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NOT QUITE CHICKEN SOUP — PART I: ARE POWERS TO ADD AND REMOVE BENEFICIARIES SAFE FOR CANADIAN FAMILY TRUST PRECEDENTS?

— Michael Goldberg, tax partner, Minden Gross LLP, a member of MERITAS law firms worldwide

This article discusses the inclusion and use of powers to add and remove beneficiaries in drafting, planning, and establishing family trusts. Due to its length, it is divided into two parts. Part I addresses some of the more straightforward non-tax and tax issues associated with powers to add and remove beneficiaries ("PARBs"). Part II addresses other potential tax issues that PARBs may pose for tax practitioners. Part II will be published in a subsequent edition of *Tax Topics*.

Introduction

Lately I've been coming across more trusts with expansive PARBs. In general, PARBs make me feel uncomfortable, particularly when they are included in Canadian discretionary family trusts ("Family Trusts"). My discomfort stems from concerns about the following:

- whether the inclusion of such provisions in a trust could cause a trust to completely fail in the sense that the trust would not satisfy the "three certainties";[1]
- that PARBs are extremely potent and if not properly thought out and drafted (and even if properly drafted), might be improperly used — particularly after the freezor in an estate freeze or the settlor in other *inter vivos* and testamentary circumstances is no longer alive; and
- potential tax issues that adding such clauses might give rise to.

As will be described in this two-part series of articles, my research into these issues has eased my concern about some but not all of these issues. In particular, I remain concerned that if PARBs become standard terms in Family Trust precedents, unlike "chicken soup", they could end up causing more problems than they solve. As a result, I would encourage practitioners to always consider carefully whether or not it is appropriate to use PARBs in trusts that they draft, particularly in Family Trusts.

In this series of articles, I'll focus on the last of the three points noted above. However, before doing so, I'll distill some commentary on PARBs from an excellent recent article by Donovan Waters.[2]

Non-Tax Matters

As Mr. Waters notes, some "questioners" have been concerned that the inclusion of PARBs might cause a trust to fail to come into existence if the PARB clause(s) would be viewed as not creating the necessary certainty to identify beneficiaries of the trust. However, according to Mr. Waters, such concerns

> . . . can be put aside. The ability of any person to extend or reduce the number of beneficiaries who may be considered does not create any initial or subsequent uncertainty of objects of the power. In the first place it is important to remember that there is no doctrinal requirement contained in the "three certainties"; they represent elements that allow a court to enforce a trust . . . Certainty is established initially and remains later when additions or deletions are made.[3]

PARBs, whether direct or even via a power to amend the beneficiary provisions that is less direct, can be extremely potent. Where such provisions are contemplated, Mr. Waters urges that they be tailored to the client's specific situation, which seems like extremely good advice.

Tax Matters — The CRA's Published Views

The Canada Revenue Agency ("CRA") appears to have provided relatively limited commentary regarding its views on the impact of adding beneficiaries to a trust,[4] whether through specific trust powers (such as PARBs) or through an amendment to the trust itself,[5] and although there have been specific situations in which the CRA has provided positive rulings, for the most part the commentary has not been positive.

In particular, the primary risk seems to be the CRA's view that where a new beneficiary is added to a trust, the existing beneficiaries will generally be deemed under paragraph 69(1)(*b*) of the *Income Tax Act* to have disposed of a portion of their interests in the trust equal to each beneficiary's *pro rata* share of the "fair market value" of the assets of the trust at that time.[6] In this regard, where the trust is a Family Trust, the CRA's general view appears to be that each beneficiary's interest would generally be of equal value unless a beneficiary has "a lesser chance" of receiving distribution — in which case adjustments may be required.[7]

In his article, Mr. Waters makes a number of strong arguments at law as to why the CRA's administrative positions (which have not as of yet been the subject of litigation) are likely wrong at law, and he notes that others have also put forward their own arguments in this regard.[8] However, since the CRA continues to maintain those positions, planners who amend trusts to add or delete beneficiaries or employ PARBs in their trusts and who are involved in a later exercise of those powers without the benefit of a CRA advance ruling all continue to be faced with uncertainty as to the tax consequences.[9]

Having reviewed some of the more conventional non-tax and tax issues associated with PARBs in Part I of this article, Part II will examine some other potential tax issues that PARBs may pose for unsuspecting tax practitioners.

The author wishes to thank Elie Roth of Davies Ward Phillips & Vineberg as well as a number of other tax and trust specialists who provided comments on earlier versions of this article. Any errors or omissions are the author's sole responsibility.

Notes:

[1] The three certainties are generally referred to as the certainty of intention (to create a trust), the certainty of subject matter (which involves the requirement to be able to identify the property that is to be held for the benefit of the beneficiaries of the trust), and the certainty of objects (which involves determining the person or purpose who is to benefit from the trust — i.e., to provide a means of identifying the beneficiaries).

[2] See Donovan Waters, "The Power in a Trust Instrument To Add and Delete Beneficiaries" (2012) 31 E.T.P.J. 173.

[3] *Ibid.*, at 187.

[4] The CRA has provided positive rulings in connection with non-PARB trust amendments that result in changes to beneficial interests. For example, rulings have been provided in connection with accelerating interests, deferring vesting dates, encroachment powers over capital, and creation of new trusts to hold funds set aside for minor or unascertained beneficiaries. For more on this subject, see page 11 of Elie Roth's portion of a joint presentation with Donovan Waters, "Adding and Deleting a Beneficiary to a Trust — Income Tax Considerations", presented at the June 2013 STEP conference.

[5] An additional risk of adding beneficiaries or making other fundamental changes through an amending clause is that under some circumstances the trust may be so fundamentally changed as to cause it to be resettled, giving rise to a deemed disposition of the assets of the trust. For more on this subject, see Sian Matthews, "Enigma Variations", 28 E.T.P.J. (2009) 355 at 379.

[6] In this regard, the CRA has been strongly criticized by Waters, Roth, and others for employing concepts of fair market value derived from family law cases such as *Sagl v. Sagl*, 31 R.F.L. (4th) 405 (Ont. Gen. Div.).

[7] For more on the CRA's "standard" position, see CRA Document Nos. 2012-0451791E5, February 11, 2013; 2003-0181465, April 3, 2002; and 2001-0111303, January 1, 2002; among others. See also Roth, *supra* and David Louis, Samantha Prasad, and Michael Goldberg, *Tax and Family Business Succession Planning*, 3rd edition at pages 126–130. For an example of a positive ruling by the CRA, see CRA Document No. 2007-255961R3, January 28, 2008, which is discussed in Louis *et al*. at page 129. See also CRA Document No. 2008-0281411I7, November 20, 2008 — but only released on June 12, 2013, which involved the exercise of a PARB in a trust indenture by the sole trustee to add new beneficiaries who were unrelated to the existing trust beneficiaries. In this case, the CRA held that with the exception of the sole trustee, who was also a beneficiary of the trust, none of the other beneficiaries would have been deemed to have disposed of their interests in the trust as a consequence of the exercise of the PARB.

[8] For example, see Tim Youdan, "Income Tax Consequences of Trust Variation, Revocable Trusts and Powers of Appointment" (2005) 24 E.T.P.J. 141. It is beyond the scope of this article to describe the criticisms that have been raised by Waters and others.

[9] See David Louis, Samantha Prasad, and Michael Goldberg, *Tax and Family Business Succession Planning*, 3rd edition at pages 129 and 130.

UPDATE: INCOME TAX FOLIO S1-F2-C1, EDUCATION AND TEXTBOOK TAX CREDITS

On October 30, 2013, the Canada Revenue Agency announced an update to Income Tax Folio S1-F2-C1, Education and Textbook Tax Credits. The update to the Folio — which replaces and cancels Interpretation Bulletin IT-515R2, Education Tax Credit — is pursuant to S.C. 2013, c. 34 (formerly Bill C-48) and revises ¶1.9 at item "a" to reflect amended subparagraph 118.6(1)(*a*)(i) of the *Income Tax Act*.

TAX AGREEMENT BETWEEN CANADA AND HONG KONG ENTERS INTO FORCE

On October 29, 2013, the Agreement between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (the "Agreement") for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income entered into force. Signed on November 11, 2012, Article 27 of the Agreement stipulates that its provisions in respect of tax withheld at the source on amounts paid or credited to non-residents generally have effect in Canada on or after the first day of January 2014. Article 27 also stipulates that, in respect of other Canadian tax, the Agreement's provisions generally have effect in Canada for taxation years beginning on or after the first day of January 2014.

TAX CONVENTION BETWEEN CANADA AND POLAND ENTERS INTO FORCE

On October 30, 2013, the Convention between the Government of Canada and the Republic of Poland (the "Convention") for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income entered into force. Signed on May 14, 2012, the Convention replaces the previous tax convention that was signed on May 4, 1987. Article 27 of the Convention stipulates that its provisions in respect of tax withheld at the source on amounts paid or credited to non-residents generally have effect in Canada on or after the first day of January 2014. Article 27 also stipulates that, in respect of other Canadian tax, the Convention's provisions generally have effect in Canada for taxation years beginning on or after the first day of January 2014.

CLERGY RESIDENCE DEDUCTION

The Canada Revenue Agency ("CRA") was asked if spouses who are both members of the clergy and who own and reside in separate residences can each claim the clergy residence deduction in paragraph 8(1)(*c*) of the *Income Tax Act* (the "Act"). Paragraph 8(1)(*c*) provides a deduction in certain circumstances to clergy, ministers, and members of religious orders in respect of their residence. In order to qualify for the deduction, a person must meet both a status test and a function test in terms of his or her employment, which, for the purpose of this question, were assumed to have been met. Where the residence is owned as in the situation described, the deduction is calculated under subparagraph 8(1)(*c*)(iv) and is based on the fair rental value of the residence, including utilities. The accommodation must be the taxpayer's principal place of residence and must be ordinarily occupied during the year by the taxpayer.

The CRA noted that a taxpayer's "principal place of residence", which is not a defined term in the Act (but is also used in subsection 6(6) and paragraph 81(1)(*h*)), should not be confused with a taxpayer's "principal residence", which is defined in section 54. In the CRA's opinion, significant factors determining a person's principal place of residence include where an individual normally sleeps, the location of the individual's belongings, where the individual receives his or her mail, and where the individual's immediate family, including his or her spouse or common-law partner and children, live. The term "ordinarily occupied" is not defined in the Act but is also used in subparagraph 62(3)(*g*)(i) regarding moving expenses. The CRA stated that the courts have considered that the terms "ordinarily occupied" and "ordinarily resided" are synonymous and that this is where an individual "regularly, normally, or customarily lives". As a result, if the facts support the conclusion that each spouse ordinarily occupies a dwelling that is his or her principal place of residence, then each of them may claim the clergy residence deduction in respect of his or her residence.

— *Internal Technical Interpretation, Business and Employment Division, June 4, 2013, Document No. 2012-0455961I7*

RECENT CASES

Minister's imposition of repeated late-filing penalties affirmed in part

Upon retirement, the taxpayer withdrew all of the funds from his employer's pension plan, transferring $268,466 mandatorily to a locked-in retirement account, transferring $36,102 to an RRSP from which no source deductions were withheld, and taking the balance of $144,757 in cash, from which $43,427 in source deductions was withheld and reported on a T4A slip. Since the taxpayer had not reported some income for 2006 and 2007 the Minister imposed repeated late-filing penalties under subsection 163(1) for 2009 because of his failure to report the $144,757 and the $36,102 as income for 2009. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was allowed in part. The penalty under subsection 163(1) was imposed on a year-by-year basis, so that the penalty for 2009 was exigible, even though similar penalties had also been imposed for 2006 and 2007. The $144,757 was reported to the taxpayer on a T4A slip, and he was told by his employer that it was a "taxable cash refund". He should therefore have investigated his obligation to report this $144,757 in his 2009 return, rather than leaving the matter with his bank as he alleged he had done. The repeated late-filing penalty, therefore, was properly imposed for 2009 on the $144,757 in the absence of due diligence on the taxpayer's part. Conversely, the $36,102 was the subject of a tax-free rollover from one tax-exempt vehicle to another, so it was inappropriate to impose the penalty on this amount. The Minister was ordered to reassess accordingly.

¶48,538, *Morgan*, 2013 DTC 1188

Minister's motion to amend its Reply granted in order to properly frame issues

Each party brought a motion, with the Minister seeking leave to file an amended Reply and the corporate taxpayer requesting that the Court strike the amended Reply or, alternatively, for the Minister to provide particulars. The underlying issue in the main action was whether the taxpayer could deduct amounts paid to its US parent company on account of guaranteed fees and other financing expenses. The Minister reassessed the taxpayer, denied the deductions, and levied transfer pricing penalties for 2001 and 2002. The Minister brought its motion to remedy deficiencies in its Reply. The taxpayer brought a motion to strike the Reply as having no prospect of success.

The Minister's motion was granted. The Minister's Reply had numerous drafting deficiencies; however, the appropriate remedy was to permit a further amended Reply acknowledging the existence of the guarantee and properly framing the analysis. The assumptions made by the Minister are not plainly and obviously fatal to the Minister's case. The taxpayer was also granted 60 days to file an answer to the Minister's further amended Reply.

¶48,539, *Burlington Resources Finance Company*, 2013 DTC 1190

Taxpayer was eligible individual but needed to file return as precondition to determining entitlement to CCTBs

The taxpayer was appealing the Minister's determination that he was not entitled to Canada child tax benefits ("CCTBs") for his daughter from July 2010 to June 2011. The taxpayer and his former wife separated in 1998 and their daughter, J, lived with her mother until June 5, 2010. After a quarrel with her mother on that date, J came to live with the taxpayer and he applied for CCTBs as of June 5, 2010. The Minister argued that the taxpayer was not the "eligible individual" as J did not live with him and he did not primarily fulfill the responsibility for her care and upbringing at the beginning of the period in question. In any event, the Minister argued that the taxpayer would not be entitled to the CCTBs because a prerequisite to entitlement is the filing of a return of income, which the taxpayer failed to do.

The appeal was allowed. An eligible individual must live with the qualified dependant and be the parent who is primarily responsible for the care and upbringing of that dependant. Factors to consider in that determination include the supervision of the dependant's daily activities, providing a safe environment in which to live, looking after medical care and recreational activities, and providing guidance and companionship. The evidence showed that J had lived with the taxpayer since June 2010 and that he was the parent primarily responsible for her care and upbringing from July 2010 to June 2011 and was therefore the eligible individual. As an income-based credit, a precondition to applying the formula that calculates entitlement to CCTBs is the filing of a return of income. The taxpayer's entitlement to the CCTBs was to be determined once he filed his return of income for 2009.

¶48,540, *Armstrong*, 2013 DTC 1191

Taxpayer's donation of cash and software did not qualify for charitable donation tax credit

Under the terms of a "Charitable Technology Gifting Program" (the "Program"), the taxpayer purported to make a $5,996 gift, comprising a cash payment of $1,872 and four software licences (the "Licences") with an alleged fair market value ("FMV") of $4,124. In disallowing the taxpayer's claim for a $5,996 charitable donation tax credit for 2003, the Minister alleged that: (a) the promoters of the Program obtained a tax shelter identification number but then implemented a totally different plan, which amounted to an unregistered tax shelter; (b) there was no evidence that the software in question ever existed; (c) there was no evidence that the trust through which the taxpayer was to acquire the Licences existed; and (d) the cash portion of the taxpayer's alleged gift could not be treated separately from the Licences portion because of the interconnection between the cash and the Licences. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. Registration of a tax shelter does not constitute a pre-clearance of the arrangement by the Canada Revenue Agency and does not guarantee that participants will receive the tax benefits promised by the promoter. In this case, the taxpayer failed to produce any evidence that the software existed, and he also admitted to never receiving the Licences. In addition, the Program had been marketed on the understanding that the taxpayer would receive the software, which had an FMV in excess of his $1,872 cash contribution, which nullified altogether his alleged donative intent. The Minister's reassessment was affirmed accordingly.

¶48,541, *Bandi*, 2013 DTC 1192

Extension of time requests to file notices of objection denied as out of time

The taxpayers brought applications requesting extensions of time to file their respective notices of objection for assessments of their 2007 tax returns. After receiving the notices of assessment, they each filed T1 adjustment requests to claim amounts for deductions as part of an alleged tax shelter scheme to remedy the original assessments. Those requests were denied. The taxpayers missed the statutory filing deadline to file notices of objection, but claimed that their requests ought to have been treated as objections and/or applications for extensions of time to file objections.

The taxpayers' applications were dismissed. While the form of the document will not dictate whether it was an objection, in this case, it would have been a pretty big step to treat the requests as notices of objection to the assessments. While the Canada Revenue Agency was heavy-handed in its treatment of the taxpayers, it has the authority to exercise that discretion. The objections were not filed in the prescribed deadline.

¶48,542, *Petratos*, 2013 DTC 1193

Penalties for gross negligence imposed on taxpayers claiming business loss deductions without having businesses

The taxpayers J and L, a husband and wife, were engaged in full-time employment but used a tax consulting firm to prepare their returns for 2008. Although J's total employment and investment income for 2008 amounted to $258,822.09, he purported to claim a business loss deduction of $876,260. Similarly, although L's employment income for 2008 amounted to $66,779, she purported to claim a business loss deduction of $232,677.40. The Minister disallowed the substantial business loss and loss carryback deductions claimed by both taxpayers for 2008 and imposed penalties for gross negligence. On appeal to the Tax Court of Canada, the Minister conceded that L's penalties should be reduced from $127,567.06 to $120,948.70.

J's appeal was dismissed and L's appeal was allowed in part, but only to give effect to the Minister's concession. Gross negligence includes wilful blindness. Gross negligence also includes blindly trusting persons who have prepared tax returns. J had prepared his own returns for many years, and he managed several profitable rental properties of his own, in addition to holding a responsible executive position with his employer. He was therefore a sophisticated business person who ought to have known that he was not entitled to any business loss deductions, which he even admitted in cross-examination. Therefore, when told by his tax consultant that he was entitled to deduct a business loss for 2008, he ought to have sought a second opinion, rather than simply signing his 2008 return without reading it. Accordingly, if he did not know that his tax consultant was participating in a scam, he was at least wilfully blind to this fact. Similarly, L was also well educated and she knew that she had no business and no business losses. She too, therefore, was wilfully blind. In conclusion, the Minister's imposition of the penalties, subject to the Minister's concession, was justified.

¶48,545, *Brisson*, 2013 DTC 1197

Disability tax credit disallowed as impairment does not markedly restrict ability to perform basic activities

The taxpayer suffered from fibromyalgia since 2004. Her condition worsened following a surgical operation in January 2011, after which time she could no longer work. Her family doctor provided letters to substantiate that she could not work due to severe pain. At issue was whether the taxpayer qualified for the disability tax credit under section 118.3. In order to qualify, her condition must be "prolonged" and "markedly restrict" her ability. Those terms are defined in section 118.4 to mean an impairment that lasts for a continuous period of at least 12 months, and for the latter term, that the individual require an inordinate amount of time to perform basic activities of daily living. Her physician filled out a Disability Tax Credit Certificate on September 16, 2011. However, in the form, the physician effectively provided that the taxpayer's impairment does not markedly restrict her ability to perform basic activities.

The taxpayer's appeal was dismissed. A positive certificate is a prerequisite to receiving the disability tax credit and it is not open to the Court to ignore that requirement to substitute its opinion for that of the medical practitioner.

¶48,546, *Wiley*, 2013 DTC 1198

In criminal proceedings involving tax evasion, Crown not required to divulge tip from confidential informer

The taxpayers were charged with false reporting and tax evasion under section 239 of the *Income Tax Act* ("ITA") and section 327 of the *Excise Tax Act* ("ETA"). On June 10, 2013, the British Columbia Provincial Court ordered, among

other things, an *in camera* hearing to determine the validity of the Crown's claim of informer privilege respecting a tip that the Canada Revenue Agency (the "CRA") had received from an informer (2013 DTC 5119). Gouge J disqualified himself from holding the *in camera* hearing since he was also the trial judge and felt that what he might learn in the *in camera* hearing could compromise the rights of the accused to a fair trial over which he would later be presiding. Therefore, MacCarthy J of the British Columbia Provincial Court conducted the *in camera* hearing.

The Crown's claim of informer privilege was upheld. The informer in this case was a confidential one known to the CRA and not an anonymous one. The informer privilege rule (applicable to both known and anonymous informers) is a total bar to any information that might reveal the informer's identity, subject to the "innocence at stake" exception, which was not relevant in this case. Accordingly, while the confidential tip that the taxpayers were seeking to have disclosed was relevant to a query at their trial, the Crown's assertion of the informer privilege under the *Leipert* doctrine prevented the disclosure of that tip to the taxpayers.

¶48,547, *McCartie*, 2013 DTC 5136

Taxpayer granted conditional discharge from "tax-driven" bankruptcy

At the time of his deemed bankruptcy on January 30, 2010, which resulted from the Minister refusing to accept a proposal, the taxpayer and several corporations of which he was the principal and a director had a long history of non-compliance respecting their tax affairs. His unpaid income tax amounted to $28,404.71 with interest and penalties, his legal costs owing respecting a Tax Court hearing were $15,116.73, and his outstanding director's vicarious liabilities were $707,015.66. The taxpayer was 60 years of age, did not live extravagantly, was approaching retirement, had limited income, but favoured having his corporations pay for his indebtedness besides income tax and GST owing. When he moved for his discharge on April 22, 2013, his total proven unsecured liabilities (including director's vicarious liabilities), amounted to $821,921.61, 87% of which represented amounts owing by him and his corporations to the Minister.

The taxpayer was granted a conditional discharge. This was a "tax-driven" bankruptcy, respecting which the courts normally impose conditions. The taxpayer's assets were not equal to $0.50 on the dollar amount of his unsecured liabilities, he kept inadequate records, and he had previously made a proposal in 1993. He had also culpably neglected his business affairs. Therefore, the taxpayer was entitled to a discharge, conditional upon: (a) payment to the trustee of $95,000 in monthly instalments of $350; (b) bringing up to date and keeping current the filing of his tax returns; and (c) acknowledging that his corporations owed income tax and GST in excess of $1 million and making his best effort to ensure that they continued to file their returns and pay their tax.

¶48,548, *McKinney*, 2013 DTC 5138

Payments received by taxpayers to compensate for termination of business contracts were capital in nature

The corporate taxpayers' businesses involved the collection of pregnant mare urine ("PMU") for a multinational pharmaceutical corporation, Wyeth, under the terms of PMU collection agreements (the "Collection Agreements"). In return for the execution of releases by the taxpayers (the "Releases"), Wyeth terminated the Collection Agreements and paid them: (a) certain weekly collection season payments for certain contracted quantities of PMU; (b) a lump sum (the "Rancher Payment"); and (c) certain instalment payments allegedly to compensate the taxpayers for feed and herd health expenses (the "FHH Payments"). In assessing the taxpayers for various years from 2003 to 2006, the Minister treated the collection season payments and the Rancher Payment as capital receipts, but considered the FHH Payments to be income from business under subsection 9(1) in the form of an allowance for anticipated expenses. The taxpayers appealed to the Tax Court of Canada, alleging, in part, that extrinsic evidence should be admissible to assist in construing certain inconsistencies in the Collection Agreements.

The taxpayers' appeals were allowed. There is a distinction between cases in which extrinsic evidence is admissible to resolve ambiguities in contractual language and cases where extrinsic evidence is admitted to interpret a contract in light of the "surrounding circumstances" or factual matrix of the agreement. In the latter case, no ambiguity need exist.

There were inconsistencies in the Collection Agreements. Accordingly, while evidence pertaining to the parties' understanding as to the intended use of the FHH Payments was inadmissible, evidence as to the parties' conduct following the execution of the Collection Agreements was admissible, either as part of the factual matrix surrounding the execution of those agreements or because of the ambiguities resulting from certain inconsistencies in their language. That said, the termination of the Collection Agreements resulted in the complete cessation of the taxpayers' PMU businesses, and their equipment and PMU herds became worthless capital assets. The taxpayers' businesses were therefore destroyed and Wyeth presented the Releases to them on a "take it or leave it basis" to secure protection from potential lawsuits and to counter a potential negative public backlash resulting from the destruction of PMU herds in Western Canada. In addition, the FHH Payments were not calculated on actual feed and health expenses incurred by the taxpayers, but on a percentage of the taxpayers' 2003-2004 collection season payments. Nor were the taxpayers required to account for the FHH Payments, nor to keep their PMU herds, but merely to provide Wyeth with an audited number of horses continuing to exist until sometime in 2005. There were also no conditions requiring the taxpayers to use the FHH Payments to cover their feed and herd health expenses. Applying the *surrogatum* principle, therefore, the FHH Payments were capital payments to the taxpayers following the "sterilization" of their capital assets after being forced out of business. The Minister was ordered to reassess accordingly.

¶48,550, *River Hills Ranch Ltd.*, 2013 DTC 1200

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For Wolters Kluwer Limited

Robin Mackie, Director of Editorial
Tax, Accounting, and Financial Planning
(416) 228-6135
email: Robin.Mackie@wolterskluwer.com

Natasha Menon, Content Product Manager
Tax, Accounting, and Financial Planning
(416) 224-2224, ext. 6360
email: Natasha.Menon@wolterskluwer.com

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Wolters Kluwer Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 · 1 800 268 4522 tel
416 224 2243 · 1 800 461 4131 fax
www.cch.ca

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email: circdept@publisher.com

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