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Finance proposes tying transfer-pricing rules to OECD guidelines

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Finance released a consultation paper on June 6, 2023 proposing to rewrite Canada's transfer-pricing rules. The draft amendments incorporate base erosion and profit shifting (BEPS) concepts and introduce a "consistency rule" to align amounts determined under Canada's domestic transfer-pricing provisions with the OECD transfer-pricing guidelines (unless the context otherwise requires). This proposal reflects a departure from Canada's current approach to the guidelines, and lessons can be learned from Australia's experience with introducing a similar consistency rule.

The proposed link is to the 2022 edition of the guidelines. Future editions will not be automatically incorporated unless they amend the OECD's definition of "Transfer Pricing Guidelines" or introduce new regulations. The rules would also link to any other text prescribed by regulation, so other documents could be incorporated.

Section 247 was introduced in 1997 to bring Canada's transfer-ricing rules in line with the arm's-length principle outlined in the 1995 guidelines (prior to that, transfer pricing was governed by section 69). Later revisions to the guidelines, such as those published in 2010 and 2017, did not lead to amendments to the Act. Instead, the CRA and Finance stated that these revisions were consistent with previous versions of the guidelines and aligned with the CRA's interpretation and application of the arm's-length principle.

The proposed "consistency rule" differs from the current approach to the guidelines taken by Canadian courts. In *Canada v. GlaxoSmithKline Inc.* (2012 SCC 52), the SCC commented that the guidelines are "not controlling as if they were a Canadian statute" (at paragraph 20). This sentiment was echoed in *McKesson Canada Corporation v. The Queen* (2013 TCC 404), where the TCC criticized placing too much reliance on the guidelines: "The transfer pricing provisions of the *Act* govern and are determinative, not any particular methodology or commentary from the OECD Guidelines, or any source other than the *Act*" (at paragraph 120). Notwithstanding these statements, the guidelines are still relevant and do affect the interpretation of transfer-pricing provisions in the Act; Canadian courts have acknowledged that the guidelines can be useful in interpreting section 247, despite their lack of legal authority.

The current approach in Canada is consistent with that of Australian cases heard before their consistency rule was introduced. For example, see *Commissioner of Taxation v. SNF (Australia) Pty. Ltd.* ([2011] FCAFC 74): "[T]he 1995 guidelines do not dictate to the Court any one or more appropriate methods, and are just what they purport to be, guidelines" (at paragraph 58). Australia later introduced a consistency rule to its Income Tax Assessment Act 1997 (No. 38, 1997, as amended), initially referring to the 2010 guidelines. This provision was subsequently amended to add the 2015 BEPS revisions and then the 2017 guidelines (section 815-135). Australia also introduced a provision in the Income Tax (Transitional Provisions) Act 1997 that applies to prior taxation years and references the version of the guidelines last amended before the start of the taxation year (section 815-5). The latter rule was engaged in the

decision in *Glencore Investment Pty. Ltd. v. Commissioner of Taxation* ([2019] FCA 1432), where the Australian FCA rejected the commissioner's primary basis for assessment on the basis of the 1995 guidelines, which was the relevant edition for the taxation years at issue.

The consultation paper suggests that the amendments would apply prospectively. This means that Australia may see a case that engages the impact of the BEPS revisions before Canada does. It remains to be seen—in either jurisdiction—what impact the specific reference to BEPS concepts and the OECD guidelines in the legislation will have on transfer-pricing disputes.

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