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# GST Issues with Sections 156 and 167 Elections

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# Overview

- Issues with section 156 elections
- Issues with section 167 elections
- Conclusion

# Section 156



# Section 156

## Overview

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- **Purpose**
  - **Conditions**
  - **Application**
  - **Filing/Cessation**

# Section 156

## Issues

- Common traps in determining whether two persons are closely-related
  - “Qualifying voting control” and “interest in a partnership”
  - “specified partnership”
- Common traps - “Qualifying member”
  - “Property of nominal value”
  - “Reasonability test”
  - *de minimis* financial institutions
- Cessation (Timing issue)
- Compliance related issues

# Section 156

## Common traps – Closely related

—“Qualifying voting control”

—Looks to whether a person or the members of the group collectively own shares to which are attached **not less** than 90% of the shareholder votes

—**Deemed not to own share:** a share is excluded in determining if a person has qualifying voting control if the shareholder voting rights attached to share owned by the person are subject to a right of control by another person who is not closely related to the person.

—“Interest in a partnership”

—Entitlement to receive **at least** 90% of income;

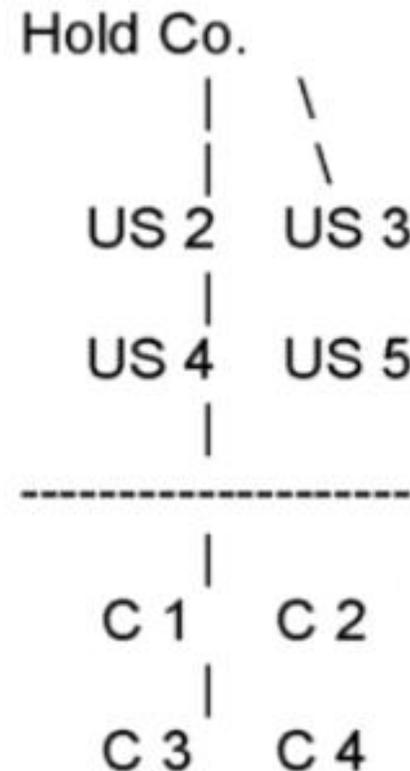
—Entitlement to receive **at least** 90% of distributions if there was a wound up; and

—**Able to direct the business and affairs of the partnership.**

# Section 156

## “Reverse interpretation”

- CRA confirmed that two corporations (i.e., C3 and C4) are closely related even if there are 3 tiers (C1-C2, US4-US5, US2-US3) in between the common ownership (Hold Co).
- Each of the following entities can make a section 156 election:
  - C1 and C2
  - C1 and C4
  - C2 and C3
  - C3 and C4



“**Qualifying subsidiary** of a particular corporation is defined in subsection 123(1) as “another corporation in respect of which the particular corporation holds qualifying voting control and owns not less than 90% of the value and number of the issued and outstanding shares, having full voting rights under all circumstances, of the capital stock of the other corporation...”

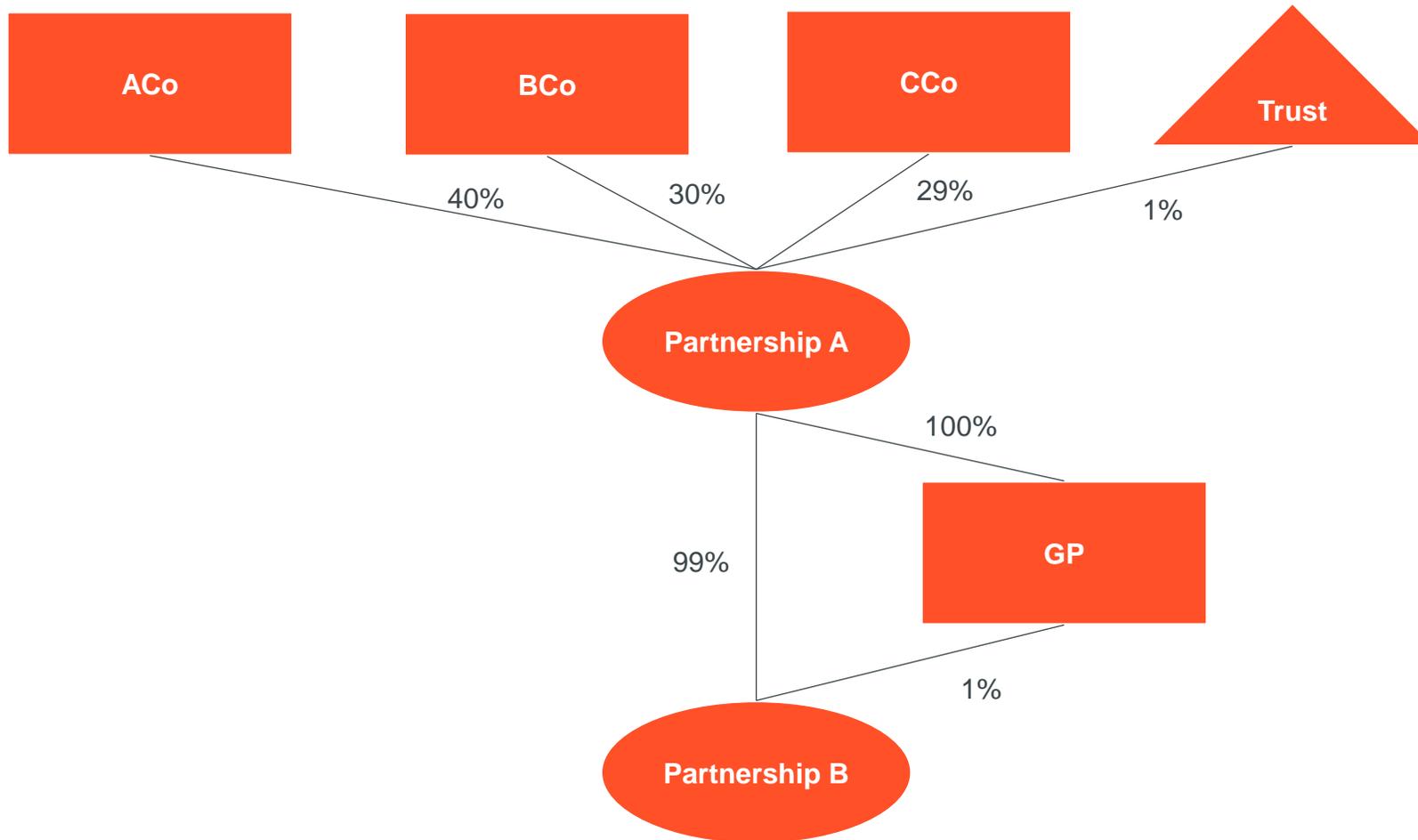
# Section 156

## “Specified Partnership”

- Non-resident members no longer affect a partnership from being a member of a “qualifying group”.
- Prior to August 10, 2022, definition of “qualifying group” described a group of “Canadian partnerships” or Canadian partnership and corporations that are closely related to one another.
- Amendments were made in 2022 to replace “Canadian partnership” with “specified partnership” to broaden the scope of “qualifying group”.
  - **“specified partnership” means a partnership each member of which is a corporation or a partnership (156(1.1))**
  - **“Canadian partnership” restricted member of a partnership to a corporation or a partnership who is resident in Canada.**

# Section 156

## “Specified Partnership”



# Section 156

## “Qualifying Member”

“qualifying member” of a qualifying group means a registrant that is **a corporation resident in Canada** or a **specified partnership**, each member of which is resident in Canada, and that meets the following conditions:

...

(c) one of the following conditions is met:

(i) the registrant **has property** (other than financial instruments and property having a **nominal value**) and has last manufactured, produced, acquired or imported **all or substantially all** of its property (other than financial instruments and property having a nominal value) for consumption, use or supply **exclusively** in the course of commercial activities of the registrant,

(ii) the registrant has no property (other than financial instruments and property having a nominal value) and has made supplies and **all or substantially all** of the supplies made by the registrant are taxable supplies, or

# Section 156

## “Qualifying Member”

“qualifying member” of a qualifying group means a registrant that is **a corporation resident in Canada** or a **specified partnership**, each member of which is resident in Canada, and that meets the following conditions:

...

(c) one of the following conditions is met:

(iii) the registrant has no property (other than financial instruments and property having a **nominal value**) and has not made taxable supplies and it is **reasonable to expect** that

(A) the registrant will be making supplies throughout the next 12 months,

(B) all or substantially all of those supplies will be taxable supplies, and

(C) all or substantially all of the property (other than financial instruments and property having a nominal value) to be manufactured, produced, acquired or imported by the registrant within the next 12 months will be for consumption, use or supply exclusively in the course of commercial activities of the registrant.

# Section 156

## Nominal Value

- Question of fact, determined on a case-by-case basis.
- Value is determined by referencing “the value of the property and its significance, **relative to the commercial activity in question**”.
  - i.e., \$300 computer is of nominal value compared to \$1 billion of assets

# Section 156

## Reasonable to Expect

- CRA determines whether it is reasonable to expect the registrar will be making supplies by reviewing documents such as:
  - Business plans
  - Input tax credit claims
  - Activities undertaken by the registrant to make taxable supplies (i.e., research and marketing)
- Meaning of “reasonable”: courts have generally relied on the dictionary (in the context of income tax)

*“The Oxford English Dictionary defines “reasonable” as meaning, in this context, “in accordance with reason; not irrational, absurd or ridiculous; just, legitimate; due, fitting” and “sufficient, adequate, or appropriate for the circumstances or purpose; fair or acceptable in amount, size, number, level, quality, or condition”. In a similar fashion, Black’s Law Dictionary defines reasonable as meaning, in this context, “fair, proper, or moderate under the circumstances; sensible”.” (Conolly v Canada, 2019 FCA 161)*

# Section 156

## ***De minimis* Financial Institution**

- De minimis* Financial Institutions can make a section 156 election.
- Caution as term “exclusively” means 100% for a financial institution.
- Person may not be a “qualifying member” if property used exclusively in commercial activity falls below the “all or substantially all” threshold.
  - E.g., *de minimis* FI uses part of its head office building to originate certain loans or extend credit to its customers (e.g., 1%).

# Section 156

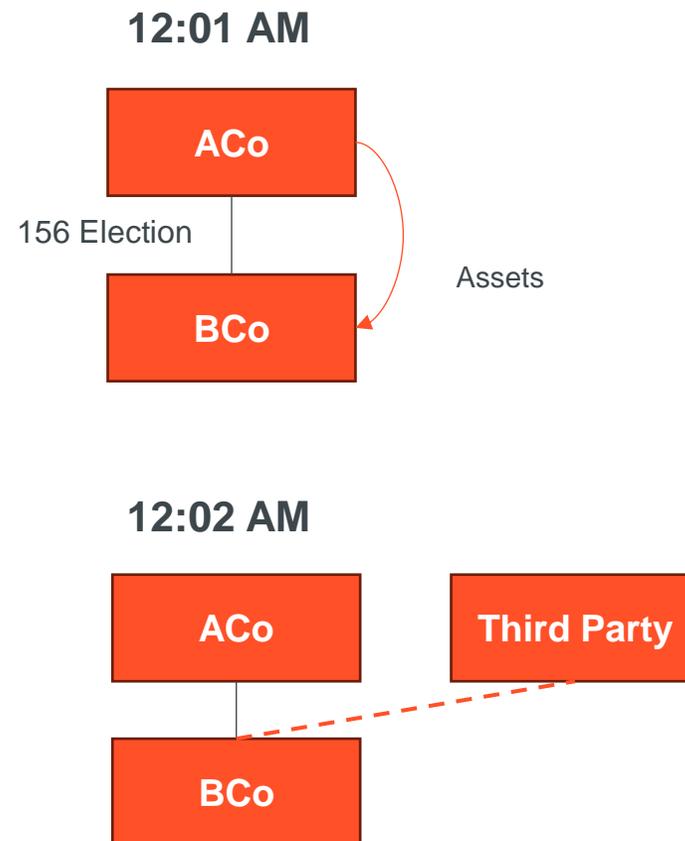
## Cessation (Timing of Election)

- **12:01 AM:** ACo (Parent) transfers assets to BCo (Subsidiary).
- **12:02 AM:** ACo sells shares of BCo to third party.

### CRA Roundtable Question

Does the section 156 election apply to the transfer of assets from ACo and BCo?

- No, election ceases on the day BCo ceases to be a specified member.
- *Interpretation Act, 27(3):*
  - Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.



# Section 156

## Compliance Issues

- Election to be made in prescribed form (Form RC4616).
- Form must be signed by an authorized representative.
- Separate form for each new member.
- Late filing is permitted, but the CRA has discretion to accept or refuse late-filed elections.



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# Section 167

# Section 167

## Overview

— Purpose: mitigate the cash-flow cost of the transaction by eliminating the obligation to pay GST/HST.

— Key conditions:

— Business test

*Where a supplier makes a supply of a business or part of a business that was established or carried on by the supplier or that was established or carried on by another person and **acquired** by the supplier, and...*

— Property test

*...under the agreement for the supply, the recipient is acquiring ownership, possession or use of all or substantially all of the property that can reasonably be regarded as being necessary for the recipient to be capable of carrying on the business or part as a business*

# Section 167

## Issues

- Business test
  - Supply of a “business”
  - Established or carried on by the supplier (or another person)
  
- Registration of the recipient
  
- Contractual Provisions

# Section 167

## Supply of a “business”

— CRA Roundtable 2004, Q. #21

— Facts:

- A corporation operates a number of divisions.
- One of the divisions operates a distinct manufacturing and distribution business. A decision is made to close down the operations and ultimately to sell the assets.
- After standing idle for some months, the corporation enters into an agreement with a purchaser to sell all of the assets used in operating the business, which include the manufacturing plant including the real property, the machinery and equipment used in the manufacturing operation, and the office furniture and equipment of the business.

— CRA Comments:

- Where one of a corporation's divisions that operated a manufacturing and distribution business has not been operating for months, and if the only assets of the division being supplied are the real property, the machinery and equipment, and the office furniture, it appears that it is not a supply of a business and therefore the election under section 167(1) of the ETA would not be available.

# Section 167

## Supply of a “business”

— CRA Roundtable 2025, Q. #1

— Facts:

- For businesses that are involved in exploration and exploitation of natural resources, their start-up phase includes obtaining the correct licences to explore and exploit natural resources, conduct geological and environmental feasibility studies, obtain engineering reports, and other similar activities.
- For these entities, their only business assets consist of the licences, feasibility studies and engineering reports.
- The entities would not have other business assets such as customer contracts, equipment, machinery, inventory, etc.

# Section 167

## Supply of a “business”

— CRA Roundtable 2025, Q. #1

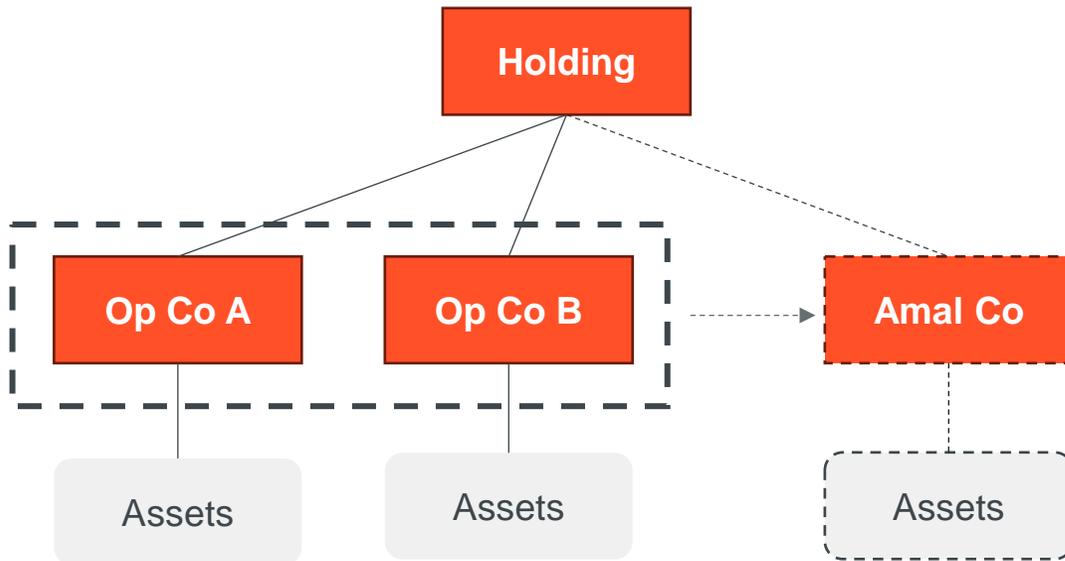
—CRA Comments:

- Although we understand that the assets required by a person to operate in the start-up phase of an exploration and exploitation of a natural resource business may be different than those assets required to operate in the mature phase of such a business, or any other business, we would still expect that the start-up phase of a natural resource business would require additional property.
- For example, the business might also require space in a building (real property) for individuals to perform the work of the business, and other property such as vehicles or computers.

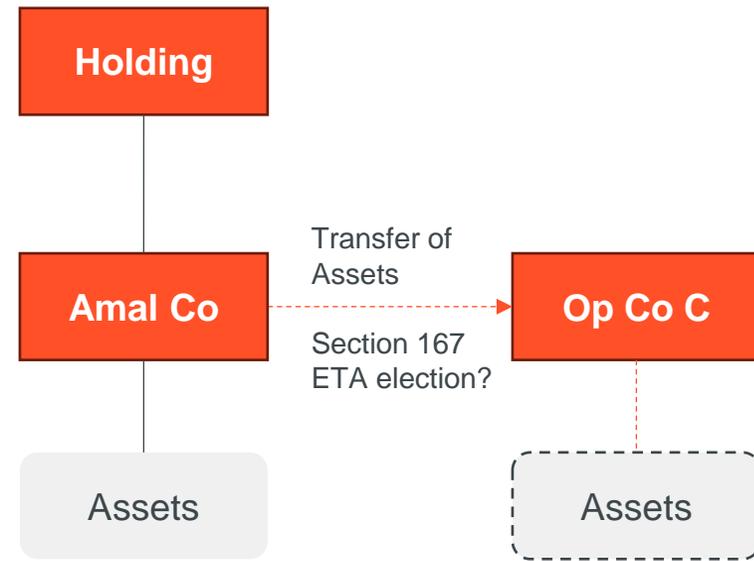
# Section 167

Established or carried on by the supplier (or another person)

12:01 AM



12:02 AM



# Section 167

## Established or carried on by the supplier (or another person)

— CRA Roundtable 2019, Q. #24

— CRA Comments:

— Amal Co did not establish or carry on the business (or part thereof).

— Para. 271(a):

— Deems the newly amalgamated corporation to be a separate person from each of its predecessor corporations, except as otherwise provided in Part IX.

— Corporations A and B were the persons that established or carried on the business, Amal Co cannot be considered to have done so, since it is deemed to be a separate person for GST/HST purposes.

# Section 167

## Established or carried on by the supplier (or another person)

— CRA Roundtable 2019, Q. #24

— CRA Comments:

— Amal Co did not acquire the business (or part thereof) from a person that established or carried on the business.

— Para. 271(b):

— The new corporation will be considered to be the same corporation as, and a continuation of, each of the predecessor corporations with respect to the property of those predecessors, as well as with respect to any services that the predecessor corporations had acquired, imported or brought into a participating province.

— Therefore, where an amalgamation occurs for GST/HST purposes, the transfer of property or services to Amal Co by Corporations A and B under the amalgamation agreement does not constitute an acquisition made by Amal Co from those corporations, since Amal Co is deemed to be the same person and a continuation of those corporations in respect of that property or those services.

# Section 167

## Established or carried on by the supplier (or another person)

— CRA Roundtable 2019, Q. #24

— CRA Comments:

— Amal Co did not acquire the business (or part thereof) from a person that established or carried on the business.

— Para. 271(c):

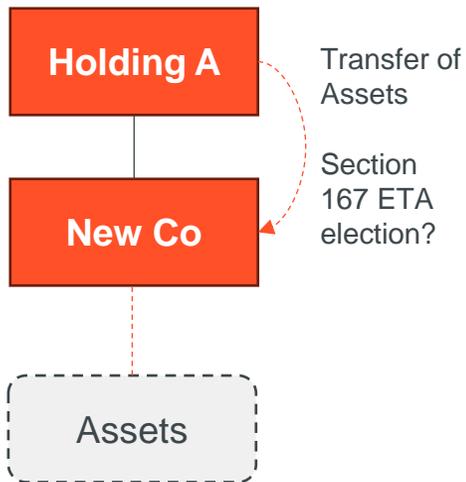
— deems the transfer of property from the predecessor corporations to the new corporation not to be a supply for GST/HST purposes.

— Thus if the amalgamation of Corporation A and Corporation B meets the conditions of section 271 where the rules in paragraphs 271(b) and (c) apply to the property that is transferred to AmalCo by those corporations, AmalCo cannot be considered to have “acquired” a business established or carried on by another person in accordance with section 167 nor be considered the recipient of a supply of a business.

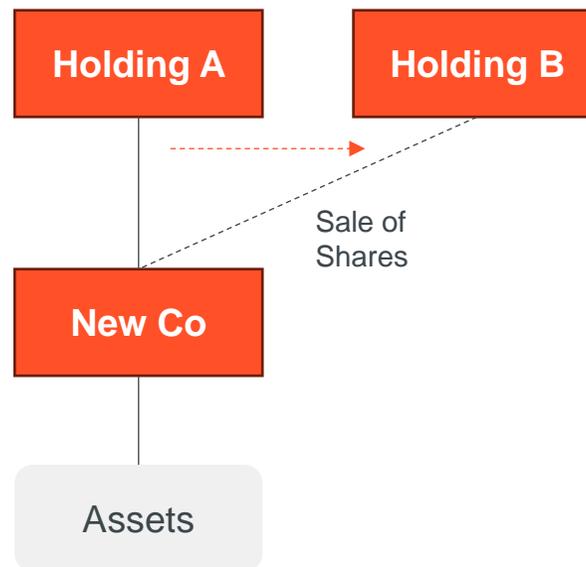
# Section 167

## Registration of the recipient

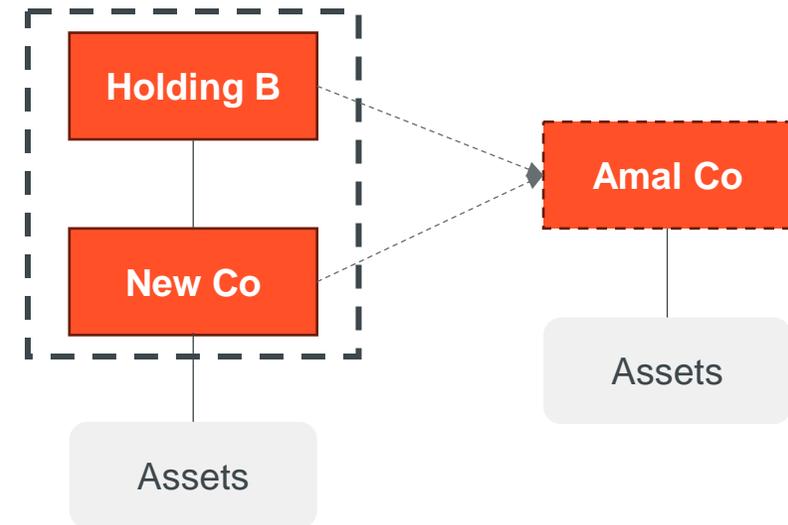
12:01 AM



12:02 AM



12:03 AM



# Section 167

## Registration of the recipient

— CRA Roundtable 2013, Q. #20

— CRA Comments:

- One of the conditions for making a section 167 election is that if the supplier is a registrant, the recipient must be a registrant.
- Under section 271, an Amalco is deemed for GST/HST purposes to be a separate person from each of its predecessors, except as otherwise provided under the ETA.
- There is no provision deeming a predecessor (in this case, Newco) to acquire the characteristics of its successor Amalco. In other words, Newco's ability to register cannot be based on the proposed actions of a corporation, i.e., Amalco, that does not exist at the time Newco needs to be a registrant so it can make the section 167 election.

# Section 167

## Contractual Provisions

- Representations & Warranties
- Covenants
- Indemnity

# Conclusion



# Thank you.



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