



New Tax Measures Designed to Boost Direct Foreign Investment

by Paul Schnier

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Governments across the world are searching in these early post-recession days for measures that will continue to help create a new era of sustainable economic vigour and the business and personal prosperity that go with it.

It seems clear from the March 4 federal budget that part of the Government of Canada's plan is to promote more foreign direct investment in this country.

Foreign direct investment plays a crucial role in Canadian business. Not only does it provide a significant portion of the capital for economic growth, but it brings in new management expertise, technology and value-added jobs.

At the end of 2007, according to Statistics Canada, foreign direct investment constituted a \$501 billion share of a national economic engine that generated \$1.2 trillion in goods and services, more than double the \$219 billion stake that international investors had held a decade earlier.

This growth seems destined to continue and perhaps even accelerate as Canada's historic social and political stability and its watchful approach to banking regulation continue to help the country stand out in bold relief as a safe haven for international investment.

And in addition to those strengths, we now have a new budget that proposes a number of significant tax changes, one of which will reduce taxes collected but should lead to a substantial increase in the venture capital investment that foreigners are prepared to make in Canada.

Until now, non-residents have had to deal with a complex withholding and reporting regime when disposing of their Canadian investments. The Budget loosens these requirements significantly.

Under current legislation, when a non-resident disposes of taxable Canadian property to a Canadian resident, he must first obtain a clearance certificate from the Canada Revenue Agency. This is done through a filing with the CRA and often involves paying an amount or posting security with respect to any applicable taxes, or satisfying the CRA that no tax is payable.

Unless the purchaser receives this clearance certificate, he is obliged to withhold 25 per cent of the purchase price from the sale proceeds on account of the vendor's potential tax liability. One can easily

see the distress that would be caused where, for example: the clearance certificate is not produced in time for closing or where the purchase price is not paid in cash.

“Taxable Canadian Property” has, until now, included Canadian real property and items akin to real property, such as resource properties and timber limits. It has also included shares of private companies as well as shares of public companies where 25 per cent or more of any class of shares of the public company are held by one or more members of a family group.

The Budget proposes to amend this definition so that the foregoing types of shares will only constitute taxable Canadian property where they derive more than 50 per cent of their value principally from Canadian real estate, resource properties or timber limits held by the company at any time in the 60 month period preceding the date of sale.

In other words, shares of private companies or shares of a closely held public company will be subject to the old withholding and reporting regime only where the companies are, or have been, involved in the real estate, resource or forestry sectors. This allows for a wide array of companies, such as those in the high tech, manufacturing, and retail sectors (which are intensive in technology and value-added employment), to attract foreign investment without the concern that any gains realized on these investments will be subject to Canadian tax.

Also, it is important to note that this proposal applies to investments by any non-resident. Formerly, certain investors who were resident in a country with which Canada had a tax treaty would have enjoyed some relief from this taxation. The change applies equally to both residents of a treaty jurisdiction, such as the United States or Japan, as well as those resident in jurisdictions with which Canada does not have a tax treaty, such as Hong Kong.

This means everyone is now on a level playing field and there is no reason to engage in complicated investment structures utilizing treaty jurisdictions. This amendment should open up Canadian investment to all comers and thus further enhance our global competitiveness as a place to invest.

The change will also affect distributions to non-residents from Canadian trusts and estates. The clearance certificate requirement will no longer apply to such distributions unless the property distributed meets the new definition. This will ease the administrative burden on trustees and beneficiaries alike.

In a parallel move, the Budget also proposes to make it easier for non-residents to obtain refunds where more funds than necessary have been withheld by a purchaser under the clearance certificate procedure. Both proposals are important moves in the right direction to attract greater international investment to Canada. ■