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REFDATE 141202

SUBJECT Q.9 95(6) (b) Post Lehigh

SECTION 95(5) (b)

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: How does FCA decision in Lehigh Cement affect CRA's interpretation of 95(6) (b)?

POSITION: CRA accepts that 95(6) (b) is generally targeted at transactions intended to manipulate the status of a non-resident corporation for the purposes of subdivision i, Division B of Part I of the Act.

REASONS: See below.

2014 CTF Conference - CRA Roundtable

Q.9 - 95(6) (b) Post Lehigh

How will the Federal Court of Appeal decision in Lehigh Cement affect the CRA's interpretation of paragraph 95(6) (b)?

CRA Response

The CRA accepts the decision in the Lehigh Cement case that paragraph 95(6) (b) is generally targeted at acquisitions and dispositions of shares in non-resident corporations that are carried out for the principal purpose of manipulating status of the non-resident corporation for the purposes of subdivision i of Division B of Part I of the Act with a view to avoiding, reducing or deferring Canadian tax. However, the CRA believes paragraph 95(6) (b) could still apply in other contexts such as, for example, in a case involving the manipulation of a taxpayer's participating percentage in a controlled foreign affiliate.

Going forward, the CRA's 95(6) (b) Committee intends to review cases and assess whether they include a share investment or divestment in a foreign affiliate that could be considered to have been for the principal purpose of manipulating share ownership in the affiliate in order to secure a tax benefit, such as for example, a subsection 113(1) deduction for a stream of dividends. This may be the case where it could be considered that the share ownership in the foreign affiliate is transitory on the basis that it is reasonable to conclude that a subsequent disposition was contemplated at the outset.

After March 28, 2012, tax planning of the kind in the Lehigh Cement case is generally subject to the foreign affiliate dumping rule in section 212.3. However, we observe that the Technical Notes accompanying the introduction of that provision indicate that the government believes that existing anti-avoidance rules in the Act, including the general anti-avoidance rule in section 245, would apply to certain past cases of this nature. Consideration will be given by the CRA to whether any pre-section 212.3 cases involving foreign affiliate dumping could be

challenged under existing anti-avoidance rules, including section 245.

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