

## Contacts:

**National Leader**  
Rob O'Connor  
416-601-6316

**Montreal**  
David Francescucci  
514-393-5308

Bernard Barsalo  
514-393-7096

**Ottawa**  
Jean-Jacques Lefebvre  
613-751-5270

Shiraj Keshvani  
613-751-5293

**Toronto**  
Norma Kraay  
416-601-4678

Richard Garland  
416-601-6026

Muris Dujic  
416-601-6006

**Southwestern Ontario**  
Tony Anderson  
905-315-6731

**Calgary**  
Markus Navikenas  
403-267-1859

Keith Falkenberg  
403-267-0621

**Vancouver**  
Rob Stewart  
604-640-3325

**Related links:**  
[Transfer Pricing](#)

[Deloitte Tax Services](#)

[Update your subscription](#)

## Transfer pricing alert

April 26, 2012

### Intercompany contingent liability payments: staying well-armed

The Canada Revenue Agency (CRA) is increasingly focusing on intercompany financial transactions. The last two years saw three landmark transfer pricing court cases that dealt with financial transactions: *the Queen v. General Electric Capital Canada Inc*<sup>1</sup> (*GE Capital*), *the Queen v. McKesson Canada Corporation*, and *the Queen v. General Electric Canada Company (GE Company)*.

In *GE Company*, currently in its earliest stage, the Crown challenges guarantee fees paid by General Electric Canada Company's (GE Company's) predecessors<sup>2</sup> to their U.S. parent in a manner very familiar to those who followed *GE Capital*. The significance of this dispute is that for the first time in Canadian transfer pricing litigation history the CRA questions the commercial purpose of a cross border transaction. In *GE Company*, the Crown argues that the guarantees were unnecessary and thus guarantee fees that the Canadian taxpayers paid to their U.S. parent should be disallowed. Referring to s.247 2(b) in the Income Tax Act, the Crown contends that "the transactions... would not have been entered into by arm's length parties because there would have been no economic incentive present" and that the guarantee fees were introduced "... for no bona fide purposes other than to obtain tax benefits."

In all preceding transfer pricing cases considered by Canadian courts on financial or non-financial transactions, the Crown only disputed the arm's length nature of the transfer prices, not the purpose of the transaction itself.

#### What makes financial transactions so dispute prone?

Many intercompany financial transactions are large and complex; they often involve some kind of contingent liability where a Canadian taxpayer makes regular payments to a related foreign entity that has assumed the contingent liability. Guarantees, insurance, reinsurance, and derivatives involve a contingent liability to a larger or smaller extent. In simple terms, a Canadian taxpayer purchases protection from a future uncertain event which has uncertain financial consequences. Due to an inherent uncertainty, such event, of course, may or may not happen. When it happens, a foreign related party that has assumed a risk must make significant payments to honour the contingent liability that materialized.

<sup>1</sup> For more information on the case, please refer to our *Transfer Pricing Alerts* of [January 8, 2010](#), [May 14, 2010](#), and [December 20, 2010](#).

<sup>2</sup> One of the predecessors is General Electric Capital Canada Inc., the appellant in *GE Capital* in the Tax Court of Canada.

However, if the event did not occur or contingent liability did not materialize, with hindsight it can be difficult to resist an impression that the payments to a related party were made "... for no bona fide purposes".

### Armed for a contingency

In our experience, for intercompany transactions involving a contingent liability, such as a guarantee or reinsurance, it is crucial to analyze and document *expected* pre- and-post transaction risk profiles of participating entities at the time an intercompany transaction is entered into. Such *ex ante* analysis and documentation are very important since transactions are usually structured based on the probability distribution *expected* at the time when the transaction is entered into. Several years later, it can be prohibitively difficult to recreate this information and, if audited, to build arguments stronger than those of tax authorities, which often resort to hindsight.

A contemporaneous transfer pricing planning or documentation study that addresses both the commercial reason and the pricing of intercompany transactions involving a contingent liability is a good shield against the perfect vision of hindsight.

*Muris Dujsic – Toronto*  
*Inna Golodniuk – Toronto*  
*Adam Cooper – Toronto*

---

[Home](#) | [Security](#) | [Legal](#) | [Privacy](#)

30 Wellington Street West  
P.O. Box 400  
Stn Commerce Court  
Toronto ON M5L 1B1 Canada

© Deloitte & Touche LLP and affiliated entities.  
TM/MC © Used under license from the Canadian Olympic Committee, 2011.

This publication is produced by Deloitte & Touche LLP as an information service to clients and friends of the firm, and is not intended to substitute for competent professional advice. No action should be initiated without consulting your professional advisors. Your use of this document is at your own risk.

Deloitte, one of Canada's leading professional services firms, provides audit, tax, consulting, and financial advisory services through more than 8,000 people in 56 offices. Deloitte operates in Québec as Samson Bélair/Deloitte & Touche s.e.n.c.r.l. Deloitte & Touche LLP, an Ontario Limited Liability Partnership, is the Canadian member firm of Deloitte Touche Tohmatsu Limited.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

[www.deloitte.ca](http://www.deloitte.ca)  
[Unsubscribe](#)

 [Deloitte RSS feeds](#)

Please add "@deloitte.ca" to your safe senders list to ensure delivery to your inbox and to view images.

