Tax Notes

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PRICE ADJUSTMENT CLAUSES AND OTHER MINUTIAE

— David Louis, tax partner, Minden Gross LLP, a member of MERITAS law firms worldwide

Only a tax drone would have the chutzpah to come up with a price adjustment clause ("PAC"). You'd think that such a clause would apply, say, if a beneficiary was being ripped off. But in most cases, PACs are only operative in the event of a dust-up with the CRA or with another taxation authority. It's no wonder that these clauses have had a mottled history. In recent months, courts have struck down such clauses as ineffective because they were deficient in dealing with a structural problem (when a retraction right required the cooperation of another party) or when values were not "determined" by a court or taxation authority as required by the clause itself.

In CRA Document No. 2011-0429991E5 (May 24, 2012), the CRA was asked to comment on a situation where an estate freeze in favour of a taxpayer's child was done in year 1. The freeze was done as a standard section 86 reorganization, and it included PACs relating to the freeze shares. After the death of the taxpayer in year 16, his estate requested a clearance certificate under subsection 159(2). The CRA then found that the freeze shares were undervalued.

The CRA stated that, assuming that it recognizes the PAC as valid, its position is that the clause would "generally have a retroactive effect back to the moment of the transaction to which the PAC is applicable." In other words, the CRA believes that it can adjust the value of the freeze shares on a taxpayer's death.

The CRA is of the view that generally, if there is a "significant discrepancy" between the fair market value ("FMV") established by the CRA and the one established by the taxpayer, it may indicate that the taxpayer did not make a "real effort" to determine the FMV of the property; then the PAC would not be valid.

If the PAC is not valid, there would be no adjustment of the freeze shares back to year 1, "but it could be argued that using an unfair and unreasonable valuation method with respect to the valuation of the Freeze Shares could be considered for the purposes of the application of subparagraph 152(4)(*a*)(i) as a misrepresentation attributable to neglect, carelessness or wilful default, thus allowing the CRA to make a reassessment in Year 1 in order to apply subsection 86(2) to the Taxpayer"— i.e., the excess between the FMV of the old common shares and the redemption value of the freeze shares at the time of the freeze would be assessed as a benefit that the taxpayer desired to have conferred on the related person for the application of subsection 86(2) (a deemed capital gain for the taxpayer). Also not surprisingly, the CRA further indicated that in the absence of an operative PAC, the excess would consequently increase the FMV of the new common shares; thus, when the related person sold the new common shares of the capital of Opco, the related person would probably be taxable on the excess. Finally, when the related person subsequently sold the "new" common shares of the capital stock of Opco, paragraph 110.6(7)(*b*) could apply to deny the capital gains exemption.

In reference to its position that a valid price adjustment clause is retroactive to the time of the original freeze, the CRA cites *Gurberg* (2006 QCCA 867 (CanLII)), a French-language case involving Quebec provincial taxation.[1] However, the issue would presumably depend on the wording of the particular PAC. And the real point may be that this could be a sign of things to come.

Recapture — Active? Passive? Both?

CRA Document No. 2012-0440781E5 (May 9, 2012) involved a corporation selling a building which for a significant period was rented to an associated company that was carrying on an active business, so that the rental income was considered to be active business income (under subsection 129(6)). However, the active business had been sold some years earlier, so that capital cost allowance ("CCA") was subsequently claimed against passive rental income. The CRA indicated that where subsection 129(6) deems rental income to be active business income and CCA on the rented building was deducted in calculating active business income, any recapture of CCA on the disposition of the building would also be considered to be active business income. However, since CCA was only deducted in calculating active business income for some of the years of ownership, it is the CRA's view that it would be "reasonable to allocate the recapture of CCA in the same manner in which it was claimed". Although no further elaboration was made as to the specific method of proration,[2] a similar question recently released in French (CRA Document No. 2011-0413891I7, December 15, 2011) appears to indicate that the proration could be based on the number of years the property generated income from an active business relative to the number of years it generated income from property. (It was also observed in the latter technical interpretation that no provision in the Act specifically supports the basic proration methodology in question.)

As noted, the situation involved Holdco renting to an Opco. One would think that similar comments would apply for a corporation with direct use of depreciable property in similar activities; however, several older technical interpretations provide different results, by and large focusing on use at the time of disposition rather than a historical determination (see, for example, CRA Document Nos. 2000-0049105, AC58315, and AC57890; see also paragraph 9 of IT-73R6). Whether CRA Document No. 2012-0440781E5 is a change of CRA policy in the more straightforward situation remains to be clarified.

Refundable Dividend Tax on Hand — The Three-Year Trap

As commentators have recently pointed out, if a corporate return is not filed within three years after the year of the payment of a dividend, the CRA will deny the dividend refund. This can be a real trap; consider, for example, a Holdco that pays dividends to offset its Part IV tax and neglects to file tax returns because they appear to be nil. But it could get even worse: often, the CRA's pre-existing policy was not to add the amount of the denied dividend refund back to the refundable dividend tax on hand ("RDTOH"). Happily, *Tawa Developments Inc. v. The Queen*, 2011 DTC 1324 (which also affirmed the above three-year trap), held that the RDTOH is not reduced by the amount of the dividend refund denied, because the tax return wasn't filed within the three-year period.

The more recent case of *Ottawa Ritz Hotel* (2012 TCC 166) also supports the result in *Tawa* (although the case mainly concerns penalties for failure to file corporate tax returns, there are approving references to *Tawa* in paragraphs 4 and 5). By the way, the denied dividend refund cannot be applied to another tax liability under subsection 129(2), nor can it be reappropriated for use against other tax debts under section 221.2 — see CRA Document Nos. 2011-0421291I7, 2011-0405701I7, and 2011-0421291I7.

Canadian-Controlled Private Corporations and Unanimous Shareholders' Agreements

Per paragraph (*b*) of the definition of "Canadian-controlled private corporation" ("CCPC") in subsection 125(7), non-residents' and public corporations' shareholdings must be notionally attributed to one "hypothetical person"; if that person would control the corporation then the corporation is not a CCPC. (This rule is to counter a case — *Silicon Graphics Ltd.*, 2002 DTC 7112 (FCA) — which would require a common connection between non-residents and/or public companies.) The CRA has taken the position that a unanimous shareholders' agreement is irrelevant for the purpose of determining whether the "hypothetical person" would control the corporation (see 2009 RCRT Questions 13 and 14 and *Income Tax Technical News* No. 44). However, the validity of this position is questionable in view of the recent *Price Waterhouse Coopers Inc.* case (2012 DTC 1142 (TCC)). In that case, the Court held that the hypothetical

shareholder should have the same rights as the non-resident shareholders and would be bound by a unanimous shareholders' agreement. This case, of course, is significant, since the terms of the agreement could restrict the voting rights of non-residents and/or public corporations and thus result in CCPC status. In the case of a corporation with investment income and/or capital gains, an interesting question is whether this is desirable: without the refundable tax system, corporate tax rates are lower.

RRSPs and the 2011 Federal Budget

In previous months, many accounting and law firm releases have pointed out the pitfalls of the RRSP rules brought in by the 2011 federal Budget (including those pertaining to prohibited RRSP investments, "advantages", the "swap rules", etc.). A six-page letter dated June 13th was sent by the Department of Finance to the Joint Committee on Taxation, containing details of proposed rules that would ameliorate some of the harshness of the new rules. For example, the rules would remove the 10-year period for so-called transitional prohibited investment rules, so that these rules would apply indefinitely. Furthermore, a new exclusion from "prohibited investment" status will be included,[3] and so on.

The trouble is, these rules are already law — implemented as part of Bill C-13 (which received Royal Assent back in December 2011). The technical amendments will coincide with the effective date of the Budget 2011 measures and apply likewise to tax-free savings accounts where relevant. So add one more piece of proposed legislation to the already considerable stockpile.[4]

Notes:

[1] In that case, the PAC stated that the FMV would be subject to revision in accordance with any binding agreement with, or decision by, the appropriate taxation authorities, or any judgment of a court of competent jurisdiction. Because a binding agreement was reached with Revenue Canada, the Court was of the view that the PAC was also applicable for the Quebec provincial reassessment with retroactive effect to the date of the freeze, notwithstanding that the freeze date was statute-barred.

Gurberg was also cited in CRA Document No. 2012-0437001I7 (also concerning PACs), which was released shortly after CRA Document No. 2011-0429991E5.

[2] However, it might be inferred from the technical interpretation that recapture is prorated based on the percentage of CCA claimed against passive/active income.

[3] An investment is excluded from "prohibited investment" status if all of the following are satisfied:

(1) Persons who deal at arm's length with the controlling individual of the registered plan hold at least

(a) 90% of the "equity value" (as defined in subsection 122.1(1) of the Act);

(b) 90% of the total of the "equity value" plus the outstanding debt of the organization; and

(c) 90% of the total votes associated with the "equity" (as defined in subsection 122.1(1) of the Act);

(2) One or more persons who deal at arm's length with the controlling individual own equity that has terms and conditions that are substantially similar to the terms and conditions of the investment that is held by the registered plan, and if that equity owned by those arm's length persons was acquired by a particular individual, that individual would be a specified shareholder or a specified unitholder of the organization determined, if the class of equity owned by the controlling individual is separate from the class owned by those arm's length persons, as if those classes of equity were one class;

(3) The controlling individual deals at arm's length with the organization; and

(4) None of the main purposes of the controlling individual in the acquisition or holding of the investment by the registered plan is to obtain an advantage (other than income or capital gains on the investment).

[4] A process which has recently come under criticism in terms of federal Budget procedures — see "Is It Time for Finance to Revisit Draft Legislation Process?", Ryan Keey, *General Corporate Tax*, June 2012, Carswell.

BUSINESS EXPENSES FOR REAL ESTATE AGENT

The CRA was asked whether a real estate agent, having earned a commission on the sale of a home, would be entitled to deduct the cost of a gift or cash provided to the purchasers of the home. The CRA was also asked whether, in its view, the cash or gift would be taxable to the recipient.

Generally, a payment is deductible if it is made for the purpose of gaining or producing income from a business, is not on account of capital, is not a personal expense, and is reasonable in the circumstances. In the CRA's view, if the cash or gift is a rebate offered for the purpose of gaining or producing income from the agent's business, then payment of the rebate would likely be deductible. The CRA noted that, depending on the circumstances, if the cash or gift was paid to a non-arm's length purchaser such as a family member of the real estate agent, the deduction could be regarded as a personal expense and therefore would be specifically prohibited by s. 18(1)(*h*) of the Act.

On the recipient's side, whether the cash or gift was taxable would depend on the circumstances. Generally, where the home purchased is for the recipient's personal use, the receipt of the gift would not result in tax consequences to the purchaser. If the home was purchased for the purpose of earning income from a business, property, office, or employment, the taxpayer's capital cost in the property would be reduced by the amount of the gift.

See also CRA Document No. 2009-0345021I7, "Costs of a Missionary Trip" (January 13, 2010).

CRA File Number: 2012-0432621E5, March 19, 2012

CHILDREN'S ARTS TAX CREDIT

The CRA was asked whether fees paid for a child to be enrolled in either the Beaver Scouts or a martial arts program would be eligible for the children's arts tax credit ("CATC"). The CRA provided only general comments on whether expenditures related to Beaver Scouts activities were eligible for the CATC. If the activity involves creative skills or expertise to improve the dexterity or coordination of the child through artistic or cultural activities, then the fees paid to the Beaver Scouts would be eligible for the CATC, all other criteria being met. The CRA noted that although it administers the CATC, it does not determine the eligibility of a particular activity. The person or organization that offers the program can determine if it meets the legislative requirements.

The fees for the child's martial arts program would not be eligible for the CATC because the program meets the criteria under the children's fitness tax credit. The fitness credit is available for significant activity that contributes to cardio endurance and one of muscular strength, muscular endurance, flexibility, or balance. A fee paid for a children's activity, whether it is fitness or arts related, may only be claimed towards one credit and cannot be eligible for both.

CRA File Number: 2012-0437311M4, April 5, 2012

MEDICAL EXPENSES — RESIDENTIAL TREATMENT CENTRE

The CRA was asked whether amounts paid for a dependant with attention deficit hyperactivity disorder to attend a residential treatment centre that provides medical care and counselling for participants, where the centre is in another city, would qualify as eligible medical expenses for the purposes of the medical expense tax credit. The CRA only provided general comments regarding the criteria for eligible medical expenses described in s. 118.2(2) of the Act and Interpretation Bulletin IT-519R2, *Medical Expenses and Disability Tax Credits and Attendant Care Expense Deduction*.

The CRA specified that for the fees to qualify under s. 118.2(2)(*e*), the individual must suffer from a condition of such severity that the person requires the facilities, equipment, or personnel of the school, institution, or other place. As well, an appropriately qualified person must certify that these conditions are met with the care received at the institution. According to paragraph 29 in IT-519R2, an appropriately qualified person to provide the certification includes a medical practitioner and any other person who has been given the required certification powers under provincial or federal law. The CRA indicated that in order for the residential treatment centre to qualify under s. 118.2(2)(*e*), it should be tailored for the care of the individual that is suffering from the medical condition. The CRA directed the remainder of its comments on general criteria relating to dependants and travel expenses for purposes of claiming medical expenses.

CRA File Number: 2012-0444341E5, April 23, 2012

PAYMENTS FOR IN-HOME CARE OF DISABLED PERSON

The CRA was asked whether payments received by a taxpayer for the in-home care of a disabled child must be included in the taxpayer's income, and if so, whether the payments are business income.

The taxpayer receives funds for the in-home care of a disabled child. All funds are to be used to pay a home care worker for services provided, and any unused funds are to be returned.

Under s. 56(1)(*u*), social assistance payments that are made on the basis of a means, needs, or income test are included in a taxpayer's income. There is a corresponding deduction under s. 110(1)(*f*) (with the result that social assistance payments are not taxed). The CRA interprets "social assistance" to mean aid made by a government or government agency on the basis of need. Further, the CRA interprets the means, needs, or income tests to be financial tests as follows: (i) the income test is a test based solely on the income of the applicant; (ii) the means test is similar to the income test but takes into account the assets of the applicant; and (iii) the needs test takes into account the income, assets, and financial needs of the applicant.

The CRA stated that it appeared the financial assistance received by the taxpayer could be social assistance for the purposes of ss. 56(1)(*u*) and 110(1)(*f*).

The CRA noted that s. 233(1) of the *Income Tax Regulations* requires every person making a payment under s. 56(1)(*u*) to file an information return (see form T5007), subject to certain exceptions (see s. 233(2) of the Regulations).

In respect of whether the payments were business income, the CRA stated that unless the facts and circumstances indicate that the individual is providing the support to the cared-for individual as part of a business carried on by the individual, then it was unlikely the payments would be considered business income.

See also CRA Document No. 2010-0384491E5, “81(1)(h) — Social Assistance” (January 7, 2011); CRA Document No. 2009-0305961E5, “Social Assistance Payments” (April 14, 2009); CRA Document No. 2001-0113305, “Funding for Care of Adult Child” (February 7, 2002); and CRA Document No. 2001-0076767, “Payment to Disabled — Persons with Developmental Disabilities Program” (May 16, 2001).

CRA File Number: 2011-0414651E5, March 27, 2012

REMUNERATION PAID TO REAL ESTATE AGENT TO FIND NEW TENANT

The situation the CRA was asked to comment on involved a landlord who owned two buildings from which he earned rental income and who had a third building under construction. The landlord entered into a verbal agreement with a real estate agent wherein the agent would help him find a new tenant for the building under construction, and the landlord promised the agent a fixed remuneration to find the tenant. The calculation of the remuneration was based on the length of the commercial lease multiplied by the annual rent paid by the tenant, plus a commission percentage. Further, the remuneration would only be payable after the conclusion of the lease contract. After the agent found the tenant, the landlord paid the agent an amount in the first year of the tenant’s residence and another amount in the second year of residence. The CRA was asked if the landlord could deduct the remuneration paid to the real estate agent in the calculation of his rental income at the time the expense was incurred (i.e., in the first and second year of the tenant’s residence), or if the expense should instead be deferred and amortized over the total duration of the lease contract.

The CRA confirmed that, although the tax treatment of the remuneration paid to the real estate agent could only be determined after a careful review of all the facts and circumstances, the remuneration should be deductible in the years during which it was paid and not amortized over the duration of the lease. To reach that opinion, the CRA assumed that the remuneration was a current expense, not a capital expense. Normally, if the remuneration is incurred with the specific intention to produce an identifiable element of income, triggering the application of the revenue and expense matching principle, it should not be deducted in the year it was incurred but amortized over the term of the lease. However, where the remuneration gives rise to significant current benefits, it must be deducted in the year it is incurred, not amortized over the term of the lease. The principal objective is to provide a fair estimation of the landlord’s income. The landlord would also have to prove that the remuneration was reasonable under s. 67 of the Act, was not a capital expense under s. 18(1)(*b*), and was incurred to earn business or property income under s. 18(1)(*a*). This technical interpretation is based on the *Cummings* decision by the Federal Court of Appeal and the *Canderel* and *Toronto College Park Ltd.* decisions by the Supreme Court of Canada. Note that although the Supreme Court of Canada treated tenant inducement payments in those two decisions as current rather than capital expenses, that does not mean that all similar payments are deductible in the years they are paid.

CRA File Number: 2011-0424461E5, March 20, 2012

RECENT CASES

Corporate taxpayer not “controlled” by majority of non-resident shareholders, and therefore was CCPC entitled to refundable ITCs claimed

Tax Court of Canada, April 12, 2012

At the end of 2004, more than 60% of the corporate taxpayer’s class A voting shares were held by non-residents, and by the end of 2005, this percentage had increased to 70%. On reassessment, the Minister concluded that the taxpayer was not a Canadian-controlled private corporation (“CCPC”) under paragraph 125(7)(*b*) during those years because a “particular person“ (consisting of its non-resident shareholders as a group) controlled it, and therefore the taxpayer was not entitled to the refundable input tax credits (“ITCs”) claimed. On appeal to the Tax Court of Canada, the taxpayer’s trustee in bankruptcy argued that no “particular person” controlled it during the years under appeal.

The taxpayer’s appeal was allowed. In the context of the *Income Tax Act*, the word “control” means *de jure* control over the number of voting shares entitling those shareholders to elect the directors, and not *de facto* control. As a general rule, moreover, external agreements among shareholders cannot be taken into account in a *de jure* control analysis. However, the existence of a binding “unanimous shareholder agreement” of the type envisaged in subsection 2(1) and section 146 of the *Canada Business Corporations Act* is relevant to such an analysis. The

distinguishing feature of that type of agreement is that it "restricts in whole or in part the powers of the directors to manage the business and affairs of the corporation". There was such an agreement governing the taxpayer's shareholders in this case during 2004 and 2005, and it restricted the taxpayer's non-resident shareholders (i.e., the "particular person") from electing a majority of its board of directors. Only the taxpayer's Canadian shareholders could elect that majority. Therefore, its Canadian resident shareholders, and not its non-resident shareholders, had *de jure* control over it, regardless of the fact that the majority of its class A voting shares were held by its non-resident shareholders. It was, therefore, a CCPC during 2004 and 2005, and was entitled to the refundable ITCs claimed for those years. The Minister was ordered to reassess accordingly.

Price Waterhouse Coopers Inc. v. The Queen, 2012 DTC 1142

Penalty for repeated failures to report income upheld for lack of due diligence

Tax Court of Canada, April 13, 2012

The taxpayer failed to report a small amount of interest from her savings account in 2006. She had no other interest income that year. She claimed that she moved and that the post office was supposed to forward her mail, but that she never received the T5. The taxpayer again failed to report interest and other income in 2008, this time from investments that she made from the proceeds of the sale of her home. The taxpayer again claimed that she did not receive the T5. The Minister imposed a 10% penalty for repeated failures to report income. The taxpayer appealed to the Tax Court of Canada, contending that the 2006 failure was an innocent mistake.

The taxpayer's appeal was dismissed. The Court found that, while the mistake was innocent, it was not satisfied that a reasonable person in the same circumstances would have made the same mistake. The taxpayer was intelligent and she appeared to be a sophisticated businesswoman. She had only one savings account in 2006, and she received only one amount of interest income. She failed to report any interest income in her 2006 return. When she took her documents to her accountant to have her 2006 tax return prepared, she ought to have realized that she had not received the T5 with her interest income, but took no actions to get the T5.

Norlock v. The Queen, 2012 DTC 1143

Taxpayer failed to report employment income and held liable for omission penalties, but encouraged to apply for relief

Tax Court of Canada, April 16, 2012

The taxpayer failed to report $40,878 in salary and severance pay for 2009, which was close to half of his income for that year. The Minister assessed "omission" penalties under subsection 163(1) of the federal *Income Tax Act* (the "Federal Act") and subsection 38(1) of the British Columbia *Income Tax Act* (the "BC Act"). The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. Although penalties under subsection 163(1) of the Federal Act are subject to a due diligence defence, the taxpayer omitted to report income in this case and was unable to show due diligence. Under the Federal Act, omission penalties often exceed gross negligence penalties, and under the BC Act this is always the case. The result is inequitable considering that gross negligence involves more blameworthy conduct than omitting to report income. The ramifications for the taxpayer in this case were that, under both statutes together, the federal and provincial treasuries were short only $3,874.72 for a period from June 1 to November 1, whereas the total penalties for the taxpayer amounted to $8,175.60, or 211% of $3,874.72, which was inappropriate. Accordingly, while the taxpayer's appeal had to be dismissed, the hope was that he would apply for relief under subsection 220(3.1) of the Federal Act in view of the amount of the penalties involved. Whether the taxpayer were to make such an application, the Minister should seriously consider granting relief, unilaterally if necessary, since subsection 220(3.1) does not prohibit the Minister from acting unilaterally. While the Court had no jurisdiction to deal with the BC Act penalty in this case, the Minister, in practice, usually assesses BC tax to accord with any successful appeal from the comparable federal tax.

Knight v. The Queen, 2012 DTC 1144

Neither GAAR nor s. 84(2) applied to series of transactions undertaken to execute surplus strip of shares in professional corporation

Tax Court of Canada, April 17, 2012

The taxpayer was a cardiologist practising in New Brunswick at the New Brunswick Heart Centre during the relevant period. He was reassessed to include a taxable dividend of $524,967 in his income for 2002 under subsection 84(2) after a series of transactions (a surplus strip) that resulted in a capital gain to the taxpayer from the sale of shares in his professional corporation ("PC") to a friendly third party. The taxpayer used personal capital losses and other loss carryforwards to offset some of the capital gains. In addition to subsection 84(2), the Minister also relied on the general anti-avoidance rule ("GAAR") provisions and, alternatively, argued that the transactions were a sham, although that basis was dropped just prior to the hearing. The taxpayer argued that he was motivated to sell his shares prior to moving to the United States to avoid a deemed disposition upon becoming a non-resident of Canada.

The taxpayer's appeal was allowed with costs. All the transactions in the series carried the appropriate legal effect and were not a sham. Additionally, subsection 84(2) did not apply to any of the transactions, and the GAAR provisions did not apply, as a tax benefit was neither material to the series of transactions nor abusive.

MacDonald v. The Queen, 2012 DTC 1145

Dental practice's claim for ITCs from SR&ED expenditures related to investigational work on dental implants was dismissed

Tax Court of Canada, April 24, 2012

The taxpayer was the professional corporation for the dental practice of a periodontist who specialized in dental implants. The taxpayer claimed investment tax credits ("ITCs") in the amount of $103,950 for each of 2007 and 2008 for time spent using a software program to do investigational research related to the success of dental implants completed by the periodontist. The taxpayer argued that the research completed would be a useful addition to scientific knowledge. The Minister denied the claims for ITCs and argued that the research was not sufficiently documented to qualify as "systematic investigation" under the definition of scientific research and experimental development and, moreover, there was insufficient evidence to support time spent on research during the relevant period.

The taxpayer's appeal was dismissed. It lacked proper documentation detailing evidence of analysis and systematic investigation. The evidence that was produced did not support the amount of time the periodontist spent on data collection. Moreover, the research information was later presented at a lecture, which was determined to have a marketing element.

Murray Arlin Dentistry Professional Corporation v. The Queen, 2012 DTC 1149

Taxpayer's spouse transferring family residence to her without valuable consideration; taxpayer liable for tax spouse owed at time of transfer

Tax Court of Canada, April 25, 2012

The taxpayer and her spouse, H, were married under the Quebec community of property regime. In the course of changing that regime and partitioning their assets, H transferred the family residence to her for "$1 and other valuable consideration" at a time when he owed tax in excess of $900,000. The Minister assessed the taxpayer accordingly under subsection 160(1) on the assumption that this was a transfer without valuable consideration. On appeal to the Tax Court of Canada the taxpayer argued that, during the course of partitioning their assets, she transferred assets to H with a value well in excess of the fair market value of the residence he transferred to her.

The taxpayer's appeal was dismissed. The notarized documentation dated June 30, 1988 effecting H's transfer of the residence made no reference to the transfer being part of the partitioning of their assets. That documentation, which was deemed under articles 1208 and 1210 of the *Civil Code of Lower Canada* to be authentic, stated that H's marriage was still governed by the community of property regime, despite the taxpayer's argument to the contrary. Also, when H transferred the residence, the list of assets involved in the partitioning process had not been compiled, so that it was impossible to establish any value for any consideration supporting the transfer. In conclusion, therefore, H's transfer of the residence was a transfer made without consideration as the Minister had argued. The Minister's assessment was affirmed accordingly.

Sokolowski Romar v. The Queen, 2012 DTC 1151

No limitation period for assessments under joint liability provisions

Tax Court of Canada, April 27, 2012

The taxpayer was appealing an assessment under the joint liability provisions for dividends paid to her from Hennig Trucking Ltd. ("Hennig") while it had outstanding tax debts. The taxpayer was the 100% shareholder of Hennig. After her husband died in 1992, the taxpayer struggled to carry on Hennig's business for 10 years. Hennig stopped operating in 2002, and paid a dividend of $108,000 to the taxpayer while it owed corporate taxes. While the joint liability provision requirements were satisfied, the taxpayer argued that the assessment was statute-barred, as it was beyond the three-year limitation period and that the Canada Revenue Agency (the "CRA") did not act fairly in cashing the taxpayer's cheque made under a settlement offer.

The taxpayer's appeal was dismissed. The taxpayer argued that the assessment failed to take into account that part of the dividend went to pay business expenses. To justify a reduction of the assessment, the dividend must be less than the amount assessed, which was not shown in this case. The taxpayer's assumption that the CRA agreed to a settlement when they cashed the taxpayer's cheque was mistaken. While it seemed unfair that the CRA refused to return the cheque to the taxpayer once the taxpayer realized the settlement offer was not accepted, the Court has no discretion to vacate an assessment on those grounds. Despite the sympathetic circumstances, the assessment was proper as there is no limitation period under the joint liability provisions.

Hennig v. The Queen, 2012 DTC 1152

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