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 REFDATE 120529
 SUBJECT Late Eligible Dividend Designation
 SECTION 89(14); 89(14.1); Reg. 600

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the CRA. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle de l'ARC.

PRINCIPAL ISSUES: 1) Whether the purpose of subsection 89(14.1) was to cover situations where a corporation would deliberately or on a regular basis make a late eligible dividend designation. 2) Whether section 600 of the Income Tax Regulations will be amended to make reference to late eligible dividend designations. 3) Whether a penalty will be attached to filing late eligible dividend designations.
 POSITION: 1) No. 2) No. 3) No.
 REASONS: Wording of the proposed legislation.

CTF Prairie Tax Conference 2012 Round Table

Question 18

Proposed Subsection 89(14.1) - Late Eligible Dividend Designations

This question is related to the payment of eligible dividends. Subsection 89(14) requires that "a corporation designates a dividend it pays at any time to be an eligible dividend by notifying in writing at that time each person or partnership to whom it pays all or any part of the dividend that the dividend is an eligible dividend." While there are some exceptions to this (for example, public corporations can post something on their website to that effect), it still has some issues where, for example, you want to pay an eligible dividend as of the corporate year-end, but do not know what that amount would be.

The March 29th Federal Budget proposed to modify this requirement. Proposed subsection 89(14.1) would allow for a late designation, but at the Minister's discretion. The language in the Notice of Ways and Means Motion ("NWMM") is as follows:

Late designation

(14.1) Where, in the opinion of the Minister, the circumstances of a case are such that it would be just and equitable to permit a designation under subsection (14) to be made before the day that is three years after the day on which the designation was required to be made under that subsection, the designation is deemed to have been made on the day the designation was required to be made.

The question is with respect to what would constitute "just and equitable". For example, it is fairly common practice for a dividend to be recorded as of the year-end, based on the shareholder debit balance. Another would be where the corporation wishes to pay an eligible dividend,

but the amount is uncertain until the year-end is completed, so that the GRIP balance can be determined.

Can CRA provide some guidance on what would be "just and equitable"? For example, would it be considered "just and equitable" if all shareholders agree to a late designation?

Also, would there be any penalties attached to a late designation? There are none currently indicated, but this is only the NWMM language.

Finally, if the designation is made beyond the 3-year limit, would that be included as a late designation under Reg. 600?

CRA response

On April 23, 2012, the Minister of Finance tabled a NWMM to implement certain provisions of the 2012 Budget as well as certain other tax measures. This notice of ways and means motion includes proposed subsection 89(14.1) which, subject to certain conditions, may permit late eligible dividend designations.

Taxpayers should file the request for a late eligible dividend designation directly to their local tax services office. This request should provide the reasons why it would be just and equitable to permit the late designation.

Our understanding is that this proposed amendment was designed to allow relief for situations where, for example:

- there have been tax consequences not intended by the taxpayers and there is evidence that the taxpayers took reasonable steps to comply with the law,
- the request for late designation arises from circumstances that were beyond the taxpayers' control, or
- the taxpayers can demonstrate that they were not aware of the election provision, but took a reasonable amount of care to comply with the law and took remedial action as quickly as possible.

In contrast, a request for late eligible dividend designation will not be accepted if it is reasonable to conclude that the taxpayers made the request for retroactive tax planning purposes.

For example and depending on the facts and circumstances, relief under proposed subsection 89(14.1) could be granted in a situation where a public corporation receives dividends from its subsidiaries and the subsidiaries do not designate the dividends paid pursuant to subsection 89(14). The absence of timely designations would result in the creation of low rate income pool ("LRIP") balance at the public corporation's level, even though all of the income generated within the corporate group has been taxed at a rate not less than that which applies to full rate taxable income.

However, in our view, the purpose of proposed subsection 89(14.1) was not to cover situations where a corporation would deliberately or on a regular

basis make a late eligible dividend designation. We feel that accepting late designations in such situations would, in effect, override the written and contemporaneous designation requirements that the legislator decided to maintain in subsection 89(14). Furthermore, this would inevitably create considerable administrative burden for the CRA.

We understand that section 600 of the Income Tax Regulations will not be amended to make reference to late eligible dividend designations.

Finally, we understand that no penalty will be attached to filing late eligible dividend designations.

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