

# Canada Revenue Agency Roundtable

CRA Commentators:

Robert Demeter, Jackson MacGillivray,  
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Moderators:

Sandra Jack, Felesky Flynn LLP  
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# Q1: Beneficial Ownership

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- There have been a number of developments concerning the meaning of “beneficial owner” in tax treaties:
  - *Prévost Car* and *Velcro Canada* judgments
  - the OECD draft *Clarification of the Meaning of “Beneficial Owner”* in the *OECD Model Tax Convention*
  - challenges by tax authorities around the world on the interpretation of this term

# Q1: Beneficial Ownership

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## Questions:

- Based on the outcomes in *Prévost Car* and *Velcro Canada*, is CRA continuing to challenge beneficial ownership?
- Alternatively, would CRA comment on what factors it will take into account in determining beneficial ownership in light of these cases?

## Q2: Treaty-Reduced Tax Withholdings

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- With the introduction of forms NR301, 302 and 303, it seems that the CRA requires a higher degree of due diligence by a payer in determining whether the recipient is entitled to reduced tax withholdings.
- Previously the payer only required the name and address of the recipient to apply a lower treaty rate.
- The CRA allowed taxpayers until December 22, 2011 to gather the necessary information to complete these forms.

# Q2: Treaty-Reduced Tax Withholdings

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- Deadline extended to December 22, 2011 unless the following criteria existed:
  - The payee is known to act, even occasionally, as an agent or nominee (other than a Swiss agent or nominee);
  - The payee is reported as "in care of" another person, or "in trust," or the address is a post office box;
  - The mailing address provided for payment of interest or dividends is different from the registered address of the "owner";
  - The payee is a flow through entity such as a partnership or limited liability company (that is not taxed on its worldwide income under the laws of another country); or
  - There is reason to believe that a reduced rate will not apply due to limitation of benefits provisions in the Canada - United States tax treaty.

# Q2: Treaty-Reduced Tax Withholdings

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- Regardless of the deadline for obtaining the necessary information, if there is any doubt, we understand that the relevant NR 301, 302 and/or 303 forms should be completed.

# Q2: Treaty-Reduced Tax Withholdings

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## Questions:

- If the payer obtains the relevant information for this form, and relies on that information in determining amount to withhold from payment, is payer subject to interest and/or penalties in the event amount withheld is insufficient?
- If it is not possible to make this general statement, would CRA be willing to provide some guidance on when it would provide this due diligence relief?

# Q2: Treaty-Reduced Tax Withholdings

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## Questions:

- It would be expected that payers will not reduce withholdings if in doubt and that there will be more refund requests by recipients. The mechanism for requesting a refund is NR7-R. Does the CRA have any plans to simplify the process by which refunds may be claimed?



# Q3: Transfer Pricing Cases

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## Questions:

- Could you provide us with an update on paragraph 247(2)(b) assessments and the role of the Transfer Pricing Review Committee (TPRC) in reviewing the application of this provision?
- In addition, could you please provide us the most recent TPRC statistics with respect to both penalty application and re-characterization?

# Statistics

## Executive Summary as of April 24, 2012

### 247(3) PENALTY REFERRALS

Penalty Recommended	152	50.7%
Penalty not Recommended	<u>148</u>	<u>49.3%</u>
Total 247(3) Cases Referred	<u>300</u>	<u>100.0%</u>

### 247(2)(b) Re-characterizations

Denied / abandoned	34	61.8%
Approved	11	20.0%
Ongoing	<u>10</u>	<u>18.2%</u>
Total Cases Referred	<u>55</u>	<u>100.0%</u>

# Q4: Section 116 Clearance Certificates

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- If a partnership (including a widely-held partnership and including a partnership in a multi-tier partnership structure) proposes to dispose of Canadian real estate, a clearance certificate will not be available without disclosure of all indirect partners.
- It is often impossible to make this disclosure.
- Disclosure is required even if full tax is being paid on the gain since no treaty relief would apply to real estate disposition.

# Q4: Section 116 Clearance Certificates

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## Question:

- Please comment on whether the CRA would consider relief from disclosure requirement where partnership disposes of Canadian real property and is willing to pay tax payable on gains realized from the disposition.

# Q5: Definition of Taxable Canadian Property

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## Background

- “Gross asset” Test
  - to determine whether a share of a company derives its value principally from real or immovable property situated in Canada, reference is made to the value of the properties of the company without taking into account its debts or other liabilities.

# Q5: Definition of Taxable Canadian Property

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## Background

- “Look-through” Test
  - Where a non-resident disposes of shares of a parent corporation that has a subsidiary, the FMV of the subsidiary’s shares, and the proportion of the subsidiary’s total gross assets that comprises of real or immovable property situated in Canada, must be determined

# Q5: Definition of Taxable Canadian Property

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## Background

- “Look-through” Test
  - Under the current definition of “taxable Canadian property” (“TCP”), an amount equal to that same proportion of the FMV of the subsidiary’s shares will be considered real or immovable property situated in Canada of the parent in determining whether the shares of the parent derive their value principally from real or immovable property situated in Canada

# Q5: Definition of Taxable Canadian Property

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## Background

- “Look-through” Test
  - August 27, 2010 Draft Legislation, applicable after March 4, 2010, will prevent indirect “look-through” to the property of a subsidiary in the event that the subsidiary’s shares would not themselves be TCP
  - If enacted as proposed, and the subsidiary’s shares would not themselves be TCP, the full value of the subsidiary’s shares will be viewed as property other than real or immovable property situated in Canada.



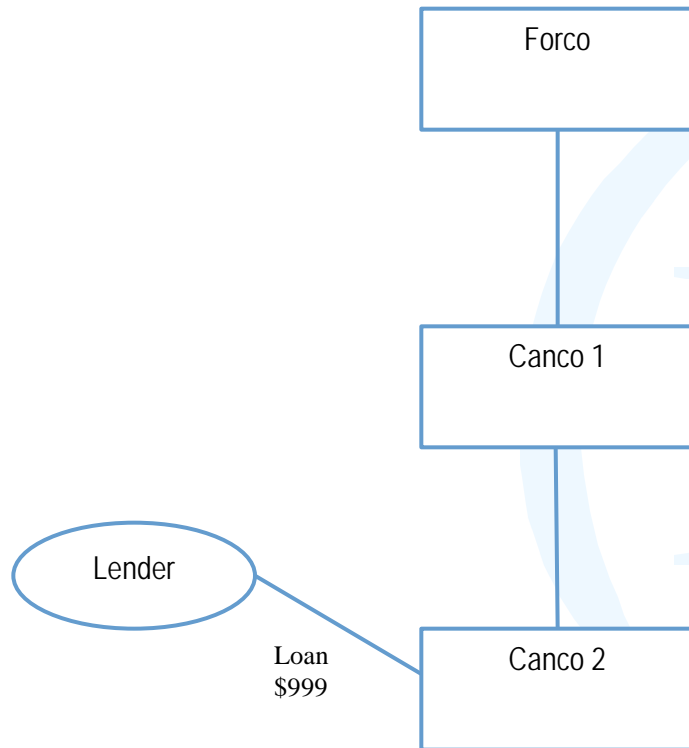
# Q5: Definition of Taxable Canadian Property

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## Questions:

- In assessing the amount of real or immovable property situated in Canada that a parent derives from shares of a subsidiary, what is the correct approach (under current wording and August 27, 2010 proposals)?
  - Full value approach
  - Proportionate value approach
  - Consolidated gross asset approach

# Q5: Definition of Taxable Canadian Property



## Canco 1

Cash	\$ 99
Canco 2 share value	<u>401</u>
Canco 1 share value	<u>\$ 500</u>

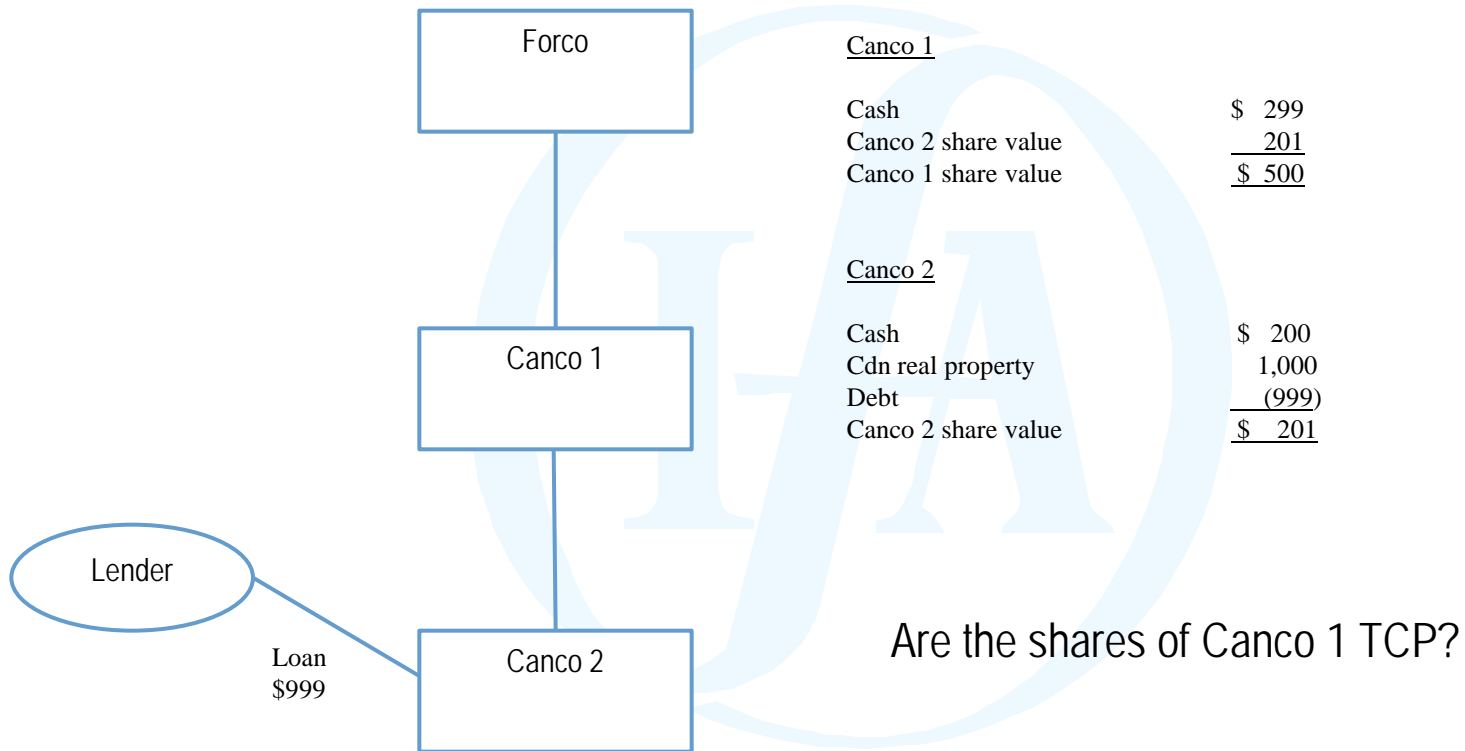
## Canco 2

Cash	\$ 400
Cdn real property	1,000
Debt	<u>(999)</u>
Canco 2 share value	<u>\$ 401</u>

In assessing the TCP status of the Canco 1 shares:

1. Are the shares of Canco 2 treated as immovable property with a value of \$401 (i.e., a full value approach) ?
2. Is the FMV of the Canco 2 shares allocated between immovable property and other property based on the proportion of gross assets that are immovable property (i.e., a proportionate value approach) ?
3. Is Canco 1 considered to hold the gross assets of Canco 2 (i.e., a consolidated gross asset approach) ?

# Q5: Definition of Taxable Canadian Property



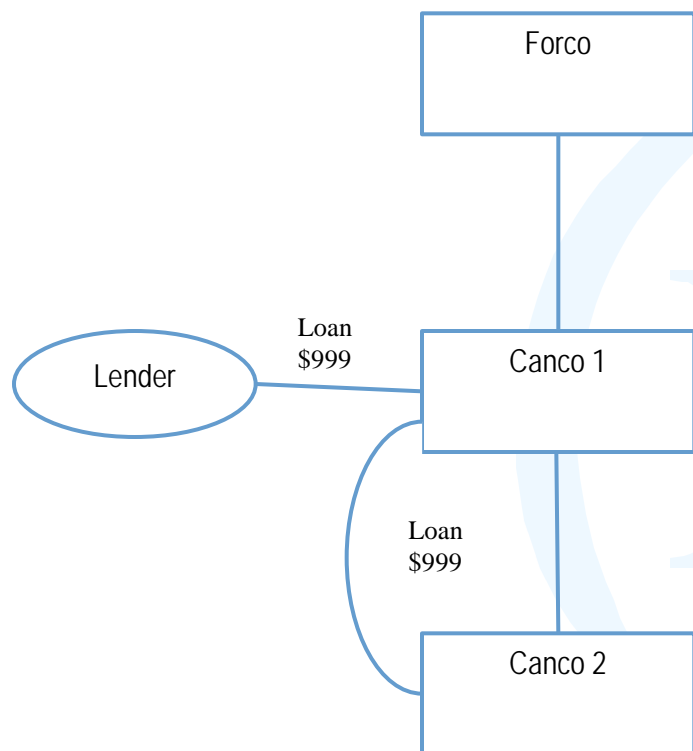
# Q5: Definition of Taxable Canadian Property

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## Questions:

- How do intercompany debts impact the determination?

# Q5: Definition of Taxable Canadian Property



## Canco 1

Cash	\$ 99
Canco 2 loan receivable	999
Canco 2 share value	401
Debt	<u>(999)</u>
Canco 1 share value	<u>\$ 500</u>

## Canco 2

Cash	\$ 400
Cdn real property	1,000
Debt due to Canco 1	<u>(999)</u>
Canco 2 share value	<u>\$ 401</u>

In assessing the TCP status of the Canco 1 shares is the intercompany debt::

1. Treated as other property?
2. Treated as immovable property with a value of \$999?
3. Is the value of the intercompany debt allocated between immovable property and other property based on the proportion of gross assets that are immovable property?
4. Is it ignored as an asset of Canco 1 and a liability of Canco 2?

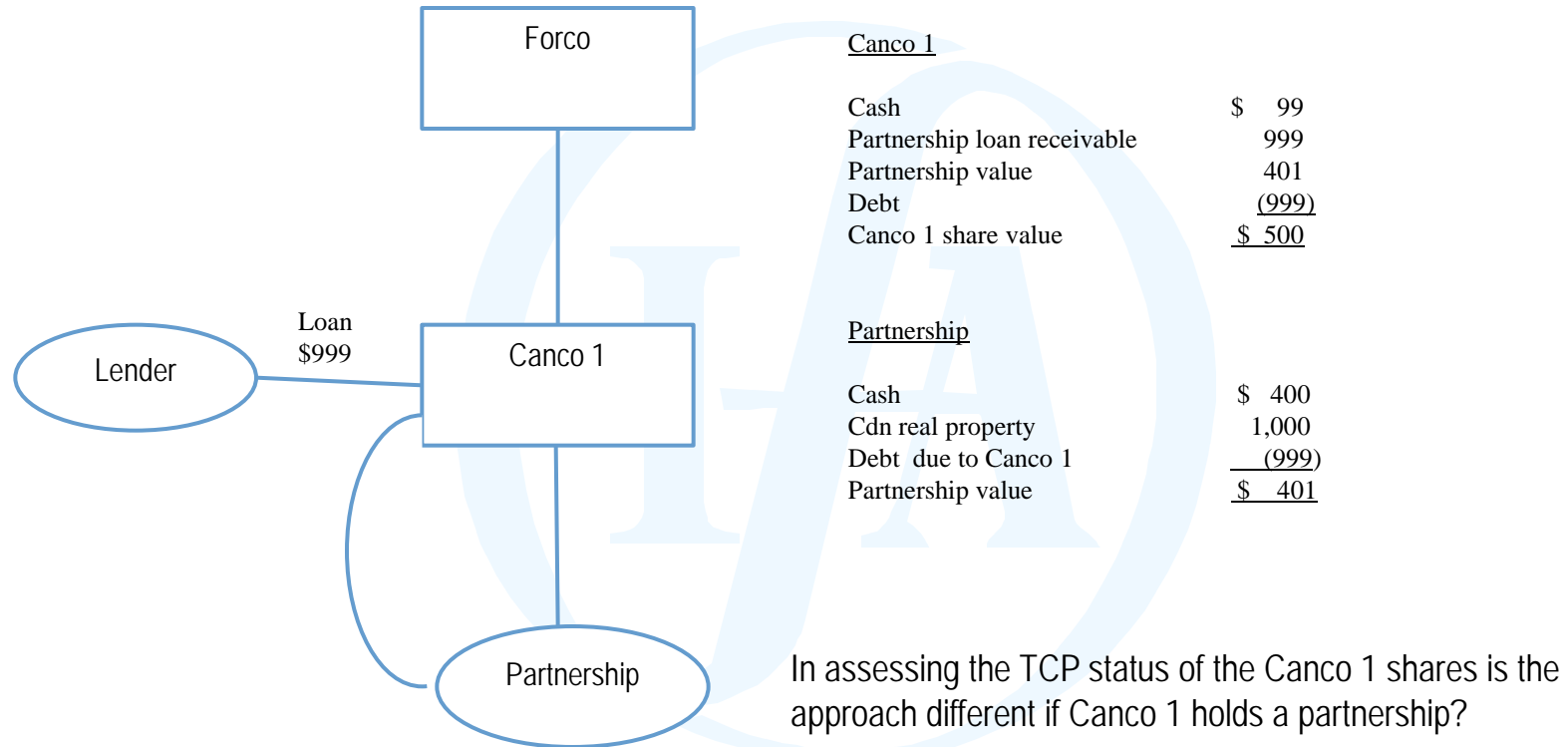
# Q5: Definition of Taxable Canadian Property

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## Questions:

- Are investments in partnerships treated differently than investments in shares of a subsidiary for purposes of determining a parent's investment in immovable property?

# Q5: Definition of Taxable Canadian Property



## Q6: Regulation 105

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- Where a partnership with non-resident members renders services in Canada, it is understood that Regulation 105 withholding applies to payments made in respect of those services.

### Question:

- Does CRA require that all members of partnership file Canadian income tax returns?



# Q7: T1134 Forms

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## Questions:

- Status of revised 1134 a and b forms?
- Is there a plan to allow electronic filing of 1134 forms?

# Q8: Policy Initiatives

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## Question:

- Can you give us an update on any policy initiatives being considered by the International Tax Division?

# Q9: International Initiatives

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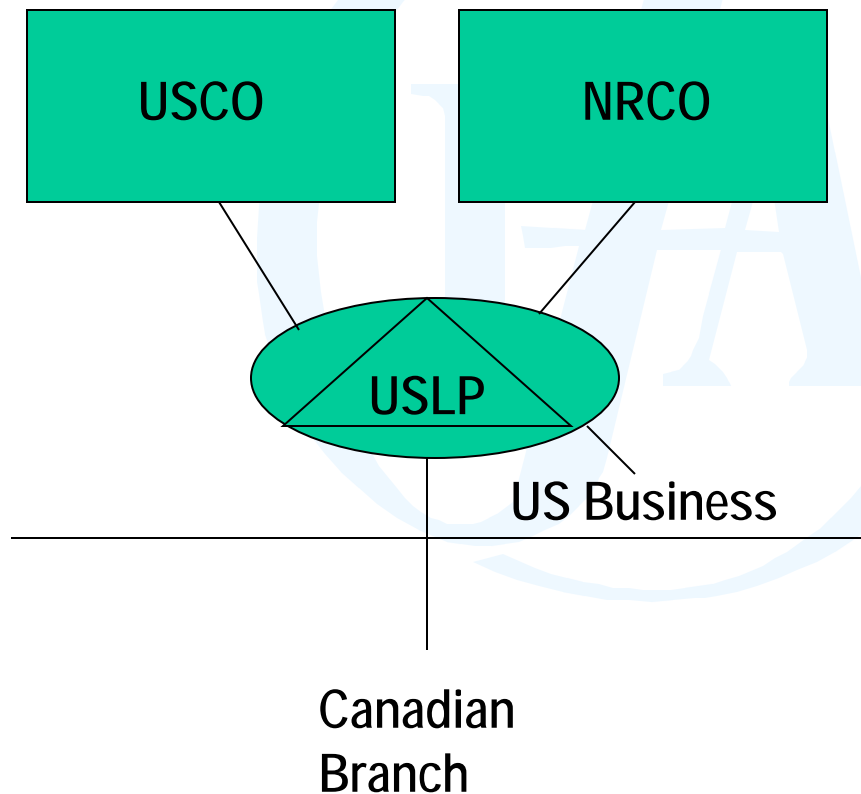
## Question:

- Can you give us an update on other international initiatives and co-operation such as JITSIC, OECD, Global Forum on Exchange of Information?

# Q10: Hybrid Partnerships and Branch Tax

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## ■ Example:



# Q10: Hybrid Partnerships and Branch Tax

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- USCO is resident of United States under Canada-US Treaty; NRCO is not resident in a treaty country.
- USCO and NRCO are the partners of USLP, a partnership that has elected to be a US domestic corporation for US tax purposes.
- USLP carries on active US business activities and carries on identical business activities through Canadian permanent establishment.

# Q10: Hybrid Partnerships and Branch Tax

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## Question:

- Would the CRA be willing to clarify that Article X(6) of the US Treaty applies to business profits of partnerships that have “checked-the-box” to be classified as a corporation for United States tax purposes?

# Q11: Competent Authority Agreements

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- A number of Canada's income tax treaties contain provisions which allow the Canadian competent authority to enter into agreements to defer recognition of income, profits or gains from alienation of property.

## Question:

- Will the Canadian competent authority enter into such agreements where the income, profits or gains are exempted or excluded from taxation under the treaty partner's domestic tax laws?

# The End

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**THANKS!**