Tax Exempt Transfer of Property to a Corporation: *Income Tax Act* Section 85

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ABSTRACT

Section 85 of the *Income Tax Act* (Canada) is a commonly used provision that permits the tax-exempt transfer of assets to a corporation. This paper provides an overview of the application of the section covering key topics including the general rules of section 85, eligible property, consideration or “boot,” paid up capital, anti-abuse rules, requisite filings and other related provisions of the *Income Tax Act*.

Keywords: Taxation, Law, Income Tax Act, Canada, Section 85, Rollover, Tax Exempt, Transfer, Corporation, Corporate Reorganizations

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1. Section 85 Applicability

Section 85 of the *Income Tax Act* (Canada) (the "Act") is a "rollover" provision that allows for the tax deferred transfer of property to an eligible corporation. It is widely used in corporate reorganizations and tax planning. In reviewing and examining the provisions of this section and its application, this paper seeks to examine key topics such as the general rules of section 85, eligible property, consideration or "boot," paid up capital, anti-abuse rules, requisite filings and other related provisions of the Act.

Section 85 of the Act allows for the tax-exempt transfer of assets to a corporation. It should be considered whenever there is a disposition of property that has appreciated in value to a corporation. The section allows for an eligible transferor to jointly elect with an eligible transferee corporation to transfer eligible property at an agreed upon amount that is then used for tax purposes. It allows parties to defer the recognition of a taxable gain that would otherwise be realized by conveying the asset(s) at an elected amount less than the fair market value.[1] Such a taxable gain can be business income when inventory is transferred, capital gains or losses when capital property is transferred, recapture of depreciation when depreciable capital property is transferred or terminal loss when depreciable property is transferred and the transferor no longer owns property of that class.[2] The policy rationale behind the section is that of tax neutrality – the notion that taxation should not impact or interfere with business decisions. Section 85, for example, makes a business person's decision to operate using a corporation a tax neutral one by permitting the deferral of taxable gains that would otherwise be incurred by transferring business assets to the corporation. This function has made section 85 a commonly used provision in the

context of corporate formation and reorganization. To understand section 85, we will first review the key concepts used in its application.

The concepts for determining the applicability of section 85, specifically section 85(1), include that of eligible transferor, eligible transferee, eligible property, non-share consideration or "boot" and election. An eligible transferor includes individuals, trusts and corporations. Section 85(2) additionally permits a similar transfer for partnerships. While an eligible transferor may be either a resident or non-resident, there are restrictions on eligible property for non-residents. An eligible transferee must be a taxable Canadian corporation as defined in section 89(1) of the Act. Simply put, a corporation is a taxable Canadian corporation if it was incorporated in Canada (and therefore deemed to be a resident of Canada by section 250(4) of the Act) or a resident of Canada from June 18, 1971; and, is not tax exempt under the Act. The purpose of this restriction is to make sure that subsequent dispositions of the property by the transferee are taxable in Canada. Eligible property is defined in Section 85(1.1) of the Act and is discussed in greater detail in section 3 of this paper. A section 85(1) transfer requires that, in exchange for the eligible property, the eligible transferor receive at least some share consideration (which may be a fraction of a share). The eligible transferor may receive additional non-share compensation in exchange for the eligible property which is referred to as non-share consideration or "boot" and is discussed in further detail in section 5 of this paper. The election is a filing that must be made with the Canada Revenue Agency ("CRA") using the prescribed form in order for Section 85(1) to apply to a disposition of property.[3] *CRA Information Circular IC 76-19R3 – Transfer of property to a corporation under section 85*[4] and the archived Interpretation Bulletin 291R3 – Transfer of Property to a Corporation under Subsection 85(1)[5]

are important CRA publications outlining the CRA's position on the application of Section 85(1). The fact that IT 291R3 is archived means only that the CRA does not guarantee its currency after its date of publication on January 12, 2004.

Having provided an overview of the purpose of section 85, its key concepts and the primary CRA publications, we will now examine how the provision is commonly used.

2. Common Uses for Section 85(1)

The incorporation of a business, family business planning, divisive reorganizations[6] and transferring corporate shares to a holding company are common transactions that rely on section 85 that will be examined below.

2.1 Incorporation of a Sole Proprietorship

Frequently, small business owners will initially operate as a sole proprietorship in the early stages of business development. This can be beneficial as it facilitates the deduction of business losses against other personal income and reduces legal, accounting and administrative costs until the business' viability has been demonstrated. As a business grows, however, the desire to limit liability, facilitate raising funds through the sale of shares and the ability to defer taxes by retaining corporate profits within the corporation and pay dividends in lieu of salary often make incorporation preferable. When a sole proprietor incorporates his or her business, section 85(1) of the Act allows the business owner to transfer business assets out of the sole proprietorship and into a corporation without triggering tax liabilities due to a disposition of property.

2.2 Holding Company Share Transfer

After some time operating as a corporation, a business owner may decide that rather than holding the shares of the corporation personally, it would be advantageous to instead hold the shares via a separate corporation commonly referred to as a "holding company." This may be preferable for a number of reasons including protecting accumulated assets in the main operating company from liabilities, controlling the timing of the personal receipt of dividend payments when the individual does not solely decide when dividends are paid and ensuring that the operating company continues to meet the requirements for the sale of its shares under the lifetime capital gains exemption.

2.3 Family Business Planning

As the business owner ages and nears retirement, section 85(1) can also be used for family business and succession planning including carrying out what is commonly referred to as an "estate freeze." For example, if the business owner wishes to add his or her children to the business so that they can receive dividends and participate in the future growth of the business, the business owner can:

- **a)** Incorporate a new corporation (the "holding company") to own the shares of the corporation;
- **b)** Exchange his or her common shares in the corporation for fixed value preference shares in the holding company (that will not appreciate);
- **c)** Have his or her children subscribe for common shares in the holding company for a nominal amount (e.g. $1);

d) Set the business owner's section 85 election amount to recognize a capital gain, which can be offset by the business owner's lifetime capital gains exemption.

This arrangement "freezes" the business owner's shares in the company at the value of the fixed preference shares and leaves the children with the common shares of the corporation held through the holding company. As a result, all future gains will accrue to the children.

2.4 Divisive Reorganizations

Section 85(1) can also be used for divisive reorganizations, commonly referred to as "butterfly transactions." For example, if a business owner worked with a business partner and they each wanted to go their separate ways with the business owner taking one division of the company and his or her partner taking the other, a divisive reorganization may be used to facilitate the division on a tax-exempt basis using section 85(1) and other sections of the Act outside of the scope of this paper.

Clearly, section 85(1) is a versatile provision that has numerous practical applications throughout the lifespan of a business. The discussion of its real-world applications gives context to a detailed review of the more complex portions of the section. We will now turn our attention to the previously referenced concepts of eligible property and consideration to examine them in greater detail and provide a fuller understanding of the applicability of section 85(1).

3. Eligible Property

The definition of "eligible property" found in section 85(1.1) of the Act is important because section 85 applies only to eligible property. With exceptions, capital property including depreciable property is eligible. Eligible property includes Canadian resource property, foreign resource property (subject to the below exception), inventory, contractor's contracts in progress (where the percentage completion method is validly used), insurer's and lender's security and debt obligations with some exceptions and a NISA Fund No. 2 as defined under the *Farm Income Protection Act*.[7] Exceptions to the general rule include real property owned by non-residents and certain foreign resource properties.[8] In contrast, real property, including immovable property and an option on or interest in real property owned by a transferor that is a non-resident of Canada is *not* considered eligible property. This exception is meant to prevent non-residents from avoiding Canadian tax on the disposition of Canadian real property by converting its ownership to corporate shares prior to transfer. Notwithstanding this exception, a non-resident's real property used for business or owned by a non-resident insurer constitute eligible property so long as certain conditions are met, as outlined in section 85(1.1) (b) and (h). An anti-avoidance rule also excludes certain foreign resource property from the definition of eligible property. Specifically, foreign resource property or a partnership interest is not eligible property if it derives value from one or more foreign resource properties where the eligible transferor and eligible transferee do not deal at arm's length and it is reasonable to conclude that the purpose of the disposition is to receive a foreign tax credit.[9]

Property that does constitute eligible property includes cash, pre-paid expenses, trade accounts receivable collected in the normal course of carrying on business (and not *en bloc* – for which section 22 can likely better facilitate a tax-exempt transfer when certain conditions are met), life insurance policies, and unbilled disbursements. When relying on section 85 to carry out a transfer it is advisable to confer with section 85(1.1) to ensure that the elected properties are in fact eligible properties. If property falls under the definition of eligible property, one must then consider the permissible non-share consideration that could be paid in return.[10]

4. Consideration

Treatment of consideration is important as, like eligible property, it is an integral component of the application of section 85. For section 85 to apply, the eligible transferor must take shares in the eligible transferee corporation as consideration. This can include a fraction of a share and can be either a common or a preference share. Non-share consideration or, as it is informally referred, "boot," in the context of section 85, is the non-share portion of the payment made by the corporation to the eligible transferor in exchange for the eligible property. This can include the issuance of debt, the assumption of liabilities, cash and other non-share property. In most cases it is to the benefit of the transferor to maximize the boot, subject to the limits imposed by section 85(1) if a full tax deferral is to be available. Usually this is by way of debt in the form of a promissory note, so that cash can easily be withdrawn from the company later through debt repayment. Often boot will be taken back as the lesser of the adjusted cost base of the eligible property (used as the elected amount) and the fair market value.[11]

4.1 Cost Allocation

Sections 85(1)(f), (g) and (h) of the Act provide rules for fixing the tax cost of the consideration received pursuant to section 85(1). They state that first the cost of any boot is to be calculated, then the cost of any preference shares, and finally, the cost of any common shares. The cost of boot is calculated as the lesser of its fair market value and, where the fair value of the property transferred is less than the fair value of the property received in return (i.e. the fair market value of the boot is greater than the transferred eligible property), roughly speaking, the property's proportionate share of the fair market value of the boot. Consequently, the transferor should take care to not to receive boot of a value greater than the fair market value of the eligible property, as doing so, along with the application of the above costing rule will result in double tax. This is so because the eligible transferor will be taxed on a gain when the property is transferred because the elected amount cannot be less than the fair market value of the boot and the transfer will then be taxed again when the boot is eventually disposed of, since its tax cost is calculated as less than its fair market value. The transfer of one asset in receipt of boot above its fair market value (e.g. where a property's mortgage is higher than its market value and both the property and the mortgage liability are taken by the corporation with the mortgage liability as boot to the eligible transferor) can be permissibly addressed for a given asset by allocating the value of the boot above fair market value of the cost to a different asset that is transferred concurrently.[12]

When only one class of shares is received as consideration, the deemed cost of the shares will be the amount by which the amount elected exceeds the cost of the boot. Where multiple

classes of shares are received, first the preferred share cost is calculated then the common share cost. For preference shares one must a) calculate the excess of the agreed upon amount over boot, b) allocate the amount of the cost of the preferred share equal to the lesser of the amount calculated in a) and the fair market value of the shares, then where preferred shares of more than one class have been issued, the allocation in b) to each class is determined as the proportion of the fair value of the shares of that class to the fair value of the preferred shares of all of the classes. Similarly, for common shares, one must a) calculate the excess of the agreed amount over boot and the cost allocated to preferred shares, b) allocate the amount of the cost of the common shares equal to the lesser of the amount calculated in a) and the fair market value of the shares, then where common shares of more than one class have been issued, the allocation of b) to each class is determined as the proportion of the fair value of that class to the fair value of the common shares of all classes.[13]

4.2 Paid-Up Capital

Paid-up Capital is defined in section 89(1) of the Act. It is important because generally a corporation may return paid-up capital to shareholders tax-free. The Act defers to the legislation in the jurisdiction of incorporation for determining a corporation's stated capital. Under the *Canada Business Corporations Act*,[14] for example, the stated capital can be consideration received for the property exchanged for the shares (net of liabilities or boot issued) or less (as may be used for non-arm's length share issuance).[15] For simplicity a corporation's board of directors will often elect the fair market value. For example, if $300 is the fair market value of property transferred to a corporation with an assumed secured debt of $100, the net fair value of

the property for which shares are issued is $200. This is also the amount that the board of directors would likely set as the stated capital and which would be used in calculating paid-up capital. Section 85, however, additionally adjusts stated capital in computing paid-up capital to ensure that in a section 85 rollover the total paid-up capital of all shares does not exceed the amount, if any, that the agreed amount exceeds the boot. When applicable, this has the effect of making the total cost of the boot and the aggregate of all paid-up capital of all shares equal to the agreed amount. This corresponds to the total amount that the transferor can receive tax-free.[16]

Because paid-up capital can be returned to a shareholder tax-free it is possible for a transferor under a section 85 election to receive more than the agreed amount despite the agreed amount representing the proceeds of disposition and the amount on which tax has been paid. To prevent this section 85(2.1) of the Act has a rule to reduce paid-up capital where there would otherwise be a tax-free return of more than the agreed amount. Notably, this rule does not apply when there is a disposition of property to which section 84.1 or 212.1 (as discussed later in this paper) apply. When a paid-up capital reduction applies, it is important to be aware that a recovery of a paid-up capital reduction is permitted under section 85(2.1)(b) of the Act in certain circumstances where the corporation has been deemed to have paid a dividend as stated in sections 84(3), (4) and (4.1) of the Act.[17]

4.3 Deemed Gifting Rule

Section 85(1) (e.2) of the Act is meant to prevent the use of a section 85 rollover to confer a benefit on a related party shareholder. It applies when: a) an eligible transferor transfers

eligible property to a corporation for consideration that is less than the greater of: i) the property's fair market value; and, ii) the elected amount; and, b) it is reasonable to consider the transfer to have been intended to confer a benefit on a related person. The consequence of the application of the rule is an increase in the proceeds of disposition to the transferor and an increase in the cost of property to the corporation but without adjustment to the cost base of the consideration received by the eligible transferor. This has the effect of doubly taxing the deemed gift. This deemed gifting rule does not apply if the transferee is a wholly owned corporation as per section 85(1.3) of the Act. Consequently, what is in effect a gift to oneself, does not constitute a deemed gift under the section.[18]

4.4 Price Adjustment Clause

When transferring property using section 85, fair market value can be very important. This is true not just in relation to the applicability of the deemed gifting rule, but also for the eligibility of the lifetime capital gains exemption, which cannot be relied upon where the shares have been transferred at a price below fair market value. To address uncertainty in fair market value at the time of transfer, price adjustment clauses are used to adjust between transferor and transferee consideration paid in the event that the CRA or a Court finds that the fair market value of the property differs from that used in a section 85 election. The 1973 case of *Guilder News (1963) Ltd. v. MNR*[19] establishes the validity of the use of a price adjustment clause so long as a "fair manner is used to determine such [fair market] value."[20] The CRA has published its position on this ruling and the use of price adjustment clauses in CRA Income Tax

Folio S4-F3-C1 – Price Adjustment Clauses. It states that when property is transferred in a non-arm's-length transaction, a price adjustment clause may be used so long as:

a) The agreement reflects a bona fide intention of the parties to transfer the property at [fair market value] FMV….

b) The FMV for the purposes of the price adjustment clause must be determined by a fair and reasonable method….

c) …[I]f the FMV of the transferred property determined by the CRA or a Court of law differs from their valuation, they will use the value determined by the CRA or Court.

d) The excess or shortfall in price is actually refunded or paid, or a legal liability therefor is adjusted.[21]

Having reviewed the applicability of section 85 of the Act including definitions of eligible property and consideration in exchange for such property, we will now examine limitations on the use of the section including price limit rules and the somewhat complex anti-abuse provisions.

5. Limit Rules

Section 85 of the Act allows the transferor and transferee to designate the dollar amount at which the eligible property is transferred. This amount is referred to in the section as the "agreed amount." The agreed amount for the transfer constitutes the proceeds of disposition for the transferor and the tax cost of the property for the transferee. The agreed amount cannot be $0[22] and must be a dollar amount rather than a narrative (e.g. "$100" but not "the adjusted cost base"). Furthermore, to prevent abuse, restrictions are imposed on the amount that may be

designated. Subject to the general upper limit, if the agreed amount is less than the boot's fair market value when received from the corporation on disposition, the fair market value of the boot is deemed to have been elected (the "general lower limit"). If the amount elected exceeds the value of the property transferred to the corporation, the fair market value is deemed to have been elected (the "general upper limit"). Collectively the general lower and general upper limits permit an election for property at any amount between the fair market value of the boot and the fair market value of the property. When the parties make an election that falls outside of the applicable general limit, the agreed amount is adjusted so as not to fall outside of the applicable limit. For example, if the fair market value of the eligible property is $10, the cost $8, the boot $9 and the agreed amount $8, the agreed amount is adjusted to $9 as the general lower limit prevents the agreed amount from being less than the fair market value of the boot.[23]

While there are variations on the general lower and upper limit rules for certain types of eligible property, so long as fair market value can be elected there can be a loss where fair market value is less than the cost amount. Specifically, for inventory, non-depreciable capital property and NISA Fund No. 2 property, if the elected amount is less than the lesser of the fair market value and the cost amount (as defined in section 248(1) of the Act), the elected amount is deemed to be the lesser of these two amounts. This exception is meant to prevent the use of section 85 to trigger artificial losses by electing an amount that is less than fair market value.[24] Similarly, a farmer that has elected to compute income on a cash basis who would normally be subject to a mandatory inventory adjustment (to prevent writing off inventory as it is purchased where it remains on hand at the end of the year) is subject to a special rule to prevent the transfer of inventory to a corporation to avoid adjustment. The rule in this scenario deems the elected

amount to be the aggregate of the proportion of the adjustment that would otherwise have been included as income and such additional amount as is designated up to the inventory's fair market value.[25] Lastly, depreciable property also has a special lower limit to prevent an artificial loss. It states that if an election is made at an amount less than the least of the three following amounts, the lowest of the three is the deemed elected amount:

a) the undepreciated capital cost of all property in the class which the disposed of property belongs;

b) the cost of the property to the transferor; and,

c) the property fair market value when it is transferred.[26]

Special rules also apply to passenger vehicles and tradesperson's and apprentice mechanics tools, which will not be addressed in this paper. Additionally, to prevent issues in the calculation of eligible capital property and depreciable property there is an ordering rule allowing the transferor to designate the order of the disposition of assets.[27]

In addition to the price limit rules there are anti-abuse provisions that must also be considered when evaluating the impact of a given transaction. These have been developed to address uses of the Act that have been perceived to be abusive and contrary to legislative intent.

6. Anti-Abuse Provisions

Anti-abuse provisions relevant to the use of section 85 include the stop-loss, third party loss and surplus stripping rules. These provisions must be kept in mind when structuring a section 85

rollover. Though arguably tangential to section 85 proper, a review of these anti-abuse provisions is important to convey an understanding of the interrelation between these differing sections and the impact that an improperly structured section 85 rollover can have.

6.1 Stop Loss Rules

Section 85 of the Act permits a taxpayer to show a loss when property is transferred. In fact, it requires a loss to be shown where the fair market value is less than the tax cost. The stop loss rules are meant to limit the ability to deduct from income losses resulting from a section 85 transfer where the transfer is made to an affiliated person. The rationale is that when a loss is created within a group of affiliates there has not been a true loss to the economic unit and such loss should be deferred until the property is transferred to a non-affiliated party. The stop loss rules, which have a much broader application than section 85, relate to a section 85 transaction when a loss is triggered and when the parties to the transaction are affiliated persons. Section 251.1 of the Act defines "affiliated person." The definition is somewhat complex, but broadly speaking it applies where parties are under common control directly or indirectly. For individuals, this includes a spouse or common law partner but not siblings, children or grandchildren. Stop loss and related rules are also complicated. The stop loss rules do not apply to the transfer of eligible capital property by an individual. Separate rules apply when the transferor is an individual, a corporation is purchasing its own shares and for transfer of related party debt.[28] Stop loss rules apply to depreciable property[29] and eligible capital property,[30] while the transfer of non-depreciable capital property is subject to different rules depending on the nature of the transferor. Individuals are subject to the section 54 superficial loss rule and, for

partnerships, corporations and trusts, the stop loss is suspended until a triggering event occurs under section 40(3.4).[31]

6.2 Third Party Losses

Section 69(11) is an anti-avoidance rule that may apply to transfers between non-affiliated parties. It should be considered when property is transferred below fair market value to a non-affiliated party, which then may, within 3 years from the date of transfer, dispose of the property, sheltering the disposition from taxes with any other deductions or exemptions from tax including credits, losses and/or deductions. When this section applies, the property is deemed to have been disposed of at its fair market value rather than any amount elected amount. The rule does not apply for transfers between affiliates.[32]

For example, say that Canadian corporation A owns real property with an adjusted cost base of $1M and a fair market value of $2M and is thinking of selling the property. Canadian corporation B is owned by an unrelated party and has significant net capital losses carried forward. Corporation A suggests transferring its real property to corporation B on a section 85 tax deferred basis in exchange for retractable and redeemable preferred shares at an adjusted cost base of $1M. Corporation B will then sell the real property at fair market value, offsetting the gain with its losses carried forward. Corporation B would redeem the preferred shares, giving rise to a $1M dividend that is deductible in computing taxable income. A payment will be made by the owner of corporation A to the owner of corporation B for using corporation B's losses. In this scenario, if corporation B sells the property within 3 years of the date of the initial transfer,

section 69(11) applies and corporation B is deemed to have transferred the land at $2M. The section 85 election is in effect ignored.[33]

6.3 Surplus Stripping

Surplus stripping is the name used for a series of transactions meant to remove surplus from a corporation without paying tax. Some provisions in the Act expressly permit this, while others have been implemented as anti-avoidance measures to prevent perceived abuse. Surplus stripping sometimes includes a transaction that is the object of a section 85 election and the main anti-abuse provisions that apply are found in sections 84.1 and 212.1 of the Act. Section 84.1 puts a limit on the non-share consideration a (non-corporate) taxpayer can receive from a non-arm's-length sale of shares of one Canadian corporation to another Canadian corporation and only applies if the corporation, the shares of which are transferred to another Canadian corporation, is connected (as defined in section 186(4) of the Act) to the purchasing corporation after the disposition.[34] Any amount received over the limit is a deemed dividend and the limit is effectively the amount paid by the vendor for the shares or such other amount that another arms-length party previously paid. Section 212.1 of the Act applies to a non-resident's disposition of shares in a Canadian-resident corporation in a non-arm's-length transaction and is meant to prevent a tax-free withdrawal of any amount greater than the paid-up capital of the shares transferred. Any amount greater than this limit is taxed as a deemed dividend and subject to withholding tax.

For an example of paid-up capital reduction under section 84.1 of the Act, let's say that individual A is the sole owner of all of the shares of an operating company, which were inherited, with an adjusted cost base of $350 (the fair market value at the time of the deceased's death). Individual A's arm's length acquisition cost ("…the adjusted cost base of the shares sold, reduced by the portion represented by "valuation day" [as defined in section 24 of the *Income Tax Application Rules*][35] value and the capital gains deduction previously claimed on a disposition of shares by anyone not dealing at arm's length with the vendor"[36]) is $60. Individual A then transfers operating company shares to a holding company under section 85 at the shares' adjusted cost base of $350 in return for preferred shares of the holding company with a stated and paid-up capital of $350. In this scenario section 84.1 applies to reduce the paid-up capital of the holding company shares to $60, to reflect the arm's length acquisition cost. Consequently, if only shares are issued, paid-up capital taken back is limited to the arm's length acquisition cost of the shares transferred.[37]

Having examined the application of section 85 and its restrictions we will now review the requisite filing including how late filings and mistakes can be addressed.

7. Section 85 Election Filing

Section 85 election filing is an important consideration and a full understanding of the filing requirements can save significant time and expense. When a section 85 election is made, a corresponding form T2057 (or T2057 for a partnership) must be filed with the CRA. The form requires the transferor(s) and transferee(s) to be identified and declarations as to whether there is

a late filing penalty being paid, written agreement for the underlying transaction, the use of a price adjustment clause, any additional owners of the transferee, residency, the particulars of the property (including the agreed amount) and other information. The filing must be made prior to the earlier of when the transferor or transferee is required to file an income tax return for the year in which the transaction takes place,[38] with some exceptions.

A section 85 filing may be submitted up to three years after the submission deadline, subject to the payment of a late fee at the time the election is filed. Where such late filing is made with the proper penalty, the filing will be deemed to have been made on time. The late fee is calculated pursuant to section 85(8) of the Act as the lesser of: a) ¼ of 1% of the amount by which the fair market value of the property exceeds the agreed-upon elected amount; for each month or partial month by which the election is late; and, b) $100 for each month or partial month by which the election is late; not to exceed $8,000.[39] The Minister also has the authority to permit a late filing after the three-year period when it is equitable and to accept amended elections. CRA Information Circular 76-19R3[40] outlines when an amended filing will generally be accepted, which broadly states that the original election must not be invalid and a supporting reason must be provided. Where a mistake in filing has been made and the Minister does not consent to an amendment, the taxpayer may seek recourse from the Court under the common law remedy of rectification. Rectification is an equitable remedy that is also sometimes available where the Court may make an Order to change a written document to reflect what it was intended to have originally said. Clearly, paying careful attention to the filing rules and requirements can save potentially significant time and cost. Form T2057 should be carefully and meticulously completed and filed.

8. Conclusion

Section 85 of the Act is an important and commonly used provision for a variety of corporate tax planning transactions that benefit from the tax deferred transfer of property to an eligible corporation. It is commonly used for the incorporation of a sole proprietorship, the transfer of shares to a holding company, family business planning and divisive reorganizations. The section only applies to eligible property where at least some share consideration is provided in return. With some exceptions, the eligible transferor(s) and eligible transferee(s) may use any agreed upon amount for tax purposes that is between the fair market value of the boot and the fair market value of the eligible property. Price adjustment clauses can be used in related agreements to protect against differing CRA or Court findings on the fair market value of the property and there are a number of anti-abuse provisions that should be considered. Section 85 requires that a CRA filing be made on a designated form within a designated time period when this section is used.

END NOTES

[1] *Section 85 Rollovers: A Complete Guide, 2nd Edition*. Wolters Kluwer (Canada: 2016). Pages 1-2.

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[3] *Section 85 Rollovers*. *Supra*. Pages 2-4.

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[6] *Section 85 Rollovers*. *Supra*. Pages 4-6.

[7] *Farm Income Protection Act, SC 1991, c 22*

[8] *Section 85 Rollovers*. *Supra*. Pages 9 -22.

[9] *Ibid*.

[10] *Ibid*.

[11] *Ibid*. Pages 23-24.

[12] *Ibid*. Page 22-30.

[13] *Ibid*. Page 31-33.

[14] *Canada Business Corporations Act, RSC 1985, c C-44*

[15] Ibid. Section 26(4) as cited in *Section 85 Rollovers*. *Supra*. Page 38.

[16] *Ibid*. Page 33-34.

[17] *Ibid*. Page 33-34.

[18] *Ibid*. Page 39-40.

[19] *Guilder News (1963) Ltd. v. MNR, 73 DTC 5048 (FCA)* as cited in *Section 85 Rollovers*.

[20] *Ibid*. Page 5. Para 13.

[21] CRA Income Tax Folio S4-F3-C1 – Price Adjustment Clauses

[22] IC 76-19R3, Para 5 as cited in *Section 85 Rollovers*. *Supra*. Page 48.

[23] *Section 85 Rollovers*. *Supra*. Pages 47 -50.

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[33] *Ibid*. Page 88.

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