



The Joint Committee on Taxation of
The Canadian Bar Association

and

Chartered Professional Accountants of Canada

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Trevor McGowan
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Dear Mr. McGowan:

Subject: Reporting Requirements for Trusts

This submission sets out comments of the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada (“Joint Committee”) with respect to the Reporting Requirements for Trusts proposals included in the draft income tax legislation released on February 4, 2022.

Members of the Joint Committee and others in the tax community participated in the discussion concerning this submission and contributed to its preparation, including:

- Bruce Ball – CPA Canada
- Fabio Bonanno – CPA Canada
- Kim Moody – Moodys Private Client Law LLP
- Anthony Strawson – Felesky Flynn LLP

If it would be helpful, members of the Committee would be pleased to discuss the issues in more detail.

Yours very truly,

David Bunn
Chair, Taxation Committee
Chartered Professional Accountants of Canada

Ian Crosbie
Chair, Taxation Section
Canadian Bar Association

**Submission of the Joint Committee on Taxation of The Canadian Bar Association and
Chartered Professional Accountants of Canada
Reporting Requirements for Trusts**

Background

In the 2018 federal budget, the Government announced its intention to amend the Income Tax Act to impose new filing and reporting obligations for certain trusts. In addition, it was proposed that trusts subject to the new filing and reporting obligations would be required to report the identity of all trustees, beneficiaries and settlors of the trust, and of each person (such as a “protector”) who has the ability to exert control over trustee decisions. Draft legislation for this proposal was released on July 27, 2018. The Joint Committee provided its comments on this draft legislation by way of a written submission on September 10, 2018 (a copy of this submission is included for your reference).

As part of the draft legislation released on February 4, 2022, a revised version of the 2018 draft legislation was released. While the Joint Committee believes that many of the comments provided in our September 10, 2018 submission are still valid, the purpose of this letter is not to restate those comments and instead we would ask you to please refer to that submission again. Accordingly, the remainder of this submission points out our concerns about certain new proposals contained in the revised version.

In addition to delaying the application of the rules and some relieving provisions, a new reporting requirement was proposed. Under proposed subsection 150(1.3) of the Income Tax Act (“the Act”), arrangements under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust's property are subject to the reporting requirements. In the explanatory notes released with the draft legislation, reference is made specifically to bare trust arrangements.

Over the years, the CRA has commented several times on the reporting requirements for these arrangements. A good example of the CRA’s views was referred to in a 2012 Tax Court of Canada case¹ as it sets out both the CRA’s policy and the rationale for it:

“In the Corporate Management Tax Conference 1989: “Creative Tax Planning for Real Estate Transactions --- Beyond Tax Reform and into the 1990s”, Revenue Canada’s view of the bare trust concept is stated as follows at p. 8:1:

From Revenue Canada’s perspective, difficult income tax issues arise from the use of bare trusts for commercial purposes. The reason these issues are difficult is that in order to arrive at apparently equitable tax results, the existence of a trust, which is effective for commercial purposes, has to be ignored for income tax purposes.

Although a bare trust is not defined in the Income Tax Act, Revenue Canada generally views this to be a trust under common law where the trustee has no significant powers or responsibilities, and can take no action regarding the property held by the trust without instructions from the settlor. Normally the trustee’s only function is to hold legal title to the property. Furthermore, the settlor is also the sole beneficiary and can cause

¹ *Peragine v The Queen*, Tax Court of Canada, 2012 TCC 348, paragraph 35.

the property to revert to him at any time. Thus a bare trust does not include a blind trust or other trusts in which the trustee has established powers and responsibilities.”

When the CRA suggests that such an arrangement “has to be ignored for income tax purposes”, we believe they mean that the most efficient and effective way to report any income, losses, capital gains and capital losses related to the property is to have the beneficial owner report it as its own. This administrative position was codified in subsection 104(1) of the Act (as amended in the 2001 “Technical Bill”) which states:

*“In this Act, a reference to a trust or estate (in this Subdivision referred to as a “trust”) shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property, **but, except for the purposes of this subsection, subsection (1.1), subparagraph (b)(v) of the definition “disposition” in subsection 248(1) and paragraph (k) of that definition, a trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property** unless the trust is described in any of paragraphs (a) to (e.1) of the definition “trust” in subsection 108(1).”* [emphasis added]

Accordingly, the statute now deems bare trust arrangements not to be trusts – except in limited circumstances - for purposes of the Act.

In addition to reducing the administrative burden for taxpayers and the CRA, this ensures that the tax consequences of transactions related to the property are not altered by the presence of a bare trust arrangement. For example, if the property is used in a business by the beneficial owner, the income generated from its use will be subject to the income tax rules that apply to business income and not as income from a trust and reported directly by the beneficial owner.

Use of Bare Trust Arrangements

The use of a bare trust arrangement is common in Canada. For real estate, these arrangements are commonly used to hold title to land because the beneficial owner may not be able to be registered as the legal owner or having a nominee hold the land may be simpler administratively. As an example, this arrangement is commonly used in limited partnership arrangements where the general partner holds property for the benefit of the partnership and enters into contracts on behalf of the partnership. In these situations, the partnership agreement would typically expressly state that anything owned by the partner in such fashion is held in bare trust for the partnership.

Bare trust arrangements are also used to hold agricultural land in some situations, such as when purchasing agricultural land that is adjoining to property already held. Such an arrangement ensures that the property acquired does not become merged legally which may be of assistance in future transactions. These arrangements may also be used when farmland held by a farm corporation includes a home.

More generally, bare trust arrangements can often arise unintentionally. For example, perhaps a customer makes payment to Corporation A instead of Corporation B and so Corporation A holds the payment in bare trust for Corporation B. Such an arrangement may or may not be documented.

Finally, some of these arrangements may also be used for convenience, such as entering into transactions for others because they do not have a bank account at the time of a transaction.

The above examples are only a small sample of bare trust arrangements. Overall, such arrangements are common.

Tax Compliance Considerations

Financial transparency is an important policy issue that is being dealt with by governments both inside and outside Canada. In addition to the proposed trust reporting rules, the federal and the provincial governments have also agreed to create registries of beneficial ownership of Canadian corporations. We recognize that obtaining beneficial ownership information on other arrangements is consistent with the current federal and provincial initiatives.

Our concern, however, is with the approach that has been proposed to obtain this information regarding bare trust arrangements. As discussed, we believe that for income tax reporting purposes, the best approach is to have the beneficial owner report the tax outcomes related to the property and not the trustee. Assuming this approach will continue to apply for income tax purposes generally, that draws into question whether the filing (along with the companion disclosure requirements) by a bare trust of a trust return is an efficient and effective method to obtain beneficial ownership information, which we assume is the government's goal.

The filing of a trust income tax and information return, with related reporting of trustee and settlor/beneficiary details, in respect of a bare trust arrangement will not provide any meaningful information regarding the property that is held subject to the trust. It will merely indicate that such an arrangement exists.

There are a number of practical consequences that will arise under the proposal that should be considered:

General inefficiency related to the T3 return filing process – If a trust return must be filed, there are a number of steps that will be required:

- A name must be selected for the arrangement and an application will have to be made to the CRA to obtain a trust identification number. Where the arrangement has no specific name, it may be unclear as to what should be used for reporting purposes.
- The return prepared will include the name of the trust, the identity of the trustee and other information relating to the trust/trustee on pages 1 and 2 of the 4-page T3 form but will otherwise be blank. It will often be unclear how the questions related to “other required information” should be answered, as many of these questions are framed in respect of trusts that are otherwise “recognized” for income tax purposes.
- A separate T3 Schedule will have to be included showing the identity and other information on the beneficial owner under the February 4th proposals.
- Assuming the return is being prepared by a paid preparer, it will generally have to be filed electronically with the CRA under the February 4th proposals to avoid a penalty. Due to this, a T183 form (Information Return for the electronic filing of a Trust Return) will have to be

generated, sent to the client for signature and returned to the preparer before the return can be filed.

- Apart from registering the trust, these steps will have to be followed each year even though the information required to be reported will presumably be identical and limited. A final return will have to be filed when the arrangement ends.

Additional administration issues for tax preparers – In addition to the specific filing work, most tax preparers maintain a detailed system to track tax returns to ensure that returns are filed on a timely basis. So, these returns will have to be added to the process. Also, many firms obtain an engagement letter from a client before they prepare a tax return along with other administrative steps that are needed to ensure compliance and completeness. Taxpayers will ultimately bear the costs for the additional work as increased professional fees.

Uncertainty on whether filing is required – In some cases, it will be unclear whether a filing requirement will exist. A bare trust is one arrangement that is disregarded for income tax purposes but there are others that have similar characteristics that are not a trust. The boundaries between bare trusts, agency and bailment are not well defined nor understood, due primarily to the fact that they are often treated in a similar manner for tax purposes. The proposals would require taxpayers to determine which arrangements involve a trust and which do not, and if a trust, whether a return must be filed. The limitation on the proposed filing requirements to express trusts will help to put some parameters around the requirement but it is not sufficient. Also, the trust may meet a filing exemption, but that too will have to be reviewed.

Overall, there are numerous issues and additional compliance work that will arise for filing a return where a filing requirement does not currently exist.

Recommendation

We recommend that proposed subsection 150(1.3) not be added to the Income Tax Act. Other options should be reviewed to obtain beneficial ownership information (assuming that is the goal of the proposal). For instance, given that most beneficial owners are required to file a tax return of their own, beneficial ownership information in respect of bare trust arrangements could be obtained as part of that tax return. A reporting requirement that builds on a return that otherwise must be filed is much more efficient than creating a new income tax filing requirement for an arrangement that is not otherwise treated as a taxpayer.

In the event our recommendation cannot be accommodated, consideration could be given to legislating a separate reporting requirement, in respect of a bare trust arrangement, for the information requested in proposed Regulation 204.2. For example, the CRA could prescribe a “streamlined” T3 form specifically for bare trust arrangements, that would address only the Regulation 204.2 information.

We would be pleased to discuss these issues and other alternatives.