

# Canadian estate freeze for U.S. persons

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There are many U.S. persons who are residents of Canada that own Canadian- controlled private corporations. Corporate restructuring involving asset transfers including shares and/or share exchanges that are tax-deferred for Canadian income tax purposes may not be deferred for U.S. tax law.

For example, our section 85 rollover that involves transferring capital property to a Canadian corporation is similar to the IRS code 351 provision. However there are major differences that could result in taxation to the U.S. person.

Our section 85 rollover requires shares (special or common, voting or non-voting) as consideration for the transfer of property to the corporation. Non-share consideration is permissible to the extent of the tax basis of the property to the transferor.

The IRS code 351 transaction requires that the transferor have at least 80% voting control and non-share consideration is not included as consideration. Furthermore, our special shares may be treated as non-qualified preferred stock which is treated for U.S. purposes as non-share consideration. If non-share consideration was received, the U.S. person would have to recognize a gain to the extent of the non-share consideration. This creates a mismatching of and income and the inability to claim credit foreign tax credits as the gain for Canadian tax purposes may not be recognized for subsequent years.

One solution to the problem may involve applying under Article XIII of the Canada/U.S. tax treaty to the U.S. Competent Authority to defer recognition of the gain for U.S. purposes. There may be easier avenues such as modifying the consideration issued for the transfer.

Even if the IRS code 351 transfer was allowed, IRS code section 367 with respect to the transfer of property by a U.S. person to a foreign corporation may prevent the non-recognition transfer under IRS code 351. IRS code section 367 is a very complex provision with a series of exceptions and regulations governing interpretation and filing requirements.

The provisions in the IRS code with respect to taxable gifts made by a U.S. person may also be an important consideration in structuring the transaction.

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*Contact your professional advisor prior to implementing any of the outlined strategies*

## ***Internal Revenue Service Circular 230 Disclosure***

*Pursuant to Internal Revenue Service Circular 230, we hereby inform you that the advice set*

*forth herein with respect to U.S. federal tax issues was not intended or written to be used, and cannot be used, by you or any taxpayer, for the purpose of avoiding any penalties that may be imposed on you or any other person under the Internal Revenue Code.*