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September 10, 2018

The Honourable William Francis Morneau, P.C., M.P.
Minister of Finance
90 Elgin Street
Ottawa, Ontario K1A 0G5
Canada

Via Federal Express and Electronic Mail

Re: July 2018 Draft Income Tax Legislative Proposals

Dear Minister Morneau:

On behalf of Tax Executives Institute Inc. ("TEI"), I am pleased to accept the Department of Finance's invitation to provide comments on two of the draft income tax legislative proposals that were released for public consultation on July 27, 2018. The first proposal would amend the filing deadline for Form T1134, *Information Return Relating to Controlled and Not-Controlled Foreign Affiliates*, while the second would create a new "stop-the-clock" rule to extend the reassessment period when taxpayers challenge requirements for domestic-based information or compliance orders.

About TEI

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. Today, the organization has 57 chapters in North and South America, Europe, and Asia, including four chapters in Canada. Our approximately 7,000 members represent 2,800 of the largest companies in the world, many of which either are resident or do business in Canada.

Over 15 percent of TEI's membership comprises tax professionals who are employed by Canadian businesses from all regions and a variety of industries, with our Canadian members belonging to chapters in Calgary, Montreal, Toronto, and Vancouver. TEI members must contend daily with the planning and compliance aspects of Canada's business tax laws. Many of our non-Canadian members (including those in Europe, South America, and Asia) work for companies with substantial activities and investments in Canada. These comments reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.

As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in encouraging the uniform and equitable enforcement of tax laws, and reducing the cost and burden of tax administration and compliance to the mutual benefit of taxpayers and government. TEI is committed to maintaining a system that works—one that builds upon the principle of voluntary compliance and is consistent with sound tax policy, easy to administer, and efficient. The diversity, professional training, and global viewpoint of our members enable us to bring a balanced and practical perspective to the issues raised by the two draft legislative proposals discussed herein.

Discussion

A. Foreign Affiliates – Reporting Requirements

The *Income Tax Act* (“Act”) contains specific information reporting requirements with respect to foreign affiliates of Canadian taxpayers. Under current law, a corporate taxpayer is generally required to file an information return (Form T1134) annually with respect to each of its foreign affiliates within 15 months of its taxation year-end. One of the draft legislative proposals released on July 27, 2018, would shorten—by more than half—this information return filing deadline by aligning it with the taxpayer’s income tax return filing deadline, requiring Form T1134 to be filed within six months of the taxpayer’s taxation year-end. The proposed amendment, if enacted, would apply to taxation years of a taxpayer that begin after 2019.

TEI submitted written comments concerning this proposed change on May 1, 2018,¹ and members of TEI’s Canadian Income Tax Committee met with representatives of the Department of Finance and Canada Revenue Agency (“CRA”) to discuss those comments on May 9, 2018. The crux of TEI’s earlier comments, which are hereby incorporated by reference, was that the proposed change to the Form T1134 filing deadline would impose significant additional compliance costs and administrative burdens on Canadian taxpayers with foreign operations, while producing no material benefit to the CRA or its ability to efficiently administer the Act. In view of those and other concerns detailed in our submission, TEI recommended that the existing 15-month filing deadline be retained—a recommendation echoed by the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada, among other commenters.

TEI is disappointed that the Department of Finance has released a draft legislative proposal to accelerate the Form T1134 filing deadline to only six months after the end of the taxation year, notwithstanding the significant concerns raised by TEI and other stakeholders, both in writing and in person, earlier this year—concerns which remain unaddressed. We are

¹ Tax Executives Institute, *TEI Comments on Proposed Change to Canada’s Foreign Affiliate Reporting Requirements*, 70 Tax Exec. 65 (Sept.–Oct. 2018), available at <https://www.tei.org/advocacy/submissions/tei-comments-proposed-change-canadas-foreign-affiliate-reporting-requirements>. The proposed change to the filing deadline for Form T1134 was first detailed in the *Tax Measures: Supplementary Information* annex to the government’s 2018 federal budget plan tabled in the House of Commons on February 27, 2018.

also perplexed as to why the Department of Finance would move forward with this proposal when there remains no material benefit to be gained from a tax administration standpoint. Without a critical review and redesign (i.e., streamlining) of the form itself, shortening the filing deadline to six months will result in many Forms T1134 being filed with incomplete or inaccurate information. The reason for this is elemental: much of the information required to be reported on Form T1134 is not available within the six-month period following the taxpayer's year-end. For example, Form T1134 requires the reporting of detailed financial and tax information with respect to foreign affiliates, and foreign financial statements are required to be filed alongside the form. As previously emphasized by TEI and other commenters, however, many foreign jurisdictions have financial statement or tax return filing deadlines that extend well beyond six months after year-end. Requiring taxpayers to complete and file Form T1134 based on incomplete or estimated information, which they may then be obliged to amend or supplement at a later time, would undoubtedly create significant inefficiencies for both taxpayers and the government.

The Department of Finance recognized these significant challenges when the foreign affiliate reporting regime was first enacted in 1996. Although the original draft legislation had proposed a six-month deadline for taxpayers to file their foreign affiliate information returns, the final legislation adopted a 15-month deadline following extensive consultation with concerned taxpayers and stakeholder organizations. Regrettably, the Department of Finance has yet to meaningfully articulate (i) what, in its view, has fundamentally changed since then, and (ii) what are the perceived root deficiencies that a significantly shortened filing deadline will address.

We understand the Department of Finance to be of the view that taxpayers already need to have most of the information required by Form T1134 to compute foreign accrual property income ("FAPI") as part of their income tax liability for the year. This view does not accord, however, with the reality of how corporate taxpayers compile information for purposes of reporting FAPI. As explained in TEI's prior submission, a large Canadian multinational taxpayer would typically focus its compliance efforts only on those controlled foreign affiliates whose activities generate FAPI to the taxpayer and would compile only the relevant information needed to determine its income tax liability (i.e., it would compute only how much FAPI the particular controlled foreign affiliate generated for the year). In other words, taxpayers do not need most of the information required by Form T1134 to compute their FAPI for the year.

The Department of Finance has also suggested that the CRA's ability to audit the activities of a taxpayer's foreign affiliates may be prejudiced due to the nine-month delay between the submission of the taxpayer's income tax return and the filing of Form T1134. TEI understands that the CRA, which seeks to become more current in its audits, has requested the acceleration of the Form T1134 filing deadline to perform earlier risk assessments and facilitate the audit-selection process. From a practical perspective, however, large multinational corporations that file the greatest volume of Forms T1134 are continually under audit, therefore

accelerating the filing deadline would have little bearing on CRA's audit-selection process for such taxpayers. Furthermore, TEI notes that the CRA already has access to significant amounts of taxpayer information from other sources for risk-assessment purposes. Form T106, *Information Return of Non-Arm's Length Transactions with Non-residents*, is filed six months after the taxpayer's year-end, and Form RC4649, *Country-by-Country Report*, is filed 12 months after the taxpayer's year-end. While these forms require less detailed information than Form T1134, TEI understands that they are also used by the CRA for risk assessment. With the adoption of country-by-country reporting in Canada, which added significant additional compliance obligations for multinational taxpayers, TEI encourages the Department of Finance and CRA to review the utility of these three information reporting regimes and consider streamlining reporting requirements for taxpayers. Indeed, just recently, several TEI members have reported receiving voluminous requests for similar information from Statistics Canada, including requests for detailed financial information on an affiliate-by-affiliate basis. The imposition of all these different—and often overlapping—information reporting requirements is overly burdensome to many Canadian business taxpayers and arguably runs contrary to the Government of Canada's *Red Tape Reduction Action Plan*. In sum, accelerating the Form T1134 filing deadline without (i) substantially streamlining the information required to be reported thereon and (ii) improving filing efficiencies, such as providing additional electronic filing capabilities, would serve only to increase compliance costs and administrative burdens on an already overburdened taxpayer community.

Finally, as noted in TEI's previous comments, a parallel draft legislative proposal would extend the normal reassessment period for income arising in connection with a foreign affiliate of a taxpayer by three years, which would give the CRA seven years from the date of its initial assessment to audit and reassess the taxpayer's tax liability with respect to the income of its foreign affiliates. TEI submits that this proposal is facially incongruous with the proposal to accelerate the filing deadline for Form T1134.

TEI respectfully reasserts that the proposed amendment to the filing deadline for Form T1134 would impose undue additional compliance costs and administrative burdens on many Canadian taxpayers, while producing little or no practical benefit to the CRA. TEI urges the Department of Finance to consider the gravity of these concerns, as it did in 1996, and retain the well-founded current filing deadline of 15 months after the end of the taxpayer's taxation year. Alternatively, at an absolute minimum, TEI would recommend that a critical, consultative review of the information currently required to be reported on Form T1134 be undertaken with the goal of streamlining the reporting requirements and aligning the filing deadline with the deadline for filing country-by-country reports (i.e., 12 months after the end of the taxpayer's taxation year).

B. Reassessment Period – Requirements for Information and Compliance Orders

A separate draft legislative proposal released on July 27, 2018, would toll the statutory limitation period for making tax assessments (reassessment period) during the pendency of

taxpayer challenges to purely domestic requirements for information and compliance orders. This so-called “stop-the-clock” rule, if enacted, would be similar to the existing rule that applies to requirements for foreign-based information under section 231.6 of the Act. Specifically, proposed section 231.8 would extend the reassessment period when a taxpayer makes an application for judicial review of a requirement for information (other than a requirement for foreign-based information under section 231.6) or files a notice of appearance or otherwise challenges a compliance order. The reassessment period would be extended by the period of time that elapses between (i) the filing of the application for review of a requirement for information or the filing of a notice of appearance (or otherwise challenging the application for a compliance order) and (ii) the day on which the application for judicial review or the application to obtain the compliance order is “finally disposed of.”

As drafted, the proposed stop-the-clock rule would presumably operate in respect of all audit issues, not just those to which the requirement for information or compliance order relates. TEI is concerned that proposed section 231.8, if enacted, would deter taxpayers from challenging a requirement for information through the judicial review process because the challenge would result in extending the life of all issues to which the reassessment period relates. Recent jurisprudence demonstrates that the judicial review process can be lengthy—in *BP Canada Energy Co. v. Minister of Natural Revenue*, 2017 F.C.A. 61, an application for a compliance order brought in 2012 was not “finally disposed of” until 2017.

Furthermore, proposed section 231.8 would appear to apply without regard to the reasonableness of the Minister’s requirement for information or application for a compliance order, or to the outcome of any judicial review. This is unsettling given that there is no legal standard that the Minister must meet before issuing a requirement for information.

In view of the above, TEI strongly recommends that the scope of proposed section 231.8 be narrowed to extend the reassessment period only in respect of those audit issues to which the requirement for information or compliance order relates. We further recommend that any final legislation include appropriate measures to protect taxpayers from an extended reassessment period in cases where a court finally determines that the requirement for information or compliance order was frivolous or unwarranted.

These comments were jointly prepared under the aegis of TEI's Canadian Income Tax Committee, whose Chair is Carolyn Mulder. Watson M. McLeish, Tax Counsel for TEI, coordinated their preparation. If you have questions about TEI's comments, please contact Ms. Mulder at (905) 821-2111, extension 78046, or Carolyn.Mulder@walmart.com, or Mr. McLeish at (202) 470-3600 or wmcleish@tei.org.

Respectfully submitted,
Tax Executives Institute, Inc.



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International President

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