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TAXABLE BENEFITS: CANADA REVENUE AGENCY ELIMINATES SOME OF THE ADMINISTRATIVE BURDEN

The Honourable Jean-Pierre Blackburn, Minister of National Revenue and Minister of State (Agriculture and Agri-Food), recently announced changes to the administrative policy of the Canada Revenue Agency (CRA) with respect to employee taxable benefits. These changes will reduce or eliminate the administrative burden for employers and ensure more fairness in tax administration.

"These changes flow from the commitment by the Government of Canada in its 2007 budget to reduce the administrative burden related to tax compliance", said Minister Blackburn. "The Government of Canada is determined to provide equitable service to Canadians every time they deal with the CRA", said Minister Blackburn." These administrative changes by the CRA show the will of the Government to offer a tax system that is fair and competitive and in line with today's economic reality."

"The Canadian Payroll Association (CPA) supports the changes the Government of Canada is making to employee taxable benefits in an effort to increase the efficiency and effectiveness of federal and provincial payroll-related legislation for all stakeholders: employers, government, employees and the general public", said Patrick Culhane, President and Chief Executive Officer of the Canadian Payroll Association. "Effective and efficient payroll administration is critical, given the magnitude of the payments made by employers and the breadth of the legislative compliance requirements."

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To reduce the tax compliance burden, "our proposals aim to reduce the paperwork of small businesses and to free them up in a way that will allow Canada's entrepreneurial advantage to be developed. They represent a step in the right direction and will contribute to a dynamic economy", said Minister Blackburn.

The changes to taxable benefits are contained in "Income Tax Technical News No. 40 – Administrative Policy Changes for Taxable Employment Benefits" and is posted on CCH's PAYSOURCE News Tracker. The full text of Technical News 40 is also reproduced in the Budgets and New Developments section of PAYSOURCE at ¶180,170.

The changes concern the following:

Overtime Meals and Allowances Provided to Employees

Beginning in 2009, the CRA will allow no taxable benefit to arise for a meal or meal allowance of up to $17, if the employee works two or more hours of overtime, before or after the employee's regular hours and the overtime is infrequent or occasional. The CRA considers less than three times a week to be infrequent or occasional, but acknowledges that overtime may occur more than twice a week during certain peak periods and still meet this condition.

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Employee Travel Within Municipality or Metropolitan Area

The CRA will allow travel allowances paid for travel and/or meals within a municipality or metropolitan area to be excluded from income where the allowance is paid primarily for the benefit of the employer, to facilitate efficiency in the course of a work shift. The other *caveat* is that the allowances do not have the characteristics of a type of remuneration.

Loyalty Programs

The CRA has decided that beginning in 2009, where an employee uses his or her personal credit card for business expenses, loyalty points collected on the cards for these business expenditures will not be a taxable benefit as long as the points are not converted into cash, the arrangement does not indicate that it is an alternative form of remuneration and it is not for tax avoidance purposes. Technical News No. 40 gives an example where an employee uses her personal credit card to pay for all types of business expenses, including travel expenses of other employees. The CRA considers this situation indicative of an alternative form of remuneration and so would consider the points redeemed to be a taxable benefit.

Employer Provided Motor Vehicles Required To Be Taken Home at Night

The CRA has set out strict guidelines, which, if complied with, the CRA will allow a taxable benefit for a motor vehicle that an employee is required by his or her employer to take home at night, to be calculated at the rate for the operating benefit (under section 7305.1 of the Income Tax Regulations – 24 cents for 2008 and 2009) rather than the rate for allowable deductions (under section 7305 – 52 cents for the first 5,000 kilometres and 46 cents thereafter). The Technical News states that the lower rate will apply if the vehicle is not an automobile, as defined in subsection 248(1) of the Act; the employer stipulates that the motor vehicle cannot be used for personal use other than commuting between work and home; the vehicle has not been used for any personal use, there are *bona fide* business reasons for requiring the employee to take the vehicle home at night, such as security concerns for the contents of the vehicle if it is left at a work site over night, or that the employee must respond to emergencies in the vehicle; the vehicle is specifically designed for the

employer's business, such as modified to carry tools or respond to emergencies. The CRA notes that if the vehicle is used to go from home to a call or *vice versa*, that use is not considered personal, and so no benefit would be calculated for that use. The 24 cents would be used, assuming the vehicle and company policy meet all the other conditions, only for the commute between home and work.

Non-Cash Gifts and Non-Cash Awards

Effective for 2010, the CRA has revised its policy with respect to non-cash gifts and awards. It will allow employers to give any number of non-cash gifts and awards to an arm's length employee, tax free, to the extent that the value of the gifts and awards do not exceed $500. The total value in excess of $500 will be taxable. In addition to the non-cash gifts and awards, the employer may give a separate non-cash long service/anniversary awards of up to $500, tax free. Again, the value of the long service/anniversary award in excess of $500 will be taxable. The long service/anniversary award is a separate category from the other non-cash gifts and awards, and so has a separate $500 threshold. Certain immaterial items, such as coffee mugs, t-shirts with the employer's logo, plaques, etc., are outside of the $500 threshold and are not taxable. Performance-related awards, such as meeting sales targets and cash or near cash awards are also outside of the $500 threshold, but are taxable. The CRA notes that a shortfall in the $500 threshold for the non-cash gifts or awards cannot be made up by excess room in the $500 threshold in the long service/anniversary threshold, or *vice versa*. They are treated separately.

Surface Transit Passes Provided to Family Members of Transit Employees

Effective for 2010, free or discounted passes provided to family members of employees of bus, streetcar, subway, commuter train and ferry services will be taxable. Passes for transit employees that are for the exclusive use of the employee will continue to be non-taxable. Also passes to employees who do not work in the transit area, such as passes for municipal employees who are not part of the transit commission, will be taxable commencing in 2010.

Hot News Items

Ontario Organ Donor Leave Now Law

Ontario's new unpaid organ donor leave became law on June 26, 2009.

The new leave builds on the $4 million announced in 2007 to implement an Organ Donation Strategy. The strategy includes the establishment of the Program for Reimbursing Expenses of Living Organ Donors, a fund that will reimburse living organ donors for reasonable, out-of-pocket expenses and lost income associated with their organ donation. Living donation has many advantages such as reduced wait times and patient suffering, increased transplant success, and reduced health costs.

Organ donor leave is available to employees who are donating all or part of the following organs: kidney, liver, lung, pancreas and small bowel. Other organ and tissue donations may be added by regulation.

In order to qualify for the leave, an employee must be employed by his or her employer for at least 13 weeks. All employees covered by the *Employment Standards Act, 2000* are eligible for the leave, regardless of the size of their employer. Employees must give their employer at least two weeks' written notice before starting the leave or, if such notice is not possible in the circumstances, provide notice as soon as possible. Where an employer so requests, an employee must provide a medical certificate confirming that the employee has undergone or will undergo surgery for the purpose of organ donation.

An employee is entitled to take organ donor leave for a period of up to 13 weeks. Organ donor leave begins on the day that the surgery to donate the organ takes place. If needed, a donor may begin the leave at an earlier time as specified in a medical certificate. (The length of the leave to which a donor would be entitled would remain the same regardless of when it began.) The employee would be entitled to extend the leave for an additional period of up to 13 weeks (i.e., the total length of leave could be up to 26 weeks) if a medical certificate confirmed that the employee is not yet able to perform his or her duties.

The employee may end his or her organ donor leave early by giving the employer at least two weeks' written notice.

An employee's seniority and length of service credits continue to accumulate during the leave and the employer must continue to make its contributions to any applicable benefit plans unless the employee gives the employer written notice that he or she does not intend to pay his or her contributions, if any.

At the end of the organ donor leave, the employer is required to reinstate the employee in the position he or she occupied when the leave started, or to provide alternative work of a comparable nature at not less than the earnings and other benefits that had accrued to the employee when the leave started.

The new organ donor leave was provided for in Bill 154, the *Employment Standards Amendment Act (Organ Donor Leave), 2009*, which was previously summarized in the May issue of PAYSOURCE, No. 167.

The new Organ Donor leave is located in the "Employment Standards" section of PAYSOURCE at ¶6829.

Need To Know

2009 Budget Season

Budget season is now complete and the federal Budget and all provincial/territorial Budgets are reproduced in the "Budgets & New Developments" section at ¶180,166 and ¶180,168 respectively.

However, in the case of Nova Scotia, the Conservative Government that presented the Budget of May 4, 2009 was defeated in the provincial election held on June 9, 2009. The new government has stated its intentions to introduce a new Budget in late September or early October once an audit of the province's finances is completed. The new Budget will replace the existing 2009 Nova Scotia Budget at that time.

Minimum Wage Changes Reminder for Newfoundland and Labrador

On July 1, 2009, the minimum wage will increase to $9.00 per hour, up from the current level of $8.50 per hour.

The new minimum wage rate is located in the "Employment Standards" section of PAYSOURCE at ¶5710 and ¶5771.

Recent Cases and Rulings

Foreman Employee Not Independent Contractor

• • • **Northwest Territories** • • • Yanke was employed as the foreman of the lumberyard owned by Johnson's Building Supplies ("Johnson's"). He worked in a supervisory role, performing duties as required for the day-to-day business of the lumberyard. Although Yanke had no set hours, he tended to work six days a week plus some evenings. Yanke claimed that there was a verbal agreement whereby he would be paid $35 per hour inclusive of overtime, holiday pay, and vacation pay. Johnson's Building Supplies claimed that Yanke was an independent contractor who worked sporadically on a contract basis for $30 per hour. The Labour Standards Board affirmed a certificate of wages owing in favour of Yanke. The employer appealed, claiming that the Labour Standards Board did not have jurisdiction to deal with the claim since Yanke was an independent contractor.

The appeal was dismissed. Using a standard of review of reasonableness, the Court looked at each of the elements of the four-part test used by the Board to determine whether Yanke was an employee or an independent contractor. The Board's interpretation and application of the legal test was reasonable. Yanke performed supervisory duties in the day-to-day business of the lumberyard, but he had to clear everything else with Johnson's, and he had no control over the circumstances that would provide him with work. While there was evidence that Yanke supplied some of his own tools, Johnson's supplied the bulk of the materials, along with the individuals required to successfully run the lumberyard. The financial arrangement was such that Yanke's ability to earn money or make a profit depended on whether Johnson's had work for him to do, approved the number of hours he worked, and had the resources to pay him. Finally, there was no evidence that Yanke took on work outside of working at the lumberyard, and given the number of evening and weekend hours that he worked it would have been difficult for him to take on any outside work.

Johnson's Building Supplies Ltd. v. Yanke, (N.W.T.S.C.), 2009 CLLC ¶210-024.

Taxpayer was Independent Contractor

The taxpayer, an expert in the sugar industry, performed consulting services for Sweet Valley Food Corporation ("S Corp."). In reassessing the taxpayer for 2005, the Minister disallowed the deduction of certain business expenses claimed on the ground that the taxpayer was an employee of S Corp. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was allowed. The Court applied the employee versus independent contractor criteria set out by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.* (87 DTC 5025), and adopted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (i.e., control, supplier of tools, chance of profit/risk, and degree of integration). The conclusion was that the taxpayer was in an independent contractor relationship with S Corp. The Minister was ordered to reassess on this basis.

Ganpaul, (Tax Court of Canada), 2009 DTC 1135.

Taxpayer's Remote Employment Location was Special Work Site

The taxpayer, an education specialist, designed a special project in consultation with an Indian Band (the "Band"). In order to implement this project, the Band gave him a two-year contract of employment in 2003, which was renewed until 2007. Under that contract, he was provided with, and resided in, a residence on the reserve with his family, although he continued to maintain a separate residence off the reserve as well. In reassessing the taxpayer for 2003, the Minister disallowed an employment expense deduction of $1,430, and limited to $2,767 a northern residents deduction. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was allowed. The taxpayer's employment was both temporary and transitory. His employment location was remote from an established community, and was a special work site. His use of the residence on the reserve was entirely subject to the Band's discretion, and could be terminated by the Band at any time. The Minister was ordered to reassess on the basis that the taxpayer was entitled to the employment expense deduction claimed and a northern residents deduction of $3,389.

Dupuis, (Tax Court of Canada), 2009 DTC 1137.

Deferred Bonus and Retiring Allowance

The CRA reviews a situation wherein an employee requested his bonus be deferred to the next taxation year. Additionally, a similar question on retiring allowances is answered.

The CRA was asked about the tax treatment of a bonus paid to an employee where the employee had requested that the employer defer the payment of such bonus until the next taxation year. Also, the CRA was asked whether such treatment would also apply to a retiring allowance.

The CRA stated that, under s. 5(1), an employee's income for a taxation year is the salary, wages, or other remuneration the employee received in the year. The CRA considers an amount to have been received on the earlier date upon which payment was made or the date the employee constructively received the amount. An amount is constructively received where the employee is legally entitled to receive payment and the employer is obligated to pay the amount. This would be determined on the facts of the situation.

Where a bonus is not received (including constructive receipt) the employee would be subject to the salary deferral arrangement ("SDA") rules. An SDA is a plan or arrangement under which a person has the right to receive an amount after the end of the year and where it is reasonable to consider that one of the main purposes of the creation or existence of the right was to postpone tax payable under the Act. Where an SDA exists, the employee is required to include the amount and any interest thereon in his/her income in the year the amount was deferred or the year the interest was earned. Thus, the employee must include in income any amount he/she has a right to receive in a year that he/she rendered the services. One exception to an SDA includes a plan or arrangement under which the taxpayer has the right to receive an amount and such amount is to be paid within three years following the end of the taxation year.

In respect of retiring allowances, s. 56(1)(*a*)(ii) requires that an employee include the retiring allowance in his/her income for the year that is the earlier of the year in which the retiring allowance was paid and the year the employee constructively received payment. The determination of whether constructive receipt exists is a question of fact, and it is the CRA's view that constructive receipt would occur where the employee has the right to receive payment and the employer is obligated to make the payment but the payment is deferred to accommodate the employee. Additionally, the CRA noted that an employee may receive a retiring allowance in a lump sum or in instalments. Where the employee receives the amount in instalments, such amounts are taxable in the year they are received. The election to receive instalment payments must be made on or before the termination of employment. An SDA would not include a right to receive a retiring allowance since "salary or wages" does not include a retiring allowance.

Income Tax Rulings Directorate, Ontario Corporate Tax Division, April 23, 2009, Document No. 2008-029784117.

Deferred Salary Leave Plan/Salary Deferral Arrangement

The CRA was asked whether a penalty can be assessed pursuant to s. 163(2) where an employer and an employee enter into a deferred salary leave plan ("DSLP") with the knowledge that conditions stated in s. 6801(*a*) of the Regulations will not all be met. A DSLP must be established to fund a leave of absence and not to provide benefits after retirement. As such, the employee must return to work after the leave of absence for a period at least as long as the leave.

Where the arrangement meets the requirements under s. 6801(*a*) at the time the DSLP is established but at

some later date it becomes clear that the requirements will no longer be met, the employer should terminate the DSLP and any deferred amounts should be paid to the employee, plus interest if any, less any applicable tax required to be withheld. If this is done, there would be no additional penalty. If the arrangement is not terminated, it would be subject to the salary deferral arrangement rules in the year it is known that the arrangement ceases to qualify, and the deferred amounts would be taxable employment income in that year; any further amounts that are deferred (plus interest accrued) would be taxable in the year of deferral.

However, if the parties knew at the time of entering into the arrangement that the employee would not return to work the agreement would not be a DSLP and instead would be considered a salary deferral arrangement. The employee would be liable for taxes, interest, and perhaps penalties on the amounts deferred in the years in which they were deferred. Subsection 163(2) imposes a penalty where gross negligence is involved or when a person knowingly makes a false statement or omission in a return or in providing information. The CRA is of the view that s. 163(2) would apply where the parties knew at the time the agreement was entered into that the employee would not meet the conditions requirement pursuant to s. 6801(a) of the Regulations. In addition, this penalty may also apply to the employer in such circumstances.

Income Tax Rulings Directorate, Ontario Corporate Tax Division, April 15, 2009, Document No. 2008-029826117.

Employment Benefits – Vehicle

The CRA was asked whether the use of an employer-provided vehicle to travel between an employee's home and various sites throughout the city would constitute a taxable benefit pursuant to s. 6(1)(*a*). The employees travelled in vans to various equipment offices of the employer in order to perform installation services and would often spend one to three days at a particular location. Instead of requiring the employee to come to the employer's main office each day to pick up the van, the employer wanted to allow the employees to take the van home at the end of the day so that the employee could travel directly to the installation site the following morning.

The CRA stated that generally, the use of an employer-provided vehicle to travel from home to work would be considered personal use and as such, a taxable benefit to the employee. However, the CRA provides an exception to this rule where an employer "requires an employee to proceed directly from home to a point of call other than the employer's place of business to which the employee reports regularly (e.g., such as a salesperson or repairman visiting customers) or to return home from such a point". Whether an employee regularly reports to a particular place is a question of fact, but it seems, based on the facts described in this case, the employees do not regularly report to work at any of the installation sites since they do not return to these sites with any frequency once a particular installation is complete. Accordingly, the CRA would allow this use to be considered business related. However, the CRA cautioned that adequate documentation should be kept and if any such site becomes a place to which an employee regularly reports, the use of the vans will then be considered personal.

Income Tax Rulings Directorate, Business and Partnerships Division,December 9, 2008, Document No. 2007-0231311E5.

Taxable Benefits – Employer-Paid Life Insurance Premiums

The CRA was asked whether an employer-paid life insurance premium would constitute a taxable benefit in the hands of the employee. The CRA stated that whether a taxable benefit will arise depends on the nature of the life insurance coverage provided. If it is a "group term life insurance policy" as defined in s. 248(1), the employee will be required to include a benefit (prescribed by ss. 2700 to 2705 of the Regulations) pursuant to s. 6(4). A term-life insurance policy that insures the life of only one employee (or the employee and his or her spouse and dependants) would not be a group term-life insurance policy, and therefore the entire amount of the employer-paid premium would be required to be included in the employee's income pursuant to s. 6(1)(*a*).

Although the CRA referred the taxpayer to Interpretation Bulletin IT-85R2, "Health and Welfare Trusts for Employees" for more information on the taxation of employer-provided benefits that may be provided under a health and welfare trust, the CRA emphasized that paragraph 9, which discusses the tax implications to an employee for employer-provided group term-life insurance no longer reflects the current state of the law. Although previously, the first $25,000 of life insurance coverage was exempt, group term life insurance is now a fully taxable benefit.

Income Tax Rulings Directorate, Business and Partnerships Division, April 30, 2009, Document No. 2009-0312171E5.

Retiring Allowance – Payment of Unused Sick Leave Benefits Upon Retirement

An employer was required under contractual obligations of a collective agreement to grant sick leave days to his employees every year and then cash-out the unused portion of their sick leave benefits every December. However, if an employee had to leave his employment at any time during the year (i.e., through resignation, retirement, or otherwise), the balance of unused sick leave benefits had to be paid to the employee at that particular time. The CRA was asked to comment on the tax treatment of such payment of unused sick leave benefits to an employee under such circumstances putting an end to his employment.

The issue reviewed by the CRA involved an employer who was required by the contractual obligations of a collective agreement to grant sick leave days to his employees every year and then cash-out the unused portion of their sick leave benefits every December. However, if an employee had to leave his employment at any time during the year (i.e., through resignation, retirement, or otherwise), the balance of unused sick leave benefits had to be paid to the employee at that particular time. The CRA was asked to comment on the tax treatment of the payment of unused sick leave benefits to an employee upon his resignation, retirement, or any other event putting an end to his employment. More specifically, the CRA was asked if the payment in question could be considered a "retiring allowance" within the meaning of this term in s. 248(1) of the Act.

It is the view of the CRA that the payment would not be viewed as a "retiring allowance" and would instead be treated and taxed as other employment income. In this particular case, the payment would not be made in recognition of the employee's long service as required by the definition in s. 248(1) of the Act but would instead be made in accordance with the terms of a collective agreement (i.e., every year in December if the employee was still with the employer and at the time of his departure if he had left the employer due to a resignation, retirement, or other cause). Even if the CRA indicated in paragraph 3 of IT-337R4 that the payment for unused sick leave credits could qualify as a retiring allowance, as confirmed by the Supreme Court of Canada in *J. Camille Harel v. The Deputy Minister of Revenue of the Province of Quebec* (77 DTC 5438), the facts of this situation are completely different from the facts of that case. The CRA also referred the taxpayer to Guide RC4120 for instruction regarding the reporting of the payment of sick leave benefits on a Form T4.

Technical Interpretation, Financial Sector and Exempt Entities Division, April 14, 2009, Document No. 2009-0307791E5.

WEBINAR

Harmonization
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- What We Learned from NB, NS, NF
- Guidance from Tax Authorities

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