Still, there is uncertainty as to whether the deeming provision in paragraph 108(5)(a), which is relevant to the computation of income of the trust, would be relevant to the determination of whether a charity, as the sole beneficiary of the trust, could be said to carry on the business of the trust under common-law principles. This would be similar to how a partner of a partnership is said to carry on the business of the partnership. If unit trusts were similar to partnerships, then the income, as business income, would flow through to the beneficiaries, rather than being deemed to be trust income.

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Using Pre-Acquisition Non-Capital Losses Under the Debt Forgiveness Rules

Suppose a corporation experiences a loss restriction event (LRE) but continues to carry on the same business that it has always carried on (or a similar business) after the event. It then experiences the forgiveness of a commercial debt obligation. In policy terms, the non-capital losses both before and after the LRE should continue to be available to the corporation. In particular, they should be available to offset any possible income inclusion resulting from the debt forgiveness rules in section 80. But how can this result be achieved by a taxpayer? There seems to be a problem, because the definition of "relevant loss balance" in subsection 80(1) generally excludes losses incurred prior to an LRE. However, subsection 80(13) can effectively be used as an election, creating an income inclusion to which these non-capital losses can be applied.

Consider the example of a corporation, Corp X. The acquisition of control of Corp X resulted in an LRE under subsection 251.2(2). Corp X realized non-capital losses: $500,000 prior to the LRE and $100,000 after the LRE. Corp X continued to carry on the same or a similar business after the LRE. A $600,000 loan received after the LRE (which qualifies as a "commercial obligation" under the definition in subsection 80(1)) is being forgiven.

The $600,000 is a "forgiven amount," as defined in subsection 80(1). Under section 80, forgiven amounts must reduce certain tax attributes, including non-capital losses (subsection 80(3)), allowable business investment losses (ABILs) and net capital losses (subsection 80(4)), and certain resource expenditure pools (subsection 80(8)). The policy behind these rules recognizes that debt enables a debtor to acquire property or make expenditures that give rise to deductions. The debt forgiveness rules effectively claw back the deductions Corp X has previously taken in respect of the commercial obligation that is being forgiven: because Corp X no longer has to repay the debt, it has not borne the cost of the expenditures, and its past deductions should not be recognized for tax purposes.

One of the attributes that must be reduced is non-capital losses (paragraph 80(3)(a)). However, this is possible only to the extent that the corporation has a "relevant loss balance" (as defined in subsection 80(1)). This balance generally excludes non-capital losses incurred prior to the LRE (apparently to prevent loss trading, which is not what is happening in our example). As a result, Corp X's relevant loss balance is $100,000. This leaves Corp X with an unapplied forgiven amount of $500,000.

The remaining $500,000 could be applied against various tax attributes of Corp X—for example, to reduce the undepreciated capital cost of depreciable property or the ACB of shares (under section 80 and subsections 80(5) and (9) to (11)). But most of the reductions under section 80 are optional. Corp X could choose not to make any of these optional reductions, leaving it with a residual balance of $500,000 (subsection 80(14)), provided that it does not have any ABILs, net capital losses, or resource expenditure pools (which are mandatory reductions). The result is that subsection 80(13) would add $500,000 to Corp X's income for the year "from the source in connection with which the obligation was issued." This source is the same or similar business that Corp X is still carrying on. As a result, subsection 111(5) will not apply, and the use of the $500,000 of pre-LRE non-capital losses is not restricted. The net income inclusion is zero. The overall effect of all of these rules is that all $600,000 of the non-capital losses can be utilized.

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Section 160 Captures a "Dividend" Not in Compliance with Corporate Law

The interplay between corporate law and tax legislation has been the subject of a plethora of judicial commentary, stemming from the proposition that absent a sham or a specific provision of the Act, a taxpayer's legal relationships must be respected in tax cases (*Shell Canada Ltd. v. Canada*, [1999] 3 SCR 622, at paragraph 39). That said, in *Continental Bank Leasing Corp. v. Canada* ([1998] 2 SCR 298), the SCC held, for the taxpayer's benefit, that the contravention of a statute by a particular contract did not invalidate the effect of that contract for tax purposes.

Kufsky v. Canada (2022 FCA 66; aff'g 2019 TCC 254) reminds practitioners that these principles may operate in the other direction; a taxpayer may not necessarily rely on the contravention of corporate law to void a transaction for tax purposes without