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## Highlights

### INTERGENERATIONAL TRANSFERS BY U.S. PERSON PARENTS

**Christopher Ellett and James Meadow, *Moodys Tax***

A key feature of estate planning is transferring a family-owned business corporation to the next generation with as little tax as possible. This is a complicated subject; it is even more complex when one or more of the current owners is a United States tax resident, as then we must consider not only Canadian income tax issues but U.S. income tax, estate tax and gift tax consequences as well. Christofer Ellet and James Meadow discuss cross-border intergeneration tax planning, keeping in mind proposed amendments to the Canadian *Income Tax Act* as well as U.S. tax considerations.

### GLENCORE CASE COMMENT

**John Lorito, *Stikeman Elliott LLP***

*Glencore* is a recent decision of the Federal Court of Appeal that held that break-fees paid in an M&A deal are taxable under paragraph 12(1)(x). *Glencore* has sought leave to appeal to the Supreme Court of Canada. John Lorito discusses the decision and its implications.

### 108(5) AND FAPI

**Joel Nitikman K.C., *Dentons Canada LLP***

At common law, the character and source of income earned by a trust can flow through to the trust's beneficiaries. That means that a controlled foreign affiliate that is a beneficiary of a trust earning active business income would not have FAPI. Joel Nitikman, K.C., explores whether this remains true in light of paragraph 108(5)(a) of the Act, which deems income from a trust to be income from property.

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# Intergenerational Transfers by U.S. Person Parents<sup>1</sup>

Christopher Ellett and James Meadow, *Moodys Tax*

## Introduction

Succession planning for U.S. persons poses with Canadian assets some challenges due to the misalignment of taxes on death in the U.S. and Canada. Estate freezes done commonly for Canadian-resident non-U.S. persons<sup>2</sup> are discouraged often when U.S. persons are involved because the freeze may be considered as both a gift and a taxable disposition for U.S. tax purposes.<sup>3</sup>

Furthermore, Canadian tax laws are changing and may impact some typical planning. Some examples are the proposed changes to the general anti-avoidance rule (“GAAR”)<sup>4</sup>, the expansion of the mandatory disclosure rules and the *Foix* and *Deans Knight* decisions<sup>5</sup>, both of which applied GAAR in unexpected ways.

## C-208

Despite some new planning restrictions, the new intergenerational business transfer (“IBT”) rules in Bill C-208 (dealing with section 84.1<sup>6</sup>) provide expressly for a tax-advantageous intergenerational transfer of a family business. In particular, provided certain conditions are met, parents who are shareholders of a corporation may use their lifetime capital gains exemption (“LCGE”) on a transfer of shares to a corporation owned by their children or grandchildren (the “Child”). Taxpayers and advisors should now incorporate IBT planning into their succession planning.

## U.S. Exemption

In the U.S., the 2024 lifetime estate tax and gift tax exemption (“Estate Exemption”) is USD \$13,610,000 per person (adjusted for inflation). The Estate Exemption is set to be reduced by roughly half as of January 1, 2026. Therefore, U.S. persons with assets in excess of approximately USD \$7M are being encouraged to use their gift tax exemption before 2026.

## Cross-border planning

IBT planning raises new tax considerations for family members who are U.S. persons. A gift of all or part of the shares of a family business corporation by a parent who is a U.S. person (“US Parent”) may be sheltered from U.S. gift tax with the Estate Exemption. However, an actual sale of shares may lead to U.S. income tax (although no corresponding Canadian tax to the transferor if the LCGE is used to deduct the full capital gain). Thus, the value of the IBT planning could be limited for US Parents.<sup>7</sup>

## Intergenerational Business Transfer Planning ideas

If a US Parent owning shares in a Canadian family business operating corporation (“Opco”) wants to use the current Estate Exemption combined with IBT planning, consider the following series of transactions:

1. the (adult) Child incorporates an Unlimited Liability Corporation (“ULC”) in Canada and pays a nominal amount to subscribe for voting shares;

2. the US Parent sells \$1M worth of Opco shares (“Opco Shares”) to the ULC at fair market value (“FMV”) and takes back new shares in the ULC (“ULC Shares”). The ULC Shares will have a FMV, paid-up capital (“PUC”) and adjusted cost base (“ACB”) of \$1M;
3. the US Parent gifts the ULC Shares to the Child;
4. the ULC will pay out its stated capital over time to the Child, thus reducing the PUC of the ULC Shares as a tax-free return of capital for Canadian tax purposes, without any U.S. tax implications.<sup>8</sup>

As discussed in more detail below, if the US Parent’s LCGE can eliminate the full gain on the sale for Canadian tax purposes and the Parent’s available Estate Exemption exceeds the value of the gift, then these transactions should not create any income, estate or gift tax liability for the US Parent in Canada or the U.S.<sup>9</sup>

### Summary of U.S. Tax Considerations

The ULC should be formed so that, for U.S. tax purposes, it is treated as a single-member disregarded entity.<sup>10</sup>

Given the transitory nature of the US Parent’s ownership of the ULC Shares, it is likely that the IRS will view these transactions as the US Parent’s direct gift of the Opco Shares to the Child, under the U.S. judicially-created substance over form rules.

In the alternative, if the form of these transactions is respected, then for U.S. tax purposes the ULC should be regarded as a partnership with two partners and the US Parent’s sale of the Opco Shares to the ULC should be considered to be a tax-deferred rollover of those Shares to that partnership.<sup>11</sup> Under this characterization of the transaction, the US Parent’s gift of the ULC Shares would be treated as a gift of a partnership interest. Presumably, the FMV of that interest would be equal to the FMV of the underlying Opco Shares. Hence, the amount of the gift should be the same regardless of whether it is considered to be a gift of the Opco Shares or of the partnership interest.

The gift by the US Parent should be a taxable gift subject to the U.S. gift tax regime, pursuant to IRC section 2503(a). However, to the extent that taxable gifts have not been made in prior years, there would be gift tax payable only if the amount of the gift exceeds both the annual exclusion of USD \$18,000 for 2024<sup>12</sup> plus the basic Estate Exemption of USD \$13,610,000 for 2024.<sup>13</sup> This latter exclusion is available also in calculating the U.S. estate tax but any exclusion amounts used previously to reduce the gift tax reduces the amount available to reduce the estate tax on death. Hence, it is likely that the practical consequence of this gift will be a reduction of the amount of the US Parent’s Estate Exemption available for future use.

### Summary of Canadian Tax Considerations

If section 84.1 applied to the above transactions, the US Parent’s PUC of the ULC Shares would be reduced generally to the PUC of the transferred Opco Shares, under paragraph 84.1(1)(a). The US Parent’s claim of the LCGE on the sale would reduce the Child’s arm’s length ACB for purposes of paragraph 84.1(2) and may have a negative effect on any future reorganization undertaken by the Child.

Bill C-208 added an exception to the impact of subsection 84.1(1) by adding paragraph 84.1(2)(e), which states:

(e) if the subject shares are qualified small business corporation shares or “shares of the capital stock of a family farm or fishing corporation” within the meaning of subsection 110.6(1), the taxpayer and the purchaser corporation are deemed to be dealing at arm’s length if the purchaser corporation is

controlled by one or more children or grandchildren of the taxpayer who are 18 years of age or older and if the purchaser corporation does not dispose of the subject shares within 60 months of their purchase.

Other articles have discussed the requirements and impact of Bill C-208 and we do not propose to examine those in detail here. In summary, paragraph 84.1(2)(e) provides a safe harbour from the impact of subsection 84.1(1) where:

- (a) the shares are of a small business corporation;
- (b) the purchaser is a corporation controlled by the vendor's Child;
- (c) the purchaser corporation does not dispose of the shares of the purchased corporation for 60 months after the sale; and
- (d) the sale price is substantiated by a valuation report, the individual swears an affidavit as to the transaction and those materials are provided to the Canada Revenue Agency.<sup>14</sup>

Provided the legislative and documentation requirements are met, the US Parent should be able to use his or her LCGE to reduce capital gains on the disposition of the Opco Shares.

### Bill C-59

In Budget 2023, the Department of Finance released proposals to address its concerns with the IBT provisions created by Bill C-208. These proposals were somewhat re-drafted in Bill C-59. If that Bill is enacted as drafted currently, it would change substantially the requirements for IBT planning.

Among other changes, Bill C-59 proposes two streams of transfers: immediate (within three years) and gradual (within five to 10 years), which impacts the time period for the Child to acquire control of Opco (and the acquiring corporation) and the required holding period. Generally, immediate transfers must be based on arm's-length sales terms; gradual sales may mimic estate freezes. Further, Bill C-59 provides restrictions for subsequent transfers of the same business, which may encourage using the LCGE fully on a single share transfer.

Bill C-59 has not yet received royal assent. However, the proposed changes should not prevent implementation of the transactions contemplated above, provided the new legislative requirements are followed.

<sup>1</sup> Christopher Ellett, Moodys Private Client Law LLP and James Meadow, Moodys Private Client Law LLP.

<sup>2</sup> U.S. persons referred to herein means anyone taxable by the United States on their worldwide income, including U.S. citizens, green card holders; and residents.

<sup>3</sup> For more detail on Canadian estate freezes involving US persons, see Yager and Rothweiler, "An American in the Canadian Freeze", 2003 CR 20:1.

<sup>4</sup> The most recent GAAR proposals are in Bill C-59, the *Fall Economic Statement Implementation Act, 2023*, second reading March 18, 2024.

<sup>5</sup> *Foix v. the King*, 2023 FCA 38; *Deans Knight Income Corp. v. The King*, 2023 SCC 16.

<sup>6</sup> Unless stated otherwise, all statutory references herein are to the *Income Tax Act*, RSC 1985, c. 1 (5<sup>th</sup> Supp.), as amended (the "Act").

<sup>7</sup> It is possible that the LCGE, combined with a higher Canadian tax rate, would equal the U.S. tax liability. However, in most circumstances, we would expect the benefit of the LCGE to be diminished substantially.

<sup>8</sup> For this purpose one presumes that the ULC will receive from Opco, to the extent of Opco's safe income, a dividend that the ULC will use to pay its shareholders through a reduction of share capital.

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<sup>9</sup> The impact of any alternative minimum tax or withholding tax should also be considered.

<sup>10</sup> See Treasury Regulations §301.7701-3(b)(2)(i)(C).

<sup>11</sup> A transfer to a partnership is generally on a tax-deferred basis pursuant to Internal Revenue Code (“IRC”) section 721(a). The ULC should be regarded as a partnership for this purpose under Reg. §301.7701-3(b)(2)(i)(A).

<sup>12</sup> IRC section 2503(b).

<sup>13</sup> IRC section 2505(a).

<sup>14</sup> Paragraph 84.1(2)(e).

## GLENCORE CASE COMMENT

### John Lorito, *Stikeman Elliott LLP*

Prior to 1972, Canada did not tax capital gains. In the late 1960s, the Royal Commission on Taxation (the “Carter Commission”) coined the phrase, “a buck is a buck is a buck”.<sup>1</sup> This meant that every dollar received or earned should be taxed the same and the long-standing distinction between capital receipts and income receipts should be abolished.

As we all know, the Carter Commission’s recommendation was not accepted. Instead, the decision was made to tax capital gains at one-half the rate of ordinary income and to maintain the difference in tax treatment between capital receipts and income receipts under the *Income Tax Act* (the “Act”).<sup>2</sup> Nearly 60 years later, Canadian courts continue to struggle with the distinction, as is evidenced by the recent decision of the Federal Court of Appeal (“FCA”) in *Glencore Canada Corporation v. The King*.<sup>3</sup>

The case deals with the tax treatment of a break fee, a topic first addressed in *Morguard Corp. v. The Queen*.<sup>4</sup> The FCA in *Morguard* and both the Tax Court of Canada (TCC)<sup>5</sup> and the FCA in *Glencore* all found that the break fee was taxable but each Court reached its conclusion for a different reason.

The facts in *Glencore* were fairly simple. Glencore’s predecessor had entered into an arrangement to acquire all the shares of Diamond Fields. The agreement was not completed and instead Diamond Field’s Board of Directors accepted Inco’s offer to purchase the shares. Under Glencore’s agreement with Diamond Fields, Glencore received an upfront fee in the amount of \$28,206,106 (the “Commitment Fee”) and, because the Inco transaction was completed successfully, a further fee in the amount of \$73,335,881 (the “Non-Completion Fee” and together with the commitment fee, the “Fees”). The issue in the case was the taxation of the Fees.

The TCC found that Glencore had received the Fees in the ordinary course of its mining business and, therefore, held that the Fees were taxable under section 9. The TCC seemed to ignore the fact that Glencore had agreed to acquire the shares and not the assets of Diamond Fields. Because of this, the FCA held that the TCC had misapplied the decision of the Supreme Court of Canada in *Ikea Ltd. v. The Queen*,<sup>6</sup> thereby committing an error of law that could be corrected on appeal. Unlike *Morguard*, there was no finding of fact that Glencore was in the business of acquiring companies and so the FCA concluded that Glencore’s attempt to acquire shares of a company was a capital transaction, with the result that the Fees were capital and not income receipts.

The case did not end there. The FCA had to decide whether the Non-Completion Fee received by Glencore could be considered to be proceeds from the disposition of a capital asset that could give rise to a capital gain. Based on the terms of Glencore’s agreement with Diamond Fields, the FCA concluded that Glencore had no right to merge, so Glencore had not disposed of a right and, therefore, did not realize a capital gain on the disposition of such a right.

The final issue was whether the Fees were taxable pursuant to paragraph 12(1)(x). Paragraph 12(1)(x) was enacted to close a perceived gap in the legislation. Prior to the enactment of this paragraph, a taxpayer that was reimbursed for capital expenditures was not required to include the amount received in income (because it was a capital receipt) nor was it required to reduce its capital expenditures (as there was nothing in the Act that required such a reduction). Pursuant to paragraph 12(1)(x), the taxpayer is required either to include the reimbursement in income or reduce the expenditures by the amount of the reimbursement. Paragraph 12(1)(x)

applies also to amounts received as an inducement; it was this aspect of the paragraph that was the focus in *Glencore*.

The FCA noted that, for paragraph [12\(1\)\(x\)](#) to apply to the Fees, they had to be received both as an inducement and in the ordinary course of earning income from a business or property. The FCA examined the purpose of both, Fees and concluded easily that they were received to induce Glencore to make the bid for Diamond Fields.

With respect to whether the Fees were received in the course of earning income from a business or property, the FCA noted, correctly, that amounts taxable under paragraph [12\(i\)\(x\)](#) are by definition not income from a business or property under section [9](#) and held that, therefore, the concept of amounts received in the course of earning income from a business or property in paragraph [12\(1\)\(x\)](#) must encompass something more than amounts that are income from a business or property under subsection [9\(1\)](#). Having made this observation, the FCA included that the Fees were linked to Glencore's nickel mining operations, some of which it carried on directly. The FCA concluded also that the Fees were linked to an acquisition of shares that had the capacity to produce property income and, therefore, the Fees were received in the course of earning income from property. The fact that Glencore never acquired the property was not relevant.

It is interesting to compare the FCA's conclusion on this latter point with arguments made by the Crown in *Pangaea One Acquisition Holdings XII S.À.R.L. v. The Queen*.<sup>7</sup> The case involved an amount paid to a taxpayer that led it to enter into an agreement to sell shares that it owned. With respect to paragraph [12\(1\)\(x\)](#), the Crown argued that the amount was not received in the course of earning income from a business or property, with the result that paragraph [12\(1\)\(x\)](#) would not apply. The Crown argued that subsection [56.4\(2\)](#) was intended to fill the gap and capture the payment at issue, which could otherwise be characterized as an "inducement". This argument appears to be in direct conflict with the conclusion reached by the FCA in *Glencore*. In *Pangaea*, the taxpayer already owned shares that were the subject of the payment and, therefore, it seemed the FCA should have had no difficulty in concluding that the payment was received in the course of earning income from property. Accordingly, subsection [56.4\(2\)](#) was not required to close the perceived gap.

If we consider the payment of fees similar to those paid to *Glencore* in the context of a payment made by a Canadian resident to a non-resident, *Pangaea* becomes the elephant in the room. If such fees are considered to be income pursuant to paragraph [12\(1\)\(x\)](#), payment of the fees would not be subject to Canadian withholding tax. In *Pangaea*, the FCA concluded that the amounts in issue were received in respect of a restrictive covenant and, therefore, were subject to withholding tax by the combined application of subsection [56.4\(2\)](#) and paragraph [212\(1\)\(i\)](#). The Fees in issue in *Glencore* were received in 1996, long before the enactment of section [56.4](#).

"There are things about writing fiction that are true of real life. There's always a *what-if...*"<sup>8</sup>

This statement can apply equally to tax law. What if Glencore had been a non-resident and received the Fees in 2023? In *Pangaea*, the FCA held that the payment received by the taxpayer was for the execution of the share purchase agreement. While the FCA did not refer to the payment as an inducement, the implication is fairly clear that it thought it was. In *Glencore*, the FCA stated that "an inducement for the purpose of [paragraph] [12\(1\)\(x\)](#) can include a payment made to entice a party to enter into a commercial arrangement". Does that not describe exactly the payment in *Pangaea*?

One may say, so what? If both paragraph [12\(1\)\(x\)](#) and subsection [56.4\(2\)](#) apply to the same payment, the result is clear, as paragraph [12\(1\)\(x\)](#) does not apply to an amount that is otherwise included in income. But should it be that simple? Is it reasonable to suppose that Parliament intended that the provisions would have such a broad overlap? If subsection [56.4\(2\)](#) applies to every payment that induces a person to or not to, provide or sell property or services then what forms of inducements are left to which paragraph [12\(1\)\(x\)](#) might apply? Did the enactment of subsection [56.4\(2\)](#) effectively repeal the inducement provision in paragraph [12\(1\)\(x\)](#) without doing so expressly? Perhaps, but a more contextual interpretation may suggest that section [56.4](#) was not intended to apply to a payment made to induce a person to do something that the person always had the right to do, on the basis that such a payment does not “affect” the provision of property or services by the person.

This interpretation may clarify issues that have arisen since the *Pangaea* case was decided, which were highlighted in the recent submission by the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada (the “Joint Committee”) to the Department of Finance on the impact of *Pangaea*.<sup>9</sup> The Joint Committee has raised concerns about the application of withholding tax to loan commitment fees and consent fees. A commitment fee is basically a payment made to induce a lender to make funds available to a borrower. Many think that subsection [214\(15\)](#) treats a commitment fee as interest, such that an arm’s length commitment fee, like arm’s length interest, is not subject to withholding tax. However, subsection [214\(15\)](#) equates the commitment or standby fee to interest only if interest on the loan would be subject to withholding tax. This is not the case in an arm’s length borrowing, where subsection [214\(15\)](#) does not apply. The concern then is that the commitment fee may be treated in the same manner as the payment in *Pangaea*, a result that seems inappropriate. Why should a commitment fee paid to a lender be treated any differently from other remuneration paid to it? Interpreting section [56.4](#) to exclude a payment to induce a person to do something it has a pre-existing right to do would avoid this result.

Consent fees should be less troubling. It is hard to see how a consent fee (for example, one received in exchange for an agreement to extend the maturity of a loan) could be considered to be in respect of a restrictive covenant. It cannot be said that the agreement “affects” the provision of property (money) because the property has been provided already.

This section [56.4](#) and paragraph [12\(1\)\(x\)](#) debate highlights a troubling trend in tax interpretation. At the time paragraph [12\(1\)\(x\)](#) was introduced, a policy decision appears to have been made not to subject inducement payments to withholding tax. Section [56.4](#) was introduced to address a different policy concern raised by cases in which payments for restrictive covenants were allowed to escape tax entirely. At the time of its introduction, a policy choice was made to impose withholding tax on these payments when made by a resident to a non-resident, but there is no evidence that the rule was intended to reverse the policy choice made when paragraph [12\(1\)\(x\)](#) was introduced. However, that is exactly what the Minister of Revenue did when it decided to tax the inducement payment in *Pangaea*, using a rule that was designed to address a different situation.

A similar example is illustrated by the interaction between subsection [15\(2\)](#) and subsection [247\(2.1\)](#). Consider whether subsection [247\(2\)](#) would apply to a loan, the principal amount of which has been included in income pursuant to subsection [15\(2\)](#). Under the section [17](#) regime, an exception exists for loans for which the amount owing has been subjected to withholding tax.<sup>10</sup> This is a sensible policy; once withholding tax has been paid on the amount owing, then from a Canadian tax perspective the amount is considered to be outside of Canada, so interest or deemed interest on the amount should not be subject to tax in Canada. Notwithstanding this policy,

the Canada Revenue Agency takes a different view with respect to the interaction of subsections [15\(2\)](#) and [247\(2.1\)](#), holding that subsection [247\(2\)](#) would continue to apply to the loan even after subsection [15\(2\)](#) has applied to subject the amount of the loan to withholding tax. In the Agency's view, this interpretation is supported by the recent enactment of paragraph [247\(2.1\)\(c\)](#). It is hard to see the policy behind such an interpretation, particularly in light of the fact that if the loan receivable had been distributed to a non-resident as a dividend, subsection [247\(2\)](#) would not apply. Once again, a subsequent amendment targeted at a different concern has been used to override an existing and long-standing policy approach.

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<sup>1</sup> Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1966).

<sup>2</sup> R.S.C. 1985, c. 1 (5th Supp.), as amended (the Act). All statutory references herein are to the Act.

<sup>3</sup> [2024 FCA 3](#) (F.C.A.).

<sup>4</sup> [2012 FCA 306](#) (F.C.A.).

<sup>5</sup> [Glencore Canada Corporation v. The Queen, 2021 TCC 63](#) (T.C.C. [General Procedure]).

<sup>6</sup> [\(sub nom. Ikea Ltd. v. Canada\) \[1998\] 1 S.C.R. 196](#) (S.C.C.).

<sup>7</sup> [2020 FCA 21](#) (F.C.A.).

<sup>8</sup> John Irving, *The Last Chairlift* (Knopf Canada, 2022).

<sup>9</sup> Letter from the Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada to Robert Demeter, Department of Finance (10 January 2024), "Impact of *Pangaea* case". The Joint Committee made a submission previously on August 10, 2020.

<sup>10</sup> See subsection [17\(7\)](#).

## 108(5) AND FAPI<sup>1</sup>

Joel Nitikman K.C., *Dentons Canada LLP*

### Introduction

Suppose a Canadian resident taxpayer controls more than 50% of the voting shares of a non-Canadian corporation (“Forco”). In respect of the taxpayer, Forco will be a “controlled foreign affiliate”<sup>2</sup>. As such, any foreign accrual property income (“FAPI”)<sup>3</sup> earned by Forco will be included automatically in the taxpayer’s income, regardless of whether Forco ever pays that income to the taxpayer<sup>4</sup>.

Now suppose Forco is a beneficiary of a non-Canadian trust and the trust earns income. Will Forco have FAPI as a result of earning income from the trust<sup>5</sup>?

### 108(5)

It would appear that, with certain exceptions described below, the answer is yes automatically, even if the trust earns income which, if Forco had earned it directly, would not be FAPI (i.e., “income from an active business”)<sup>6</sup>. This is because, contrary to the common law, under which trust income retains its character or source when flowed through to a beneficiary<sup>7</sup>, paragraph 108(5)(a) deems income from a trust payable to a beneficiary to be income from property, regardless of the nature of the income earned by the trust:

#### 108(5) Interpretation

Except as otherwise provided in this Part,

(a) an amount included in computing the income for a taxation year of a beneficiary of a trust under subsection 104(13) or (14) or section 105 shall be deemed to be income of the beneficiary for the year from a property that is an interest in the trust and not from any other source. . .

but, for greater certainty, nothing in this subsection shall affect the application of subsection 56(4.1), sections 74.1 to 75 and 120.4 and subsection 160(1.2) of this Act and section 74 of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952.

### Exceptions

There are some exceptions to paragraph 108(5)(a), or perhaps it is more accurate to say there are situations in which a trust can elect out of the paragraph: among others one notes that, under subsections 104(19) and (20), a trust may flow through its taxable or non-taxable dividends to a beneficiary; subsection 104(21) permits a flow through of taxable capital gains; for the purposes of computing a foreign tax credit under section 126, subsection 104(22) permits a trust to flow through the foreign source nature of its income; and subsection 104(27) permits a flow through of pension benefits.

But none of these permit a trust to flow through its active business income to a beneficiary. Hence, the beneficiary’s income from the trust will be income from property and thus FAPI<sup>8</sup>.

## Employee exception

It has been suggested that there might be situations where this conclusion would not be correct. Element A of the definition of FAPI includes income from property. Subsection 95(1) defines “income from property” to include income from an “investment business” and “investment business” to mean a business carried on by the foreign affiliate the principal purpose of which is to derive income from property<sup>9</sup>, unless certain conditions apply, one of which is that the business must involve more than five full-time employees (the “Employee Exception”).

But it seems unlikely that Forco, at least in the scenario described above, would come within the Employee Exception. First, paragraph (a) of the definition of “investment business” provides that the Employee Exception does not apply if Forco’s business is carried out principally with non-arm’s length persons and paragraph 251(1)(b) deems a beneficiary of a “personal trust”<sup>10</sup> not to be dealing with the trust at arm’s length (of course, in many situations the trust may be a unit trust or Forco may have paid the trust to subscribe for its units, in which case it would not be a “personal trust”).

Second, under subparagraphs (a)(i) and (ii) of the definition of “investment business”, Forco must be either a foreign bank, trust company, credit union, insurance corporation or trader or dealer in securities or commodities or a developer of real property or immovables for sale, a money lender, or its business must be the leasing or licensing of property or the insurance or reinsurance of risks. None of those are likely to apply to a Forco which merely invests in the trust.

Third, paragraph 108(5)(a) states that it applies except as otherwise provided in Part I. Even if the Employee Exception applies, that means only that the income is not income from an investment business. It does not say, expressly, that the income is not income from property. So, arguably, paragraph 108(5)(a) would continue to apply. The counter-argument would be that if “income from property” is defined to include income from an investment business and the Employment Exception applies, then the context and purpose of the Exception should allow a court to conclude that the income is not “from property”.

Subsection 95(2) contains a number of paragraphs under which income that is not from an active business may be re-characterized as such, but none of them appear to apply to the simple fact scenario posited above.

Finally, in rare cases, an Australian or Indian trust may be deemed not to be a trust but to be a corporation<sup>11</sup>, so paragraph 108(5)(a) would not apply.

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<sup>1</sup> Joel Nitikman, K.C., *Dentons Canada LLP*, Vancouver. I acknowledge the assistance I received from others who are much smarter than me when researching this topic.

<sup>2</sup> See paragraph (a) of the definition of “controlled foreign affiliate” in subsection 95(1) of the *Income Tax Act*, RSC 1985, c. 1 (5<sup>th</sup> Supp.), as amended (the “Act”). All statutory references herein are to the Act.

<sup>3</sup> As defined in subsection 95(1).

<sup>4</sup> Subsection 91(1).

<sup>5</sup> Under subsection 104(13), Forco will not earn income from the trust unless that income is “payable” to Forco. Under subsection 104(24), an amount is deemed not to have become payable to a beneficiary in a taxation year unless it was paid in the year to the beneficiary or the beneficiary was entitled in the year to enforce payment of it. Note that this is a negative definition: if an amount is paid that does not mean it was “payable” for purposes of subsection 104(13).

<sup>6</sup> As defined in subsection 95(1).

<sup>7</sup> David A. Ward et. al., "The Other Income Article of Income Tax Treaties" (1990), 38 CTJ 233 at footnote 49; but the common law has been overruled by paragraph 108(5)(a)--Elie Roth, Tim Youdan, Chris Anderson, and Kim Brown, "Trusts Under General Law," in Canadian Taxation of Trusts (2016) 1.

<sup>8</sup> Under Element A of the definition of FAPI. See the inclusive definition of “income from property” in subsection 95(1).

<sup>9</sup> This may seem like a circular definition: income from property includes income from an investment business and investment business means income from a business of earning income from property. The way to read this, in my view, is that income from property includes income that flows directly from property as well as income from an activity that might be viewed as a business (which, after all, is defined in subsection 248(1) to mean any undertaking whatever) if the “business” earns income from property.

<sup>10</sup> As defined in subsection 248(1).

<sup>11</sup> Section 93.3.



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