

-- See 84(3) Notes. ... -- “Winding-up, discontinuance or reorganization” (WDR) : if there is no true WDR of the business, 84(2) does not apply, but 15(1) applies to appropriation of the corporation's property by shareholders, leading to income inclusion without the beneficial treatment given to dividend income (112(1) , 121): *Felray Inc.* [1998] 2 C.T.C. 4 FCTD . There was WDR (and 84(2) applied) in: *MacDonald* 2013 FCA 110 (converting medical professional corp to holding company); *Foix* 2023 FCA 38 (leave to appeal to SCC requested) (business changed following sale of assets [Faber & Paish, “Did Foix Change the Meaning of Reorganization?”, 13(2) *Canadian Tax Focus* (ctf.ca) 5-6 (May

Notes

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Leveraged buyout: see VIEWS docs 2013-0479651E5, 2016-0655911C6 [2016 APFF q.12] (leveraged buyout is not likely WDR); 2019-0809581R3 (leveraged buyout of Carmanah [Nitikman, “Missing the Forest”, 2519 *Tax Topics* (CCH) 5-10 (June 16, 2020); Willson & O'Connor, “Carmanah Technologies”, XXIII(3) *Corporate Finance* (Federated Press) 20-25 (2020); Kabouchi & Lang, “The Application of 84(2) to Leveraged Buy-Out”, *ibid*, 26-31]).

Surplus stripping by converting a taxable dividend into proceeds of disposition triggers 84(2): doc 2007-0224151E5. 84(2) applied to a share sale that in substance was extraction of corporate surplus, in *RMM Canadian Enterprises (Equilease)*, [1998] 1 C.T.C. 2300 (TCC) . However, in *Tremblay*, 2010 FCA 119, (2-1 decision), 84(2) did not apply where a corp was sold via 85.1 share exchange with no distribution or appropriation of assets [Osborne, “*Tax Court Reins in CRA's Views on Subsection 84(2)*”, XVI(1) *Corporate Finance* (Federated Press) 1755-58 (2009); Brender, “*The Queen v. Tremblay*”, XII(1) *Corporate Structures & Groups* (Federated Press) 644-47 (2010); Kiefer, “*Tuck-Under Transactions*”, XIV(4) *Business Vehicles* (Federated Press) 773-78 (2012)]. CRA noted the dissent in the FCA and will continue to challenge certain “tuck under” transactions: docs 2010-0370551E5, 2010-0373291C6.

In *Geransky*, [2001] 2 C.T.C. 2147 (TCC) , 84(2) did not apply to a series of transactions whereby shareholders extracted corporate surplus and claimed the capital gains exemption on a share sale. The CRA accepts this result with qualifications: 2002-0156695, 2003-0029955, 2004-0086771C6, but may restrict it to a partial sale of a business: Jean-François Drouin, “Selling a Business: Selling Shares, Assets or... Both”, 1(1) *It's Personal* (Carswell) 4 (Nov. 2007). See also Clark, Proulx & Pandher, “Hybrid Sales”, 25(5) *Canadian Tax Highlights* (ctf.ca) 4-5 (May 2017).

In *MacDonald*, 2013 FCA 110, 84(2) applied due to the words “in any manner whatever”, where at the end of a planned series of transactions, the taxpayer ended up with his company's funds. The FCA ruled that 84(2) applies to a person who was a shareholder at the beginning of an arrangement, even if the person was not a shareholder when receiving the funds: para. 29. See Falk & Morand, “Federal Court of Appeal Strikes Down Inter Vivos Surplus Strip”, 2150 *Tax Topics* (CCH) 1-9 (May 23, 2013) and 222 *The Estate Planner* (CCH) 3-10 (July 2013); Haney case comment, 61(3) *Canadian Tax Journal*

739-45 (2013); Sommerfeldt, “[The Queen v. MacDonald](#)”, XIX(1) *Tax Litigation* (Federated Press) 1134-40 (2013). In [Descarries](#), 2014 TCC 75, a dividend stripping plan using an internal rollover to offset a capital loss against a deemed dividend was held not to fall within 84(2) or abuse 84(2) for GAAR, but was abuse of [84.1\(1\)](#) so GAAR applied. For 84(2) to apply, the WDR must happen at the same time as the distribution: [Descarries](#), para. 29. CRA could not appeal [Descarries](#) on [84\(2\)](#) because it won under GAAR, but disagrees with it and will pursue this issue in another case: doc [2014-0538091C6](#) [2014 APFF q.21].

In [Latham](#), 2015 TCC 75, CRA presumed that retained earnings on a company's books were distributed to the shareholders when it ceased operating, but the Court held the books were incorrect and nothing had been distributed.

In [Foix](#), 2023 FCA 38 (leave to appeal to SCC requested), [84\(2\)](#) applied to a hybrid sale of shares and assets [255 *The Arnold Report* (ctf.ca, April 10, 2023); Lanthier, “The Foix decision”, *Canadian Accountant*, March 3, 2023, [tinyurl.com/foix-lanth](#)].

Ongoing appeal: [Gaudreau](#), 2023 TCC 115 (under appeal to FCA) (discovery issue).

Pipeline : [84\(2\)](#) can apply to a post-mortem “pipeline”, where a corp's surplus is extracted by selling the corp to a Holdco for a capital gain, taking back a note, then having the corp pay a tax-free intercorporate dividend to the Holdco, which repays the note. However, if the estate waits 1 year to wind up the corp into Holdco, and it is not an inactive corp whose underlying assets are cash, CRA permits the pipeline and will not apply GAAR: docs [2002-0154223](#), [2005-0142111R3](#), [2009-0326961C6](#), [2009-0346351R3](#), [2010-0377601R3](#), [2010-0388591R3](#), [2010-0386001C6](#) [2010 CTF q.6, conf. report p. 4:7-8], [2011-0403031R3](#) 2011-0401861C6, [2011-0401811R3](#), [2011-0426371C6](#) [2011 CTF q.23, conf. report p. 4:16-17], [2012-0435131R3](#), [2012-0456221R3](#), [2012-0464501R3](#), [2013-0503611R3](#), [2013-0509251R3](#), [2014-0526361R3](#), [2014-0526431R3](#), [2014-0540861R3](#), [2014-0541261R3](#), [2014-0545531R3](#), [2014-0548621R3](#), [2014-0552071R3](#), [2014-0559481R3](#), [2014-0563081R3](#); [2015-0569891R3](#) (pipeline with US beneficiary); [2015-0588551R3](#), [2015-0604851R3](#), [2015-0606721R3](#); [2015-0617601E5](#), [2016-0646891R3](#) (pipeline followed by butterfly); [2015-0602831R3](#); [2016-0629511R3](#) (allows extraction of “hard ACB”); [2016-0634371R3](#), [2016-0677751R3](#), [2016-0670871R3](#), [2016-0675861R3](#); [2018-0754531R3](#); [2018-0765411R3](#) and [2020-0848081R3](#) (avoiding [104\(4\)](#)) [Hamelin, “Pipeline Transactions and the 21-Year Rule”, 19(2) *Tax for the Owner-Manager [TfOM]* (ctf.ca) 1-2 (April 2019)]; [2018-0767431R3](#) (business of investing in securities); [2018-0777441R3](#), [2018-0780201R3](#) [[2019-0796351R3](#)]; [2018-0789911R3](#) [Hamelin, “Post Mortem Pipeline: The CRA Relaxes Its Position”, 20(3) *TfOM* 6-7 (July 2020)]; [2019-0790001R3](#); [2019-0800431R3](#) (*alter ego* trust); [2019-0832601R3](#), [2019-0835131R3](#), [2020-0839401R3](#); [2019-0793281R3](#), [2019-0819191R3](#), [2019-0822951R3](#), [2019-0824211R3](#), [2020-0865901R3](#), [2020-0874851R3](#), [2021-0877011R3](#) (hybrid pipelines); [2020-0838371R3](#); [2020-0838951R3](#) (pipeline implemented by beneficiaries, not the estate); [2020-0842241C6](#) [2020 CALU q.6] (gradual repayment of note), [2020-0858741R3](#); [2020-0860231R3](#) (pipeline and bump); [2020-0874931R3](#), [2020-0875341R3](#); [2021-0887301R3](#) (double pipeline including trust); [2021-0895631R3](#); [2021-0899701C6](#) [2011 APFF Financial q.8] (existing corp can be used as Newco, though [84.1](#) might apply); [2021-0906111R3](#) (transfer by *alter ego* trust); [2021-0907591R3](#); [2022-0925601R3](#) (purchaser Newco issues series of promissory notes to distribute estate over time); [2022-0933261R3](#) and [2022-0937661R3](#) (pipeline after [104\(4\)](#) applies to trust); [2022-0947921R3](#), [2022-0948091R3](#). [2010-0389551R3](#) is a withdrawn ruling request on the pipeline strategy (inactive company with only liquid assets), where the ruling would have been negative. CRA's views have been questioned, though the FCA decision in [MacDonald](#) seems to support them: see the TCC's *obiter* comments in [MacDonald](#), 2012 TCC 123, paras. 70-82 (although [MacDonald](#) was reversed and [84\(2\)](#) broadened, the FCA did not discuss the pipeline). Similarly, in [Robillard](#), 2022 TCC 13 (and see related appeal [2022 TCC 17](#)), the TCC was bound to follow [MacDonald](#) and apply [84\(2\)](#) to a pipeline done too quickly for CRA's rules, but questioned [MacDonald](#)'s correctness [Lanthier, “The Robillard Decision”, *Canadian Accountant*, Feb. 4, 2022, [tinyurl.com/lanth-rob](#); Miller & D'Amico, “Old MacDonald Does More Harm”, 15(1) *Taxes & Wealth Management* (Carswell) 2-4 (March 2022); Hamelin case comment, 70(3) *Canadian Tax Journal* 666-84 (2022)]. A normal pipeline does not trigger [55\(2\)](#): [2017-0693421C6](#) [2017 STEP q.7]. Where there are non-resident heirs, a pipeline triggers withholding tax, but this will be fixed by Finance in most cases: see [212.1\(6\)](#) Notes.

For discussion of the pipeline since the FCA decision see Bernstein & Gucciardo, “Surplus Stripping in MacDonald”, 21(6) *Canadian Tax Highlights [CTH]* (ctf.ca) 9-11 (June 2013); Welch, “[Subsection 84\(2\) and Pipeline Planning](#)”, XX(4) *Insurance Planning [IP]* (Federated Press) 1294-1300 (2014) (discusses *Descarries*); Harding, “[Post Mortem Planning](#)”, XXII(2) *IP* 7-12 (2017); Haughey, “Pipelines and Non-Resident Beneficiaries”, 27(3) *CTH* 7-8 (March 2019); Miller, “The Status of Post-Mortem Pipeline”, XXIV(3) *IP* 2-6 (2019); Pham, “Post-mortem pipeline transactions”, tinyurl.com/rsm-pipeline (Sept. 4, 2019).

The July 18, 2017 proposed amendments ([84.1](#) and [246.1](#)) might have curtailed use of the pipeline, but these were dropped: Manu Kakkar, “The Pipeline Comes Back to Life (But for How Long?)”, 18(1) *Tax for the Owner-Manager* (ctf.ca) 2-3 (Jan. 2018) and 18(2) 2-3 (April 2018). CRA has confirmed it will continue to issue favourable rulings: [2018-0748381C6](#) [STEP 2018 q.10].

See also VIEWS docs [2002-0168603](#) (public corp (PCo) spin-off using tax-free return of PUC [Fedchun, “[New Ruling](#)”, XI(1) *Corporate Finance* (Federated Press) 1033-35 (2003)]; [2005-0163191R3](#) (PCo exchanges LP units for units of mutual fund trust holding interest in LP, followed by distribution of trust units as reduction of capital); [2006-0169591R3](#), [2006-0184821R3](#), [2006-0210741R3](#), [2008-0289331R3](#), [2008-0297681R3](#), [2011-0417351R3](#), [2011-0425211R3](#), [2011-0432431R3](#), [2012-0435291R3](#), [2012-0470281R3](#), [2017-0731971R3](#) (PUC reduction by PCo); [2014-0537161R3](#) (same; shares or warrants distributed under [84\(2\)](#) have cost equal to their FMV); [2008-0270081R3](#) ([84\(2\)](#) does not apply on sale of business); [2019-0811641R3](#) ([84\(2\)](#) applies as part of a butterfly); [2020-0862441R3](#) ([84\(2\)](#) does not apply on payment of shareholder loan accounts to deceased's estate).

On discontinuance of business, payments to shareholders actively involved in the business can be bonuses (deductible to the corp), while payments to others are treated as dividends by [84\(2\)](#): VIEWS doc [2004-0106951I7](#). Liquidation of an agricultural cooperative under [135.1](#): 2010-0375361E5.

When a business is discontinued, any annual information returns (not the tax return) must be filed within 30 days: Reg. [205\(2\)](#).

If a corp winds up with unpaid tax of \$N or more, and shareholder S gets \$N from the corp, S can be assessed for \$N under [160\(1\)](#) (or pursued via other legislation, e.g. Ontario *Business Corporations Act* s. 243), even if [84\(2\)](#) also includes \$N in S's income (but not if it was dissolved involuntarily: *Kvas*, 2016 TCC 199). See Notes to [160\(1\)](#); VIEWS doc [2010-0358751I7](#). CRA also claims it can assess S under s. 159 even if S got no funds: [2011-0399191I7](#) [Chong, “Parent Company: Sub's Legal Representative”, 19(10) *Canadian Tax Highlights* (ctf.ca) 6-7 (Oct. 2011)].

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