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The Joint Committee on Taxation of
The Canadian Bar Association
and
Chartered Professional Accountants of Canada

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September 27, 2016

Ted Cook
Director, Tax Policy Branch
Finance Canada
90 Elgin Street
Ottawa, ON K1A 0G5

Dear Mr. Cook:

Subject: Subsection 152(9) draft legislation of July 29, 2016

We are enclosing a submission on subsection 152(9) draft legislation of July 29, 2016. As you know, we made a prior submission dated June 19, 2015 following the announcement in the 2015 Budget that subsection 152(9) would be clarified following the *Last* case. In our view, the draft legislation to implement that proposal is much broader than necessary and if enacted as proposed will upset the balance of procedural fairness between the Crown and taxpayers.

A number of members of the Joint Committee and others in the tax community have participated in the discussions concerning our submission and have contributed to its preparation, in particular:

Joel Nitikman (Dentons LLP)
Edward Rowe (Osler, Hoskin & Harcourt LLP)
Anthony Strawson (Felesky Flynn LLP)
Thang Trieu (KPMG Law LLP)

This is a subject of wide interest and application. Accordingly, while we trust that you will find our comments helpful, we would welcome the opportunity to discuss our concerns with you at a meeting or by telephone before the legislation is finalized.

Yours very truly,

Kim G. C. Moody
Chair, Taxation Committee
Chartered Professional Accountants of Canada

K.A. Siobhan Monaghan
Chair, Taxation Section
Canadian Bar Association

Cc: Brian Ernewein, General Director, Tax Policy Branch, Tax Legislation Division, Finance Canada
Robert Demeter, Chief, Business Property and Personal Income, Tax Legislation Division, Finance Canada
Gabe Hayos, Vice President, Taxation, CPA Canada

September 27, 2016
Submission by the Joint Committee on Taxation regarding the Draft Legislation released July 29, 2016 in respect of Budget 2015 Proposal to amend subsection 152(9)[1]

The Joint Committee is writing further to its submission dated June 19, 2015 (the "2015 Submission") regarding the proposed amendment to subsection 152(9)[2] announced in the federal Budget dated April 21, 2015 (the "2015 Budget"). The 2015 Submission was prepared before draft legislation was issued. Draft legislation was released on July 29, 2016 (the "Proposed Amendment"). We appreciate the opportunity to make submissions on it.

In this submission we focus on the following points:

(a) what problem is motivating the Department of Finance ("Finance") to issue the Proposed Amendment?

(b) whether the Proposed Amendment creates unintended problems and adverse consequences?

(c) if so, can the Proposed Amendment be revised to solve the problem Finance has identified while avoiding the problems and adverse consequences the Committee has identified?

(a) What problem is motivating Finance to issue the Proposed Amendment?

The Committee understands that Finance is concerned with the following paragraph from *The Queen v. Last*, 2014 FCA 129:

> [23] *Harris* is authority for the proposition that on appeal from an assessment, the question to be answered is whether the Minister's assessment is higher than it should be. However, *Harris* is also authority for the proposition that a taxpayer's appeal cannot result in an increased assessment. This is because the Act does not give any right of appeal to the Minister and any increase to an assessment would in effect allow the Minister to appeal from her own assessment. **This principle is to be applied to each source of income.** [emphasis added]

In short, Finance views an "assessment" as the Minister of National Revenue's ascertainment of the total amount of tax owing by a taxpayer for a particular taxation year under a particular Part of the Act. As such, Finance has issued the Proposed Amendment so that, if the Minister issues an assessment for $X and the taxpayer wins on one or more issues in court such that the amount owing is less than $X, then the Crown may raise a new basis for the assessment so that the total tax owing may be defended up to $X. The Committee accepts that there is support in the case-law (e.g. *Pure*

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1 All statutory references herein are to the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended (the "Act").

2 The 2015 Budget also proposes to amend similar provisions in the *Excise Tax Act* and *Excise Act, 2001*.

Spring[3]) and the Act (e.g. subsection 248(2))[4] for the view that an "assessment" is an ascertainment of a total amount owing.

(b) Does the Proposed Amendment create other problems?

The Committee is concerned that the Proposed Amendment overturns *Last* in a manner that creates, inadvertently, other potential problems of a serious nature. The Proposed Amendment to subsection 152(9) needs to be evaluated against the values of "consistency, predictability and fairness", which the Supreme Court describes as desirable for the Canadian tax system.

(i) Normal Reassessment Period (the "NRP") fosters desirable attributes

The Act contains various provisions preventing the Minister from assessing a taxpayer for a particular taxation year after a certain period of time, or at least limiting the Minister's power to do so. The main provisions that do this are subsections 152(4), 152(3.1), 152(6), 152(4.01) and 152(5). These provisions provide that, absent a waiver, a misrepresentation (attributable to neglect, carelessness or wilful default) or the grant of an extended reassessment period by the Act, the Minister may not assess a taxpayer for a specific taxation year after the expiry of the NRP for that year.

If there is a waiver or a misrepresentation, then after the expiry of the NRP the Minister is limited to reassessing the taxpayer in relation to the specific matter waived by the taxpayer or in relation to the misrepresentation. To say it another way, the grant of a waiver or the existence of a misrepresentation does not open up the whole year and all possible items of income, deductions or credits in that year to reassessment; the waiver or the misrepresentation extends the Minister's power to reassess after the expiry of the NRP to a limited and identifiable scope.

Moreover, as an overall limitation, subsection 152(5) generally prevents the Minister from assessing a taxpayer by including amounts in income that were not included before the expiry of the NRP.

The NRP regime most obviously fosters predictability for taxpayers, but also consistency and fairness in that it ensures that similarly situated taxpayers are assessed on the basis of the Minister's understanding of the Act as that understanding exists within a particular window of time.

(ii) Proposed Amendment not appropriately limited in light of the NRP

The Proposed Amendment, as currently drafted, arguably allows the Minister to circumvent these limitations on the power to assess after the expiry of the NRP. By permitting the Minister to raise a new basis for an assessment, the Proposed Amendment appears to allow the Minister to dispute items of income, deductions or credits after the expiry of the NRP even if the Minister did not dispute those items prior to the expiry of the NRP or even if they were not assessed at all and even if no waiver has been filed or no misrepresentation has occurred in respect of those items.

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[3] *Pure Spring Co. Ltd. v. M.N.R.* (1946), 2 DTC 844 (Ex. Ct.) at 857.

[4] See also *Paul Lorne Schnier v. The Attorney General of Canada*, 2016 ONCA 5, 2016 DTC 5007 at paragraphs 40-41; *Carolyn Fuerth v. Her Majesty the Queen*, 2007 DTC 1584 (TCC) at paragraph 6.

The Committee has similar concerns for settlement agreements. Obviously, for the tax system to work, these must be respected by taxpayers and the Minister. The Proposed Amendment would seem to permit the Minister to support an assessment of a taxpayer after entering into a settlement agreement on specific issues by raising new matters or items of income, deductions or credits, thereby nullifying the point of the settlement.

Further, the Proposed Amendment is not limited to the time when there is a live dispute between the taxpayer and the Minister about the assessment in question, nor to the tax liability arising from the transactions and matters under scrutiny in that dispute. The Committee is concerned that the broad scope of the Proposed Amendment could therefore inadvertently (and inappropriately) eviscerate the NRP, including all of the carefully crafted rules in subsections 152(4), 152(3.1), 152(6), 152(4.01) and 152(5). The Committee notes that the Explanatory Notes reference an intention for subsection 152(9) to apply subject to the other limitations in the Act, and believes that it is appropriate for that intention to be clarified and reflected in the legislative text.

(iii) Lack of symmetry and fairness for Large Corporations ("LCs")

In addition to the problems with the current draft of the Proposed Amendment noted above, which apply to all taxpayers, the Committee submits that the Proposed Amendment as currently drafted raises additional problems for LCs, because they are subject to subsection 165(1.11).

Paragraph 165(1.11)(a) requires an LC filing a notice of objection to identify each issue in dispute, the relief sought in dollar terms and the relevant facts and reasons relied on by the LC, failing which it cannot appeal from the assessment on that issue, or receive relief under the objection.

Cases decided after the Committee filed its 2015 Submission have held that an LC must particularize the specific provisions of the Act on which it relies.[5] This onus applies to an LC even if it has not yet received the Minister's T-20 audit report particularizing the bases asserted by the Minister in the assessment. By contrast the Proposed Amendment would permit the Minister to raise new "bases" at any time before a judgment is issued, and perhaps even after that.

For purposes of paragraph 165(1.11)(a) it appears that an "issue" is the equivalent of a Ministerial "basis" for an assessment. As noted in *Daishowa-Marubeni International Ltd. v The Queen*,[6] symmetry and fairness are desirable values for Canada's taxation scheme. In the Committee's view, as a matter of procedural fairness and due process, the Act should provide for symmetry between the Minister and LCs in respect of the raising of "issues" or "bases" in the objection and litigation processes. As such the Committee recommends that in circumstances where subsection 165(1.11) limits the ability of the taxpayer to raise new issues at the outset of the objection stage,

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[5] In *Rio Tinto Alcan Inc. v. The Queen*, 2016 TCC 172 at paragraph 196, Justice Hogan made the following comments in respect of the application of subsection 165(1.11) in light of the Federal Court of Appeal decision in *Devon Canada Corporation v. The Queen* 2015 FCA 214 at paragraphs 21-26 [emphasis added]:

> Thus, it appears that, in the context of the deductibility of expenses, *each statutory provision on which the taxpayer grounds an entitlement to the deduction sought may entail its own distinct issue* so as to change the nature of the tax litigation.

[6] 2013 SCC 29 at para 43.

the Minister should be subject to symmetrical limitations at the appeals stage and, accordingly, subsection 152(9) should not apply. At a minimum, however, consequential amendments are required to the LC regime to reflect the proposed change in subsection 152(9).[7]

(c) Can the Proposed Amendment be revised to solve the problem Finance has identified while avoiding the problems the Committee has identified?

The Committee suggests that the following version of the Proposed Amendment[8] would cure the *Last* problem while avoiding the problems identified above (the Committee's revisions are italicized):

> **(9) Alternative basis for assessment** — Where a taxpayer, *other than one to which subsection 165(1.11) applies, has appealed from an assessment of an amount payable or remittable issued under this Part for a particular taxation year*, the Minister may, *subject to the other subsections of this section*, at any time after the expiration of *that year's* normal reassessment period, advance an alternative basis or argument to support all or any portion of the amount assessed, *provided that such alternative basis or argument concerns items of income, deduction, credit or other items otherwise in issue in the appeal*, unless. . . .

Conclusion

The Committee believes that the Crown's ability to defend an assessment on a reasonable basis, which the Proposed Amendment seeks to preserve, should not extend to, in effect, raising new assessments after the NRP and not in relation to matters specified in a waiver, not in relation to a misrepresentation or not in accordance with a settlement agreement. In the interests of preserving "consistency, predictability and fairness", Finance should balance the rules applicable to the Minister and taxpayers. The Committee submits that its revision to the Proposed Amendment does that.

The Committee believes that the potential unintended consequences arising from the Proposed Amendment could adversely affect procedural fairness and upset the carefully constructed balance between taxpayers and the Minister in the Act. In light of the fundamental nature of the issues involved, we request a meeting with you at your convenience to discuss this submission and any questions or concerns arising from it.

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[7] Specifically, in the event that subsection 152(9) is amended to allow new bases to be raised in respect of taxpayers subject to subsection 165(1.11), the following additions are required to sections 165 and 169 to ensure preservation of the taxpayer's right to respond to the new bases on objection or appeal:

> **165 (1.131)** Subsection **[165]**(1.13) does not limit the right of a taxpayer to object to an issue arising from an alternative basis or argument advanced by the Minister under subsection 152(9).
>
> **169(2.1)(a.1)** an issue arising from an alternative basis or argument advanced by the Minister under subsection 152(9).

[8] Please note that while we have reflected our suggestions by reference to the Proposed Amendment to the Act, the Committee's recommendations equally apply to the like provisions of the *Excise Tax Act* and *Excise Act, 2001*.