and a GST/HST account). Often, the application of the deposit by CRA is not the course of action the entity would prefer. As important, once the action is discovered, it is difficult for the entity to track and reconcile its accounts to make corrections. Where there is no credit or collection risk (*e.g.*, in respect of large corporate groups), would CRA consider instituting a process check to cease automatic transfers to settle offsetting tax liabilities of large corporations?

10. Transfer Pricing (1)

Michael Danilack, Deputy Commissioner (International), Large Business & International, of the Internal Revenue Service made remarks during TEI's *61st Midyear Conference* in Washington, D.C. (April 5, 2011) in respect of transfer pricing and competent authority negotiations that we believe are apropos to Canada.[3] Specifically, CRA auditors commonly

[3] Mr. Danilack said:

> I suggest that [Article 9 of the OECD Model Tax Convention can] also be read to mean that, if the taxpayer has, in good faith, completed a sound analysis to establish an arm's length result under accepted transfer pricing principles and fully documented that effort in both countries, and if it's apparent from the situation, and from all the evidence, that the taxpayer has not misused transfer pricing to reduce its overall tax burden, then the treaty should limit the ability of either contracting state to make an adjustment.
>
> I put forward this proposition because, as we all know, it's relatively easy to challenge any transfer price or expense allocation simply by invoking a different comparable set, applying a different methodology, or pointing to extraneous factual considerations. If reallocation were permissible in any case in which two enterprises are related or controlled, then virtually every cross-border reporting position would be subject to proposed reallocation and presentation to [competent authority] for resolution. In other words, just because a decent examiner or economist can dive into a case and come up with a different set of numbers in a country's favor shouldn't mean that the

assert transfer pricing positions that differ from those of the taxpayer because, as Mr. Danilack notes, it is easy to do so by simply "invoking a different comparable set, applying a different methodology, or pointing to extraneous factual considerations." The ability of auditors to make adjustments "because they can," however, frustrates taxpayers and is contrary to the underlying premise of a self-assessment system.

Since many Canadian transfer pricing disputes involving a U.S. counterpart will be referred to Competent Authority and if unresolved within a two-year timeframe be subject to the arbitration provisions of the Canada-U.S. Tax Treaty, it would be more efficient for the government and taxpayers to minimize transfer pricing reassessments, especially where the taxpayer has a well-documented transfer pricing analysis. Would CRA consider working with the IRS to develop a coordinated approach to transfer pricing audits that minimizes transfer pricing reassessments based on differing assumptions, especially where the taxpayer has not attempted to use transfer pricing to reduce its overall tax liabilities and has fully documented its analysis in establishing arm's length pricing with its related U.S. entities? We invite CRA's comments.

11. Transfer Pricing (2)

a. *Application of Arm's Length Transfer Prices Established through Competent Authority or an APA to Similar Transactions with Non-Treaty Countries*

Taxpayers often have transactions with multiple, related, non-resident companies where the nature of the transactions and the applicable transfer-pricing methodology are identical. Would CRA be willing to apply the approach (or results) achieved in a negotiated Competent Authority agreement between treaty countries to all identical transactions, even for transactions with non-treaty countries? Using the same approach for identical transactions would be more efficient for taxpayers and government and ensure consistent treatment of transactions.

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adjustment is permitted under the treaty and should be presented to the other country for correlative adjustment. To prevent this from happening, I think it's important for the adjusting country to show that, in fact, there are conditions made or imposed between the enterprises differing from those which would be made between independent enterprises and that those conditions involved mispricing to gain a tax advantage.

Further, I'll point out that, in the competent authority process, the adjusting country has the burden of proof in this regard. First, paragraph 2 of Article 9 makes clear that the specific conditions supporting the reallocation must distinguish the case from a situation in which those conditions don't exist. In addition, the OECD commentary on paragraph 2 of Article 9 makes clear that the country from which relief is requested is required to provide correlative relief only if it determines the adjustment is justified, both in terms of principle and in terms of the amount . . . .

If the taxpayer has conducted a strong analysis to establish arm's length results under accepted principles and fully documented that effort in both countries, and if it's apparent from the situation that the taxpayer hasn't misused transfer pricing to reduce its overall tax burden, then the treaty should operate to limit the ability of either contracting state to make an adjustment. Personally, I believe this concept is critical to ensuring that both taxpayers and competent authorities are not overwhelmed with proposed adjustments triggered by nothing more than common ownership and some of the subtleties that can lead to pointy-headed debates when applying the arm's length standard.

b. *International Tax Directorate Economists*

In international audits of large corporations in Canada, a team from CRA's International Tax Directorate (ITD) is often assigned to the file in support of the local auditor's review. Two trends have developed, however, that are disconcerting to taxpayers.

First, when taxpayers inquire why they have received inapt or overbroad requests for information, the local auditor's response often is that the ITD is directing the audit from Ottawa.

Second, when a transfer pricing adjustment is raised and the taxpayer applies to Competent Authority for relief, the economist from ITD who wrote the report in support of the adjustment is often brought into the Competent Authority proceeding to assist in resolving the MAP case. Similarly, the economist that assisted in a field audit may also be an advisor to Competent Authority in respect of an APA case.

In respect of the first trend, would CRA develop audit guidelines to ensure the efficient use of limited taxpayer resources and curb the issuance of overbroad Information Requests that, for example, require production of "all documents ever produced"? In many cases, a taxpayer could never reasonably comply with such a request whether voluntarily or under a court order.

With respect to the second trend, taxpayers believe that having the same ITD economist participate in both the field audit and the MAP (or APA) case is a conflict of interest comparable to assigning the field auditor who reassessed a taxpayer to the appeal of issues identified in a taxpayer's Notice of Objections. Will CRA consider staffing the Competent Authority proceeding with an economist who is independent from the audit team?

c. *Non-resident Withholding Tax related to Transfer Pricing Adjustments*

After CRA issues a transfer pricing reassessment under section 247 a secondary adjustment is typically made pursuant to paragraph 214(3)(a) for an amount considered to be a benefit — a deemed dividend — paid by a corporation resident in Canada to its "ultimate shareholder." Subsection 212(2) of Part XIII is then applied to tax the deemed dividend at a rate of 25 percent, subject to reduction under an applicable treaty with the non-resident's country. Once CRA reassesses the Part XIII tax amount, there is seemingly no provision under the Act permitting a taxpayer to defer payment or to pay any amount less than the full amount of tax plus interest.

Where a taxpayer is successful in obtaining a reduction in the transfer pricing adjustment (whether at Appeals or Competent Authority), a corresponding reduction in the proposed Part XIII tax will result. Would CRA consider deferring its reassessment of the Part XIII amounts until the underlying transfer pricing issue is resolved? Such a delay would permit the final amount of Part XIII tax liability to be determined before the taxpayer is required to pay that tax. Alternatively, would CRA consider applying collection rules similar to subsection 225.1(7) to Part XIII tax so that the amount of Part XIII payable by a taxpayer during the pendency of an Appeal or Competent Authority proceedings is limited to 50 percent of the tax amount?

d. *Conceptual Marketing or Other Intangibles of Risk-free Distributors or R&D Service Providers*

The arm's length concept requires that a related service provider be treated in the same fashion as an arm's length service provider. In the case of a third-party distributor or a contract research organization, the third party typically does not obtain or retain any rights in the property or assets of the contractee. Absent a right or intangible, the Canadian entity does not possess any asset and should not be entitled to any compensation other than a cost-plus return or a service fee. Nonetheless, in its audit of multinationals, CRA takes the position that a local entity cannot be "de-risked" by having a non-resident related party, which holds all patent rights, pay all the costs of developing a product and reimbursing the costs of marketing the product. If financial risk is borne entirely outside of Canada, will CRA explain what risk remains to be compensated in Canada or what conceptual intangible resides in Canada?

Would CRA be willing to consult with TEI on this issue with a goal of providing administrative guidance about its assessing practices for related party distributors and service providers?

12. 2010 OECD Transfer Pricing Guidelines

In July 2010 the OECD Council approved revisions to Parts I-III of the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.* TEI invites CRA comments on the following aspects of the revised OECD transfer pricing guidelines (TPG):

a. *"Most Appropriate" Method*

The 2010 TPG move away from the strict hierarchy of methods set forth in the 1995 Guidelines in favour of selecting the "most appropriate method." Paragraph 2.2 of the 2010 Guidelines explains that —

> the selection process should take account of the respective strengths and weaknesses of the OECD recognised methods; the appropriateness of the method considered in view of the nature of the controlled transaction, determined in particular through a functional analysis; the availability of reliable information (in particular on uncontrolled comparables) needed to apply the selected method and/or other methods; and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them.

Paragraph 2.3 of the 2010 TPG states that, in circumstances where a traditional method and a transactional profit method can be applied in an equally reliable manner, the traditional method is preferred. What is CRA's view of the 2010 TPG with its de-emphasis of the hierarchy of methods vis-à-vis the stricter approach of the 1995 Guidelines? Does CRA accept the 2010 TPG's de-emphasis of the hierarchy of methods?

b. *Tested Party — Data Segmentation*

Paragraph 2.78 of the 2010 TPG provides commentary about using an "appropriate level of segmentation of a taxpayer's financial data" when determining or testing the net profit from controlled transactions of the tested party. The 2010 TPG are more direct about the need to use data segmentation rather than company-wide data for testing net profit from a controlled transaction. What is CRA's view about using data segmentation approach for the tested party? Does CRA accept that data segmentation is more appropriate when available?

c. *Statistical Tools*

Paragraph 3.57 of the 2010 TPG states:

> It may also be the case that, while every effort has been made to exclude points that have a lesser degree of comparability, what is arrived at is a range of figures for which it is considered, given the process used for selecting comparables and limitations in information available on comparables, that some comparability defects remain that cannot be identified and/or quantified, and are therefore not adjusted. In such cases, if the range includes a sizeable number of observations, statistical tools that take account of central tendency to narrow the range (e.g. the interquartile range or other percentiles) might help to enhance the reliability of the analysis.

What is CRA's view about the use of statistical tools to enhance the reliability of a comparability analysis?

d. *General View of the 2010 OECD TPG*

Does CRA subscribe fully to the 2010 version of the TPG or does CRA object to or have reservations about any of the guidelines or commentary in the 2010 TPG? What is CRA's position in respect of the guidelines or commentary to which it objects or has reservations about applying?

13. Scientific Research & Experimental Development (SR&ED) Expenditures

When a taxpayer conducts an SR&ED project at a dedicated facility such as a pilot plant, expenses will be incurred in acquiring assets, constructing a test facility, conducting a testing program, and disassembling and removing the test facility. We understand that CRA auditors believe that decommissioning costs, such as the disassembly and removal of a test facility, are not qualifying SR&ED costs on the grounds that the costs are incurred after the SR&ED project ends.

TEI submits that the timing of expenditures should not be the main criterion in determining whether expenditures qualify as SR&ED. Regulation 2900(3) states

> For the purposes of subclause 37(8)(a)(ii)(A)(II) of the Act, the following expenditures are directly attributable to the provision of premises, facilities, or equipment for the prosecution of scientific research and experimental development:
>
> (a) the cost of the maintenance and upkeep of such premises, facilities or equipment; and
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> (b) other expenditures, or those portions of other expenditures, that are directly related to that provision and that would not have been incurred if those premises or facilities or that equipment had not existed.

TEI submits that decommissioning costs for a facility dedicated to a qualifying SR&ED project clearly *would not have been incurred if the facility or premises not existed for the purpose of the SR&ED project.* Hence, decommissioning costs of a facility dedicated to a qualifying SR&ED project are "directly attributable" to the provision of premises, facilities, or equipment for the prosecution of scientific research and experimental development and should thereby qualify as SR&ED expenditures. Would CRA consider revising its assessing position so that decommissioning costs incurred solely for an SR&ED project will qualify as SR&ED expenditures?

14. Publications

During the 2009 liaison meeting CRA discussed its plan to update its guidance, including Interpretations Bulletins (ITs) and Information Circulars (ICs). CRA's goal was to update 12 bulletins in 2010. More recently, CRA requested that stakeholders submit recommendations of critical and high priority ITs and ICs that should be revised. TEI was pleased to provide its recommendations in a letter submitted August 29, 2011. We invite CRA to provide a status report on its ongoing efforts to update its ITs and ICs. Has CRA developed a priority list of critical and high priority updates and can it share the list? If additional resources are necessary for this endeavor, has CRA secured them?

15. Section 79.1 Seizure of Property — Effect on Creditor

Section 79.1 applies when a property is seized at any time by a person in respect of a debt. Under subsection 79.1(2) "a property is seized at any time by a person in respect of a debt where (a) the beneficial ownership of the property is acquired or reacquired at that time by the person; and (b) the acquisition or reacquisition of the property is in consequence of another person's failure to pay to the person all or part of the specified amount of the debt."

We invite CRA's reactions to the following issues about seizures.

Issue 1

In TEI's view, where a creditor seizes *any* property, which may include, but is not limited to the property used to secure the debt, from a debtor in respect of a debt, section 79.1 should

apply because the statute refers broadly to seizure of "*a* property" acquired by a creditor as a result of the debtor's failure to pay the debt. (The statute is not limited to a seizure of *the* property that secures the debt.) For example, property seized may be shares of the debtor or an interest in a partnership owned by the debtor. We invite CRA's comments on the issue.

Issue 2

For purposes of section 79.1, a property is considered seized by a person when "(a) the beneficial ownership of the property is acquired or reacquired at that time by the person." The term "beneficial ownership" is not defined for purposes of this section. We invite CRA's comments its interpretation of the term in the context of section 79.1.

With respect to each of the following scenarios, please comment on whether the creditor acquires a beneficial ownership in the asset.

A. Scenario I

Company A owes an outstanding debt to a creditor and also owns an Asset that secures the debt. Company A defaults on the debt and, following negotiations between the creditor and Company A shareholders, the creditor acquires the shares of Company A. The debt is extinguished.

Would CRA's view change if the debt is not extinguished?

B. Scenario II

A Partnership owes an outstanding debt to a creditor and owns an Asset that secures the debt. The Partnership defaults on the debt and following negotiations between the creditor and partners of the Partnership, the creditor acquires an interest in the Partnership. The debt is extinguished.

Would CRA's view change if the debt is not extinguished?

C. Scenario III

A Limited Partnership owes an outstanding debt to a creditor and owns an Asset that secures the debt. The Partnership defaults on the debt and following negotiations between the creditor and partners of the Partnership, the creditor acquires shares of a corporation that is a General Partner of the Partnership. The debt is extinguished.

Would CRA's view change if the debt is not extinguished?

D. Scenario IV

Company A owes an outstanding debt to a creditor and owns an Asset that secures the debt. Company A defaults on the debt. The creditor incorporates a subsidiary. Following negotiations between the creditor and Company A, the subsidiary of the creditor acquires the asset from Company A in exchange for the assumption of the debt.

E. Scenario V

Company A owes an outstanding debt to a creditor and owns an Asset that is used to secure the debt. Company A defaults on the debt. The creditor incorporates a subsidiary. Following negotiations between the creditor, the subsidiary, and Company A, the Asset is transferred to the subsidiary and the debt is extinguished.

Conclusion

Tax Executives Institute appreciates this opportunity to present its comments and questions. We look forward to discussing our views with you during our December 6, 2011, liaison meeting.

Respectfully submitted,

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By: 

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