

U.S. TAX SAVINGS FOR INDIGENOUS COMMUNITIES

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TODAY'S AGENDA

1. The U.S. tax exposure of Canadian aboriginal groups
2. Strategies to eliminate tax exposure
3. Refund claims
4. Benefits
5. Successes so far
6. Case studies

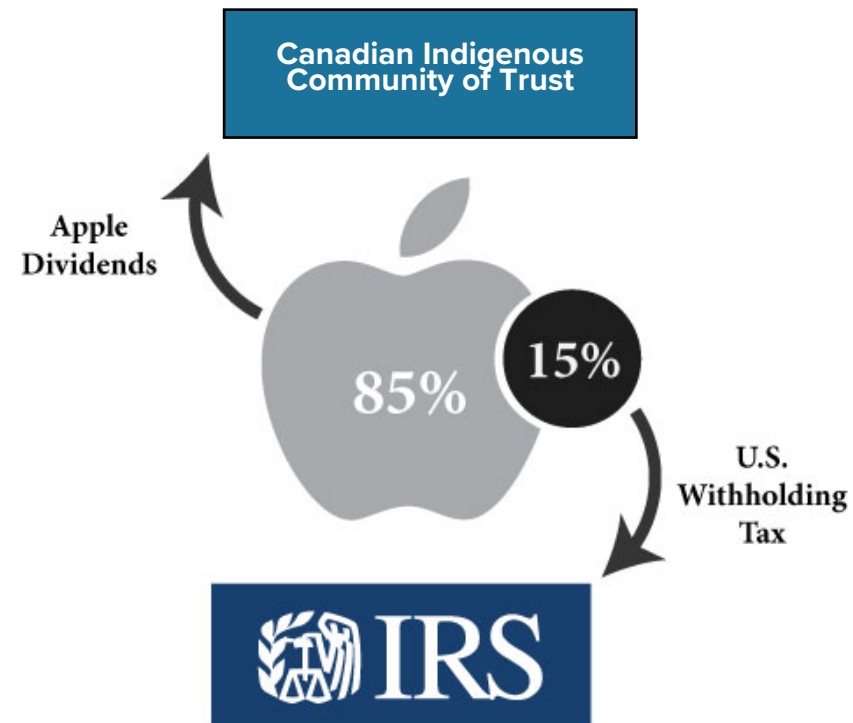
PART ONE

CURRENT U.S. TAX EXPOSURE

U.S. TAX ON DIVIDENDS

- Tax on dividends from U.S. stocks withheld at source
- 15% of dividends from U.S. stocks
- Most trusts and capital pools not taxable in Canada
- Creates a net tax loss

ILLUSTRATION OF U.S. TAXES



PART TWO

HOW TO ELIMINATE U.S. TAXES

OVERVIEW

To eliminate U.S. tax:

1. Get an opinion – all clients are different
2. Convert U.S. equity portfolio to segregated basis
3. File forms with the custodian telling them to stop withholding. **Only needs to be done once.**

SECTION 892

- Exempts foreign governments from U.S. taxes
- Section 892: the rules that apply to a foreign government also apply to a political subdivision of a foreign country
- Section 892 asks: is it a government under Canadian law?
- Under Canadian law:
 - Section 35 of Charter → constitutionally entrenched powers;
 - Section 81 of Indian Act gives legislative powers to First Nation;
 - Section 149(1)(c) of Income Tax Act treats First Nation same as municipality (a government); and
 - Other examples.
- First Nation/Métis settlements → a foreign government

SECTION 892 (CON'T)

- IRS rulings that municipality can benefit from tax exemption
- FN powers exceed that of municipality
- U.S. tax court case admits that Canadian First Nations function like governments
- Historic treaties admit that First Nations are indeed governments (i.e. Jay Treaty, Treaty of Ghent)
- Conclusion → strong position that Canadian aboriginal communities are foreign governments

WHAT ABOUT TRUSTS?

- Many First Nations invest through Trusts
- Trusts are likely “grantor trusts”
- Grantor trust = same result as s. 75(2) Income Tax Act
- First Nation is considered to be the “owner” of trust property by the IRS
- So if s. 892 will benefit First Nation, then trust can benefit as well
- IRS ruling to this effect

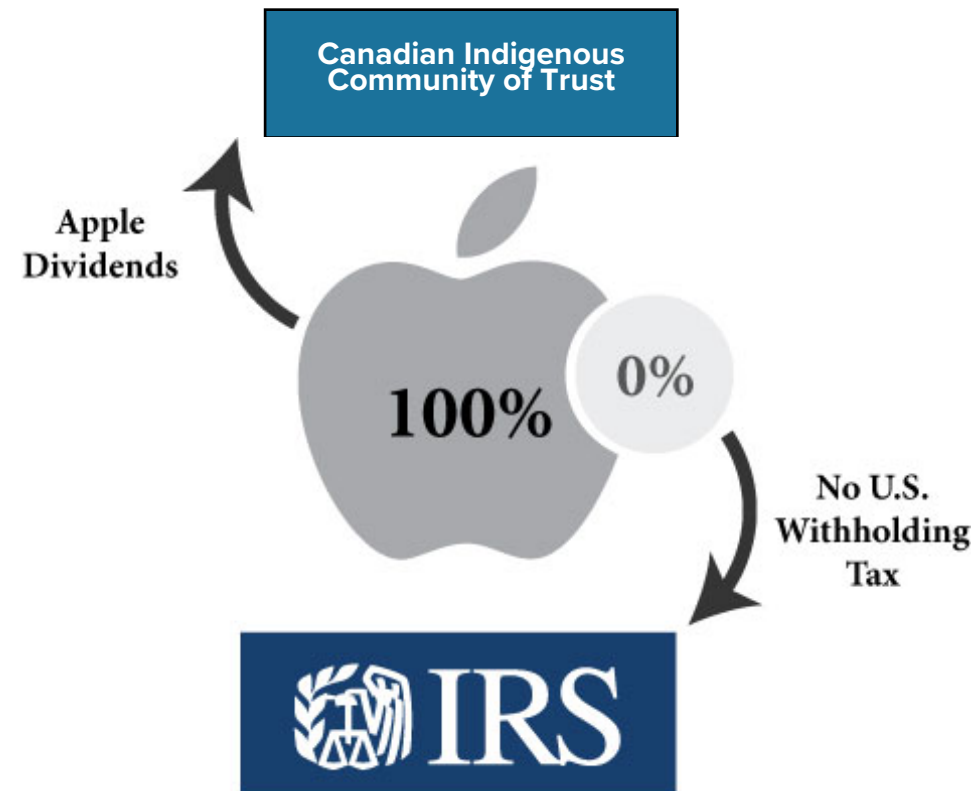
SEGREGATE U.S. EQUITY PORTFOLIO

- Segregated basis means First Nation can determine its own withholding position vs. Pooled funds → everyone has tax withheld
- Only U.S. equity portfolio needs to be segregated
- Some increase in custodial fees
- Tax savings > increased fees

FILE FORMS WITH CUSTODIAN

- Third step – provide forms to custodian
- First Nation → Form W-8EXP
- Trust → W-8IMY
- Forms are complicated
- **Don't file without opinion first as all clients are different and a minority may not be eligible**

NO U.S. TAXES PAYABLE



OTHER BENEFITS

- Opens up tax free investments in more complex U.S. investments
- Can invest in certain U.S. REITs on tax free basis
- Can invest in certain U.S. Private equity funds on tax free basis
- Each complex investment is different and requires specific tax advice

PART THREE

REFUND CLAIMS

OVERVIEW

- Can claim refunds for past taxes paid in prior three or four years
- Segregated portfolio → simple
- Pooled funds → more complex
- Can net a lot of new revenue
- Have been successful in the past

SEGREGATED FUNDS

- Refund of tax withheld
- Get Form 1042-S from the custodian
- File Form 1120-F for each of the last 3 years
 - On the basis that the funds were not subject to U.S. withholding pursuant to Code section 892

POOLED FUNDS

- More difficult to get refunds when funds invested in pooled funds
- Withholding is done at pooled fund level
- Pooled fund organized as trust in Canada
- Pooled fund usually takes the position it is a corporation for U.S. tax purposes
- Alternate view → it is actually a partnership
- Withholding done on behalf of partners
- First Nation is a partner → can claim refund
- More info → Reed/Albers → U.S. tax classification of Canadian mutual fund trusts”
[Canadian Tax Journal, 63:4 (2015)]

PART FOUR

PAST SUCCESSES

PAST SUCCESSES

- The exemption is in place for 25-30 communities
- Exemption saves millions a year in US taxes
- Got refunds for most communities
- Over USD 2 million recovered
- 500K recovered from client in pooled funds
- IRS audited one refund claim – agreed with our position
- No unsuccessful refund claims

PART FIVE

CASE STUDIES

~20 MILLION PORTFOLIO

- Invested already in a segregated basis
- 2014 → CAD \$ 33,857.66 in US tax
- 2015 → CAD \$ 26,417.30 in US tax paid
- 2016 → CAD \$ 22,881.67 in US tax paid
- 3 year average → CAD \$27,718/year
- 10 years – going forward → CAD\$ 270,000

~50 MILLION PORTFOLIO

- Invested already on a segregated basis
- 2014 → CAD \$ 29,609.30 in US tax paid
- 2015 → CAD \$ 34,895.30 in US tax paid
- 2 year average → CAD \$ 32,252.3 /year
- 10 years – going forward → CAD \$320,000

~75 MILLION PORTFOLIO

- Invested already in a segregated basis
- 2014 → CAD \$111,233.10 in US tax paid
- 2015 → CAD \$ 96,476.08 in US tax paid
- 2016 → CAD \$ 80,270.08 in US tax paid
- 3 year average → CAD \$95,000/year
- 10 years – going forward → CAD \$950,000

TRANSITION FROM POOLED FUNDS

- Half of portfolio invested in pooled funds
- Half of portfolio invested in segregated funds
- Already paying custody fee on seg portion
- No net cost on portfolio transition
- Tax exemption put in place once portfolio transitioned
- Extra CAD \$40,000 in annual revenue from tax savings
- Ask investment advisor before proceeding

POOLED FUNDS FROM REFUND CLAIM

- Client has 10-15 million invested through pooled funds
- IRS granted refunds (amounts in USD):
 - 2014 - 5,934.73
 - 2015 - 14,057.97
 - 2016 - 11,446.93
 - 2017 - 9,387.59
 - Total: \$40,827.22
- Legal fees a percentage of money recovered and contingent on success

POOLED FUNDS FROM REFUND CLAIM

- Client has 200 + million invested through pooled funds
- IRS granted refunds (USD):
 - 2015 – \$137,000
 - 2016 – \$121,861
 - 2017 - \$127,274
 - Total: USD \$386,846.71
- Legal fees a percentage of money recovered and contingent on success

PART SIX

RISKS

RISKS

- Given track record, not a lot of risk
- IRS audited one file → granted refund within a few months
- On refund claims tax already paid so worst they can do is say no
- Legal fees can be contingent on success so no financial risk

PART SEVEN

CONCLUSION

SUMMARY

- Thousands of dollars of savings available
- Tax can be turned off going forward
- Refunds for three years (pooled funds or segregated basis)
- Long track record of success
- Legal fees contingent on money recovered
- So why give dollars to Donald?
- Keep it in the community – spend in on stuff that matters

QUESTIONS?

THANK YOU!