Tax Notes

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SMALL BUSINESS TAXATION CHANGES

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Substantive CCPCs

The 2022 federal Budget announced a new measure that targets "substantive" Canadian-controlled private corporations ("CCPCs"). Essentially, the federal government was concerned that taxpayers are intentionally undertaking transactions to remove the CCPC status from their corporations in order to avoid the higher rate of tax on investment income that normally applies to CCPCs. On August 9, 2022, the government published draft legislation that included the proposed substantive CCPC rules, upon which this commentary is based.

Our income tax system is designed to ensure that income earned through a corporation is taxed more or less the same as income that is earned directly by a Canadian resident individual — this is referred to as integration. Income from a business earned by a corporation is generally subject to a low rate of tax and only when the income is paid to individual shareholders is the full tax bill paid. Thus, retaining income in a corporation provides a tax deferral advantage. However, additional refundable taxes apply to investment income earned by a CCPC. These taxes are intended to eliminate any tax deferral that could have been enjoyed by earning investment income through a CCPC.

Apparently, some taxpayers were manipulating CCPC status in order to avoid the additional taxes on investment income. And this is what brought about the proposed amendments for substantive CCPCs. Basically, a non-CCPC corporation that is a "substantive CCPC" under the rules will be subject to the additional taxes on investment income that a CCPC would be subject to, while continuing to be prohibited from accessing the beneficial aspects of CCPC status (e.g., the small business deduction).

Currently, the substantive CCPC rules are proposed by draft legislation dated August 9, 2022.

Substantive CCPC Defined

The proposed definition of a substantive CCPC would be added to subsection 248(1). A corporation will be a substantive CCPC if it is a private corporation (other than a Canadian-controlled private corporation) that:

a. is controlled, directly or indirectly in any manner whatever, by one or more Canadian resident individuals, or

b. would, if each share of the capital stock of a corporation that is owned by a Canadian resident individual were owned by a particular individual, be controlled by the particular individual.

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Consequences of Substantive CCPC Status

Where a corporation is a substantive CCPC, the following tax consequences will occur:

- The $10^{2}/_{3}$% additional refundable tax under section 123.3 will apply to the corporation's aggregative investment income;
- The corporation's aggregate investment income cannot benefit from the 13% general rate reduction under section 123.4;
- $30^{2}/_{3}$% of the corporation's aggregative investment income will be added to its "non-eligible dividend tax on hand account" (this can be refunded later by paying a dividend);
- The after-tax aggregate investment income of the substantive CCPC will be added to the low-rate income pool ("LRIP"), which is defined under subsection 89(1). As a result, the investment income will not qualify to be paid out as a tax-preferred eligible dividend; and
- Despite substantive CCPC status, the corporation will not be eligible for certain beneficial tax provisions that require CCPC status (e.g., the small business deduction and enhanced SR&ED investment tax credit).

Anti-Avoidance Rule

The legislation also includes proposed subsection 248(43), which is an anti-avoidance rule that would apply where a corporation or its shareholders intentionally cause a corporation not to be a CCPC, or a substantive CCPC. Basically, this rule would catch tax planning to avoid the additional refundable tax under section 123.3 that is not otherwise caught by the substantive CCPC definition. If it is reasonable to consider that one of the purposes of any transaction or series of transactions is to cause a corporation that is resident in Canada to avoid tax payable under section 123.3, subsection 248(43) deems the corporation to be a substantive CCPC.

Timing of Application

The definition of a substantive CCPC will apply to taxation years that end on or after April 7, 2022. However, a transitional rule will be provided for genuine commercial transactions entered into before April 7, 2022.

Small Business Deduction

The federal small business deduction allows a CCPC to benefit from a reduced federal tax rate on up to $500,000 of income from an active business. However, this $500,000 limit must be shared among associated corporations and is subject to various reductions and restrictions.

One of those reductions is where the corporation (plus any associated corporations) have taxable capital exceeding $10 million. Where taxable capital exceeds $10 million, the business limit is gradually reduced. The amount of the reduction is equal to 10 cents of every dollar by which taxable capital exceeds $10 million. Thus, when the taxable capital reaches $15 million (i.e., the excess amount is $5 million), the $500,000 small business limit is completely eliminated ($5,000,000 $\times$ 10% = $500,000).

However, Bill C-32 proposes to increase the upper limit of taxable capital employed in Canada for purposes of calculating the reduction to the business limit. The amount at which the limit is fully eliminated would be increased substantially from $15 million to $50 million. The reduction of the business limit would continue to apply on a straight-line basis, and the reduction rate would be a much lower rate of 1.25 cents per dollar of capital in excess of $10 million. For example, a CCPC with $30 million in taxable capital would be subject to a 50% reduction in the business limit, with access to a business limit of $250,000 (where previously it would be ineligible entirely). Also, a CCPC with $40 million in taxable capital would be subject to a 75% reduction in the business limit, with access to a business limit of $125,000. This change will apply to taxation years that begin on or after April 7, 2022.

CURRENT ITEMS OF INTEREST

Rent Top-Up Applications Open

Applications for the one-time $500 top-up to the Canada Housing Benefit opened December 12. Eligible individuals can apply via My Account on the CRA website. If they do not have a CRA My Account, they can apply using their My Service Canada Account. Applications can also be made using an online application form or by telephone.

Progress of Legislation

Bill C-32, *Fall Economic Statement Implementation Act, 2022*, received Royal Assent on December 15, 2022 (S.C. 2022, c. 19).

Government of Canada To Streamline Reporting of Payroll Information

The CRA and Employment and Social Development Canada ("ESDC") are launching formal consultations as part of a large scale ePayroll reporting solution project. A key goal of the project is to modernize and simplify how employers report payroll, employment, and demographic information to the Government of Canada. From December 6, 2022, until January 27, 2023, the CRA and ESDC will consult with employers, stakeholder groups, and payroll software and service providers to identify challenges they currently face with payroll reporting and opportunities to improve their experience. In addition to these consultations, individuals will have the opportunity to provide feedback through an online survey.

The CRA and ESDC will consider the input they receive to inform a proposal for a future implementation of a real-time ePayroll system, and ensure that businesses of all sizes benefit from this work, by March 2024. Interested parties can learn more on how to participate in the consultations by visiting the project web page (www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/epayroll-project.html).

Currently, employers must provide the same or similar information to multiple government departments at different times, such as to the CRA for tax purposes or to ESDC for Employment Insurance benefits. Government requests are also not always aligned to information employers have readily available in their payroll systems. Canadian businesses would benefit from this modernization and streamlining by being able to share information directly with the Government of Canada in one place, reducing duplication and effort. It would also improve the speed and accuracy of delivering services and benefits to Canadians.

Disability Advisory Committee Submits 10 Recommendations in Its Annual Report

The CRA's Disability Advisory Committee ("DAC") has released its 2022 annual report. The report includes 10 recommendations for potential improvements to the disability tax credit ("DTC") and its administration. The recommendations are listed below.

Disability Tax Credit Eligibility

(1) The CRA and the Department of Finance Canada should change the term "impairment" to "limitation" in all DTC-related administrative and legislative documents.

(2) Decisions to expand the pool of health providers, one provider group at a time, who can complete the DTC application form (T2201) take time and expertise that neither CRA nor the Department of Finance Canada possess.

(3) Any licensed health provider whose license is in good standing should be permitted to complete the DTC application (Form T2201).

(4) The CRA should replace the current eligibility criteria for life-sustaining therapies as set out in the DTC application (Form T2201) with a designated list of identified therapies.

DTC Review and Appeals

(5) The CRA should share DTC appeals data with the DAC to better understand which demographic groups are experiencing challenges.

(6) The CRA should better communicate to DTC applicants who launch an objection or appeal that they will remain eligible for all DTC-related benefits and credits until the appeal is resolved.

DTC Legal Issues

(7) The Department of Finance Canada should amend the *Income Tax Act* ("ITA"), and/or the CRA amend its policy, to allow a person with an impairment in mental functions to appoint a representative to manage their tax affairs without resorting to legal guardianship.

(8) Over the long term, the federal government should apply the Peace, Order and Good Government clause to encourage the creation of a national minimum-standard legislative framework for supported decision-making laws.

(9) The CRA should encourage the Department of Finance Canada to exempt DTC beneficiaries from the capital gains on the sale of a home entrusted to them.

(10) The federal government should broaden the list of persons defined as "qualified family member" in the ITA to include siblings to act as RDSP plan holders for persons with an impairment in mental functions.

Saskatchewan To Create New Revenue Agency

The Government of Saskatchewan introduced the *Saskatchewan Revenue Agency Act* aimed at establishing a new agency to pursue greater autonomy in tax collection. The new Act creates the framework for a new Treasury Board Crown corporation, the Saskatchewan Revenue Agency ("SRA"). The SRA would be responsible for administering taxes and related programs in Saskatchewan, including taking control of the provincial portion of the corporate income tax system from the federal government.

The bill is basic in its design, containing standard provisions required to establish a new government agency, including its purpose, powers, overarching governance structure, accountabilities, and regulation-making authority. In-depth, multi-year work will now begin on establishing a structure of a new provincial corporate income tax system.

Alberta To Index Tax Amounts Retroactively to 2022 and Implement Other Affordability Measures

The Government of Alberta introduced Bill 2, *Inflation Relief Statutes Amendment Act, 2022*. If passed, Bill 2 would implement the following measures:

- Upcoming targeted relief payments for seniors and families with dependent children under 18 years of age with household incomes below $180,000 per year.
- Upcoming targeted relief payments to vulnerable Albertans collecting Assured Income for the Severely Handicapped ("AISH"), Persons with Developmental Disabilities ("PDD"), and Income Support.
- Indexing the Alberta Child and Family Benefit to inflation starting January 1, 2023.
- Protecting consumers on the regulated electricity rate from price spikes in January, February, and March 2023.
- Indexing personal income taxes to inflation, retroactive to the 2022 tax year.
- Suspending the full 13-cent-per-litre tax on gasoline and diesel from January to June 2023, with the fuel tax relief program providing ongoing relief subject to oil prices thereafter.

In addition to the legislation, upcoming regulation amendments will include:

- $200 in additional electricity rebates from January to April 2023, bringing total electricity relief from July 2022 to April 2023 to $500.
- Indexing AISH, Income Support, and the Alberta Seniors Benefit to inflation.
- Enhancing the current natural gas rebate to provide permanent natural gas price protection.

Update on Québec's Economic and Financial Situation

The Update on Québec's Economic and Financial Situation was presented on December 8. Several new tax measures were announced, which are summarized below:

- As of the 2022 taxation year, the maximum amount for an eligible senior considered in the calculation of the refundable senior assistance tax credit is increased to $2,000 from $411. This amount is also no longer subject to annual indexation. A mechanism will be introduced as of the 2023 tax year to revalue the current 5% reduction rate. The 2022 credit will be paid in the spring of 2023 following the filing of the tax return for the 2022 tax year.
- The refundable tax credit for seniors' activities will be eliminated in respect of registration or membership fees paid after December 31, 2022.
- Regarding the non-refundable tax credit for individuals who become shareholders and, on a temporary basis, a non-refundable tax credit for those who agree to defer their previously acquired right of redemption for a new mandatory seven-year holding period for shares of Capital régional et coopératif Desjardins, an adjustment will be made to what is considered an "eligible investment". For a fiscal year of Capital régional et coopératif Desjardins beginning after December 31, 2022, its investment requirement will be amended to enable it to support new affordable housing projects distributed throughout the regions of Québec.
- The principal parameters of the personal income tax system and social assistance programs will be significantly indexed at 6.44% as of January 1, 2023.

Canada Dental Benefit and Canada Housing Benefit Applications Opening

Effective December 1, eligible Canadians can apply for the new Canada Dental Benefit. Eligible Canadians will also be able to apply for the one-time top-up to the Canada Housing Benefit on December 12. Both benefits were enacted by Bill C-31. People can apply for the benefits either through their CRA My Account or through their Service Canada Account. The CRA is also planning a phone service for applications. An application for either benefit will require applicants to confirm that they meet the various eligibility conditions in an attestation form.

For further details, visit www.canada.ca/en/revenue-agency/services/child-family-benefits/dental-benefit.html and www.canada.ca/en/services/taxes/child-and-family-benefits/top-up-canada-housing-benefit.html..

Consultation on Clean Hydrogen and Labour Conditions for New Investment Tax Credits

As first announced in the 2022 Fall Economic Statement, the Department of Finance has launched consultations on:

- An investment tax credit for clean hydrogen based on the lifecycle carbon intensity of hydrogen, including:
  - An appropriate carbon intensity-based system for the Canadian context; and
  - The level of support needed for different production pathways in Canada.
- Labour conditions attached to the investment tax credits for clean hydrogen and clean technologies, including requirements to:
  - Pay prevailing wages based on local labour market conditions; and,
  - Create apprenticeship training opportunities.

Stakeholders are invited to share their feedback until January 6, 2023.

Climate Action Incentive Payment Amounts for 2023-24

The federal government announced the payment amounts for the Climate Action Incentive ("CAI") for 2023-24. Residents of provinces in which the federal pollution pricing are in effect are eligible for the CAI. In 2023-24, the federal fuel charge will continue to apply in Alberta, Saskatchewan, Manitoba, and Ontario, and will come into effect as of July 1, 2023, in Newfoundland and Labrador, Nova Scotia, and Prince Edward Island.

In order to receive their CAI payment, Canadians need to file their annual tax return. If they are eligible for the 10% supplementary amount for residents of small and rural communities, they will need to tick the corresponding box on their tax return, with the exception of Prince Edward Island residents. In Prince Edward Island, all individuals receive the

rural supplement amount, and are not required to indicate this on their tax return. The government will evaluate an increase to the rural supplement for future years.

CAI payments for 2023-24 will be disbursed as follows:

- Residents of Alberta, Manitoba, Ontario, and Saskatchewan will receive four equal quarterly payments (April 2023, July 2023, October 2023, and January 2024), as these provinces are already covered by the federal price on pollution.
- Since the federal fuel charge will only come into effect as of July 1, 2023, in Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, residents of these provinces will receive three equal quarterly payments (July 2023, October 2023, and January 2024) in the 2023-24 fiscal year and four payments in the year after that.

Quarterly Climate Action Incentive Payment Amounts as Specified by the Minister of Finance, 2023-24

	AB	MB	ON	SK	NL	NS	PEI*
First Adult	$193	$132	$122	$170	$164	$124	$120
Second Adult	$96.50	$66	$61	$85	$82	$62	$60
Each Child	$48.25	$33	$30.50	$42.50	$41	$31	$30
Family of 4	$386	$264	$244	$340	$328	$248	$240

The payment dates for Alberta, Manitoba, Ontario, and Saskatchewan will be April 2023, July 2023, October 2023, and January 2024. The payment dates for Newfoundland and Labrador, Nova Scotia, and Prince Edward Island will be July 2023, October 2023, and January 2024.

**The amount for PEI includes the 10% rural supplement, as all residents are eligible. Rural residents in other provinces will also receive the 10% rural supplement, which is not reflected in this table.*

Nunavut and Ontario Participating in The Organ and Tissue Donation Service Offering

Since the unanimous adoption of Bill C-210, the CRA has been working with provinces and territories so that Canadians can indicate their desire to receive information about becoming an organ and tissue donor from their provincial or territorial government.

The Minister of National Revenue announced that Nunavut and Ontario have opted in to participate in the organ and tissue donation initiative. For the 2022 tax year, the return for Nunavut and Ontario will be amended by adding a tick box that will let taxpayers indicate if they want to receive information about organ and tissue donation from their provincial or territorial government. This will allow the CRA to share a taxpayer's contact information with their province or territory of residence exclusively for this purpose.

RECENT CASES

Appeal To Limit Scope of Discovery Under ITA Section 231 Dismissed

The Appellant appealed an order of the Federal Court ("FC") (2021 DTC 5104) under section 231.7 of the *Income Tax Act* (the "ITA") requiring him to provide information, produce documents, and seek information and documents from his accountants, his solicitors, and his bank in Luxembourg. The Appellant relied on the Federal Court of Appeal's *Cameco* case, which held that an order under section 231.1 (enforced if need be, as here, by a section 231.7 compliance order) could only require production of documents in a taxpayer's possession and information about the maintenance, etc. of the taxpayer's books and records.

The Federal Court of Appeal ("FCA") dismissed the appeal. The FC had rejected the Appellant's *Cameco* argument, holding that "the issue before the Court in *Cameco* concerned only the Minister's right to compel attendance at oral interviews to answer questions" under paragraph 231.1(1)(*a*). The FCA endorsed this holding. Turning to textual/contextual/purposive analysis of the ITA provisions, the Court noted that the definition of "document" in section 231.1 "includes money, a security and a record", which are matters broader than the Appellant's interpretation would allow. It also examined the meaning of "audit" in paragraph 231.1(1)(*a*) citing the Supreme Court's *Redeemer Foundation*

decision that held, in a similar situation, that the statute was broadly worded, "authoriz[ing] the Minister to examine 'information that is or should be' in the Foundation's books"; similarly for the Appellant. Contextually, paragraph 231.1(1)(*d*), which requires an owner or manager to render "all reasonable assistance" and to "answer all proper questions relating to the administration or enforcement of [the] Act" was adopted in 1986 after the obligation to answer questions was deleted from section 231.1. Its broad wording counts against the limits the Appellant argued for. Finally, the purpose of the challenged provision is to provide a mechanism to monitor and ensure compliance with the ITA.

Miler v. MNR

2022 DTC 5114

Fees Paid by Parents to Schools for Christian Education Were Consideration; No Donation Credits for Schools

This was a proceeding under Rule 58 of the Federal Courts Rules, requested by the Appellants, registered charities under the *Income Tax Act* (the"ITA") incorporated and operating in Alberta. It originated when the CRA levied penalties on the Appellants under ITA subsection 188.1(7), which imposes a 5% penalty on donations that are not valid gifts. The Appellants were required by the then-in-force *Alberta School Act* (and its successor *Education Act*; collectively, the "Acts") to provide access to all residents of the school district, tuition free. The Acts also empower school boards to establish alternative educational programs, which local school boards contracted with the Appellants to provide (in this case, Christian programs). The Appellants charged parents fees to cover the extra costs associated with their programs which were not separated from the Christian program fees. The Court noted a wide variety of activities the Appellants undertook and 18 areas of expense — supplies, facilities, and the like — to which the fees were applied. The Appellants issued official tax receipts to the parents for 100% of the alternative Christian program fees.

The Tax Court answered the questions posed, holding: (1) that the parents' transfers to the Appellants, i.e., the fees, were not voluntary; and (2) that the parents received a benefit or consideration for the fees. The Appellants argued that the parents' participation in the program was voluntary, to which the Court responded that "[o]nce parents made the voluntary choice to enroll their children in the alternative Christian program, the requirements for enrolment were obligatory." Although fee waivers were available, it was clear that they were the "exception to the rule that fees were to be paid." As for the question of consideration, the Acts empower school boards to charge fees for non-instructional costs associated with the alternative programs; without the fees, the Appellants would be compelled to offer a lesser version of the program, or none at all. Thus the fees were consideration. From the answers to the questions posed, it followed that the relationship between the parents and the Appellants was a contractual one. The transfers were not gifts, and the Appellants were subject to the subsection 188.1(7) penalty.

Leduc Society/MCS Foundation Ltd./Taber Society v. The King

2022 DTC 1083

CRA's "Egregious" Violations of Court Orders and Discovery Rules Result in Allowance of Appeal Against It

The Appellants contested gross negligence penalties imposed due to their participation in tax schemes (Fiscal Arbitrators and DeMara Consulting) for which at least one promoter had been convicted and sentenced. They moved to have their appeals allowed given the Respondent's failure to comply with discovery rules and two previous orders to do so. The Court recapped the history of the appeals from March 2019, when they were set down for argument, to the present (June 2021), in some 30 pages. The main points, among many others, were: (1) Failure to provide a knowledgeable and informed deponent for an examination for discovery on three separate occasions; (2) "Wrongly, unreasonably, and intentionally" inserting restrictive language the Court never used into an affidavit quoting the Court order specifying the material to be produced; (3) Failure to update or correct stale or incorrect answers; (4) Provision of incomplete or inaccurate documents; and (5) Failure to disclose documents even when asked by the Appellants, specifically those relating to a CRA Criminal Investigations Division inquiry that mentioned these Appellants.

The Tax Court allowed the appeals, with costs to the Appellants. Federal Courts Rules rule 110 sets forth penalties for violations of discovery rules up to and including, in this case, allowing the Appellants' appeals. The Court carefully examined the jurisprudence regarding uncooperative parties in discovery. Although the long-established principle of imposing the least drastic remedy is long established, in view of the Respondent's "consistent pattern of non-compliance with this Court's Orders and Rules", which the Court found "intentional and deliberate", "undertaken to

frustrate these Appellants' rights to pre-trial discovery", and unlikely to change if the proceeding continued, the Court held that allowing the appeal, though drastic, was the only adequate remedy for the prejudice suffered by the Appellants.

Choptiany et al. v. The King

2022 DTC 1082

CRA Not Obliged to Reassess in Light of New Information

The Appellant was "miffed," as the Tax Court put it, by a reassessment that reduced her benefits. Her 2011 separation agreement "transparently" set forth the terms of her joint custody/shared parenting arrangement. All communications between the CRA and her acknowledged the arrangement. In 2015, her ex-husband, likely prompted by legislative changes, applied for a share of her Canada Child Tax Benefit and Universal Child Care Benefit ("CCTB"). The CRA then sent her a questionnaire, having "become aware" of the arrangement. In July 2015, the CRA "re-determined" her benefits, halving her CCTB (2012 and 2013 base years) and her HST benefits (2012 taxation year). On appeal, she conceded that she should receive only a half benefit for the 2004 base year and following, but was "miffed" at being required to repay her 2012 and 2013 base year benefits.

The Tax Court dismissed the appeal. The Court considered three "refined" questions. First: Was the Minister obligated to apply the newly "recognized" joint custody arrangement to the previous benefit periods? The Court's answer was no: apart from certain narrow exceptions not relevant here, the decision to reassess a taxpayer is discretionary. The CRA is obligated to assess a return once received, but the obligation disappears once the assessment is complete. Second: Was there any consequence to the CRA having known and acknowledged the joint custody agreement in 2012 despite focusing on that fact only in 2015? The Court again answered no: "The law on this point is clear. [The CRA]'s knowledge has no legal impact. It does however foment considerable inconvenience and irritation." Third: If not obligated to apply the joint custody fact retroactively, was the CRA otherwise prevented from reassessing because of any relevant statutory limitation or equitable passage of time?" The Court addressed these issues separately. It determined that there was no limitations bar on the appeal. However, the Tax Court is not a court of equity and therefore cannot apply equitable remedies even if warranted.

McCallum v. The Queen

2022 DTC 1084

CRA Violated Procedural Fairness in Denying Applicant's CRB Claims Without Seeking Evidence

In July 2021, the CRA found that the Applicant was not eligible for the Canada Recovery Benefit ("CRB") because he had not earned at least $5,000 of employment or self-employment income in 2019, 2020, or in the 12 months preceding his application. A second CRA officer confirmed this denial in February 2022. Before the Federal Court, the Applicant sought judicial review and a direction to the CRA to find he had met the threshold. The evidence showed that he had submitted T4 and T4A slips in support of his income claims. He refused to submit any further documentation, claiming the slips were "conclusive" verification from a third party.

The Federal Court allowed the appeal, but declined the application to direct the CRA to find he had met the $5,000 requirement. Section 6 of the *Canada Recovery Benefits Act* requires an applicant to provide any information the CRA requests. The Court rejected the Applicant's argument that his ticking the boxes was conclusive. The CRA Guidelines state that the boxes can be used as an "indication" of income, but are not by themselves "validation" of income. The Guidelines offer typical means of verification (pay slips, invoices, etc.). However, as the recent Federal Court case of *Aryan v Canada (AG)*, holds, "if the CRA determines further documentation is required, they shall so advise the taxpayer." That the CRA did not do so here was a breach of procedural fairness. The Court concluded that the matter was to be sent back for determination by a different decision maker. However, given the Applicant's refusal to provide any information other than his return and income slips, it would not be appropriate to direct the CRA to find that he met the threshold and was eligible for the CRB.

Virani v. Canada (AG)

2022 DTC 5111

Industry Canada's Financial Contribution to CAE's Scientific Research and Experimental Development Project Ruled as Government Assistance

In March 2009, as part of the Strategic Aerospace and Defence Initiative ("SADI"), CAE Inc. ("CAE") and the Department of Industry Canada entered into an agreement with respect to the Falcon Project, a Scientific Research and Experimental Development project of CAE. Pursuant to this agreement the Department of Industry Canada contributed financially to the project. While admitting that this is in the nature of government assistance, the Appellant argues that a distinction should be made between loaned capital ("capital prêté") and the differential with respect to interest rates. The Tax Court had ruled that the sums received by CAE were not received as part of an ordinary commercial agreement and concluded that these sums were government assistance as defined by subsection 127(9) of the *Income Tax Act*. CAE is appealing this decision.

Dismissed with costs. The Federal Court of Appeal found that the Tax Court judge properly applied the jurisprudential principles in such matters and there was no palpable and overriding error that would justify the intervention of the Court of Appeal. The Tax Court judge concluded that sums received by CAE were not obtained under the terms of an ordinary commercial agreement. More particularly, the interest paid was substantially inferior to market rates and therefore in contradiction with the commercial interests of a private lender. Accordingly, the Court of Appeal ruled that the Tax Court judge did not err by not accepting the distinction proposed by the Appellant. The Court of Appeal found no support in the law or jurisprudence for the position of the Appellant. Accordingly, the Appeal was dismissed with costs.

CAE Inc. v. The King

2022 DTC 5108

FCA Rejects Motion to Enjoin CRA from Publishing Notice of Revocation of Charitable Status

The CRA informed the Applicant, a registered charity, of its intention to publish a notice in the Canada Gazette revoking its registration. The Applicant sought an order precluding the CRA from publishing the order until the Applicant could complete the objection process contemplated by *Income Tax Act* (the "Act") subsection 168(4). It also moved for an interim injunction under *Federal Courts Rules* 372 and 373 preventing the CRA from publishing the notice until the appeal process was complete. The CRA agreed to postpone publication until the motion was decided, in the present proceeding. Here the Applicant argued that publication would subject it to irreparable harm in three ways: (1) it would render its application moot; (2) it would prematurely deprive the Applicant of the advantages of registration; (3) it would cause the Applicant's fundraising activities to cease, impairing its ability to conduct this defence.

The Federal Court of Appeal dismissed the application. It explained the governing *Google/RJR-McDonald* three-part test for irreparable harm: there is a serious issue to be tried, publication of the notice will cause the Applicant irreparable harm, and the balance of convenience favours the Applicant and not the Respondent. The Respondent conceded there was a serious issue to be tried. However, the Court did not agree that the Applicant would suffer irreparable harm in any of the ways it contended. Regarding the mootness argument, it first noted that the application and this motion were supported by the same evidence, a single director's affidavit, so that any evidence it would introduce for the application was already there for the motion. Second, publication of the notice of revocation would not eliminate any opportunity the Applicant had under the ITA to challenge the CRA's decision to revoke its registration. Third, the Applicant's argument would permit any registered charity to frustrate the CRA's attempts at revocation by simultaneously filing an application for a long-term stay and a motion for a short-term stay. Regarding the advantages-of-registration argument, the Federal Court of Appeal has long rejected general assertions of irreparable harm in the context of charitable status revocation on the basis that a charity could always say that its work would be seriously impaired by the CRA's revocation. Finally, regarding the Applicant's argument that it needed to collect donations for its defense, the Court held that absent unique harm or damage, the ordinary consequences that flow from an entity losing its registered charity status do not constitute irreparable harm. Even if it could in an appropriate case, the Applicant received negligible funding from receipted donations. Although this was sufficient to dismiss the motion, the Court considered the balance of convenience and determined that, given the public interest in the CRA's enforcement of the obligations of registered charities, as well as the amounts involved, it favoured the Respondent.

Fortius Foundation v. MNR

2022 DTC 5107

Taxpayer Jointly and Severally Liable for Corporation's Tax Debt; "Dividends" Were Not Compensation

The Appellant was the sole director and controlling shareholder of a BC numbered company that provided management services to a corporation it owned, through which the Appellant offered accounting services. Under *Income Tax Act* section 160, if a tax debtor transfers property to another while it owes a tax debt, the CRA can assess the transferee for the debt. It did so for dividends the numbered company had issued to the Appellant, which the Appellant claimed were consideration for his services, claiming further that in current business practice, dividends were a legitimate form of compensation.

The Tax Court dismissed the appeal. There was no dispute that the numbered company had a tax debt, that it had transferred property to the Appellant under the label "dividends," and that it and the Appellant were not dealing at arm's length. Moreover, a dividend is an allocation of a corporation's undistributed profits, not compensation. Conversely, as the Tax Court has held on numerous occasions, there cannot be compensation for them. Therefore the Appellant was jointly and severally liable for the tax debt of the numbered company.

Murphy v. The King

2022 DTC 1079

Taxpayer Was Bound by Election to Abide by Lead Cases in Section 174 Proceeding

Appellant claimed donation tax credits on her 2005, 2006, 2007, 2010, and 2011 returns. When the credits were denied and she objected, hers was one of many similar objections CRA sought to bind to the result of four identified appeals under the authority of *Income Tax Act* section 174. CRA offered Appellant four possible responses: (1) waive her objection and appeal rights in exchange for a waiver of any interest accruing on the disallowed donation tax credits; (2) waive her objection and appeal rights and agree to be bound by the outcome of the lead cases; (3) appeal directly to the Tax Court; or (4) take no action. In January 2015 Appellant chose option (2) by signing an Agreement to be Bound. This agreement included a clause stating the appellant waived "any right of objection and appeal in respect of the issue of [her] entitlement to donation tax credit(s) ...". CRA's assessment was upheld in one of the four cases. Appellant then appealed to the Tax Court. The Tax Court held that she had full knowledge of her rights when she signed the Agreement and that she had waived her right to appeal.

The Federal Court of Appeal ("FCA") dismissed the appeal. The Appellant claimed she made her choice because if she had chosen to take no action, the CRA would have bound her in the option (2) group. The FCA noted in response that the CRA's letter explaining her options said only that the CRA "intends to request" the Tax Court bind objections. The FCA found no reversible error in the Tax Court's reasons. The Appellant was aware of her choices, including the choice to do nothing.

Oddleifson v. The King

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TAX NOTES

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