Tax Notes

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LATEST CHANGES TO THE WAGE, RENT, AND HIRING SUBSIDIES

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Since the Canada Emergency Wage Subsidy ("CEWS") first applied in March 2020, there have been countless changes, including adding the Canada Emergency Rent Subsidy ("CERS") and Canada Recovery Hiring Program ("CRHP"), changes to subsidy rates, changes to revenue calculations, and new top-up amounts, to name a few. Most recently, Bill C-2 enacted a new set of amendments to section 125.7 of the *Income Tax Act* that drastically change the eligibility criteria for the CEWS and CERS. Bill C-2 received Royal Assent on December 17, 2021. The following is a summary of these key changes to the programs that apply in late 2021 and into 2022.

Note that the government effectively rebranded the CEWS and CERS by replacing them with three new programs that are discussed below. Accordingly, the government now generally refers to the CEWS and CERS as the wage and rent subsidies, respectively. Although the calculations of the wage and rent subsidies remain mostly unchanged, they can only be accessed by meeting additional criteria per the three new programs. Thus, for the sake of continuity and clarity, this article still refers to the wage and rent subsidies as the CEWS and CERS respectively.

Note that all definitions referenced in the article are found under subsection 125.7(1) of the *Income Tax Act*.

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Extension to 2022

Bill C-2 extends the CEWS, CERS, and CRHP to May 7, 2022. The bill also empowers the government to further extend the subsidies up to July 2, 2022, by passing regulations. The new qualifying periods (plus the reference periods for the purpose of calculating the revenue reduction percentage) are listed below.

Period Number	Qualifying Period	Current Revenue Reference Period	Prior Revenue Reference Period	Alternative Prior Revenue Reference Period
22	October 24, 2021, to November 20, 2021	November 2021	November 2019	Average of January and February 2020
23	November 21, 2021, to December 18, 2021	December 2021	December 2019	Average of January and February 2020
24	December 19, 2021, to January 15, 2022	January 2022	January 2020	Average of January and February 2020
25	January 16, 2022, to February 12, 2022	February 2022	February 2020	Average of January and February 2020
26	February 13, 2022, to March 12, 2022	March 2022	March 2019	Average of January and February 2020
27	March 13, 2022, to April 9, 2022	April 2022	April 2019	Average of January and February 2020
28	April 10, 2022, to May 7, 2022	May 2022	May 2019	Average of January and February 2020

Eligibility Changes

After October 23, 2021, both the CEWS and CERS are accessible only to organizations that fall under one of three possible streams. These are as follows:

(1) The Tourism and Hospitality Recovery Program,

(2) The Hardest-Hit Business Recovery Program, and

(3) The Local Lockdown Program.

After October 23, 2021, if an organization does not qualify under one of these programs, it cannot access the CEWS or CERS — but it can still potentially qualify for the CRHP.

The base subsidy rate depends on the program under which the entity qualifies. Once the eligibility under one of the programs above and the applicable subsidy rate have been ascertained, you can calculate the CEWS and CERS amounts per the existing rules. Also note that Bill C-2 ends the top-up subsidy for the CEWS. However, the Lockdown Support (a top-up subsidy for the CERS) percentage rate remains at 25% in Periods 22–28.

Tourism and Hospitality Recovery Program

To qualify for the CEWS and CERS under the Tourism and Hospitality Program, the applicant must be a qualifying tourism or hospitality entity. First, to meet this definition, the entity must have experienced an average monthly revenue reduction of at least 40% over the first 13 qualifying periods of the CEWS — this is the "prior year revenue decline". The prior year revenue decline is the average of the percentage revenue declines for the first 13 qualifying periods (either the tenth or eleventh period is omitted from the calculation since they are identical amounts).

Second, the entity's revenue for these periods must have been earned primarily from carrying on one or more prescribed activities. There are too many eligible activities to list here, but the government cast a very wide net to ensure that many types of activities will qualify. A complete list of eligible activities can be found under Regulation 8901.1(2) and the government backgrounder titled *Types of Business Eligible for the Tourism and Hospitality Recovery Program*.

Last, even if the entity is a qualifying tourism or hospitality entity, it must have a sufficient revenue reduction percentage in respect of the qualifying period in order to qualify for the CEWS or CERS for that particular period. More specifically, the entity must have a revenue reduction percentage of at least 40% for the qualifying period.

Once it has been ascertained that an entity qualifies under this stream, its base subsidy rate should be determined. The base subsidy rates for this stream are summarized in the table below.

CEWS and CERS Base Rates under the Tourism and Hospitality Recovery Program

Current-month revenue decline	**Periods 22–26** **October 24, 2021 – March 12, 2022**	**Periods 27–28** **March 13 – May 7, 2022**
75% and over	75%	37.5%
40–74%	revenue reduction percentage e.g., 60% revenue decline = 60% subsidy rate	revenue decline ÷ 2 e.g., 60% revenue decline ÷ 2 = 30% subsidy rate
0–39%	0%	0%

Once the subsidy rate has been determined, the CEWS and/or CERS can be calculated per the existing rules.

Hardest-Hit Business Recovery Program

Organizations that experienced a severe decline in revenue since the pandemic began may be eligible for the Hardest-Hit Business Recovery Program. To qualify for the CEWS and CERS under this program, the entity must have experienced an average monthly revenue reduction of at least 50% over the first 13 qualifying periods of the CEWS — this is called the "prior year revenue decline", as previously discussed.

Second, to be eligible in a given qualifying period, the entity must experience a revenue reduction percentage in that period of at least 50%.

Once it has been ascertained that an entity qualifies under this stream, its base subsidy rate can be determined. The base subsidy rates for this stream are summarized in the table below.

CEWS and CERS Base Rates under the Hardest-Hit Business Recovery Program

Current-month revenue decline	**Periods 22–26** **October 24, 2021 – March 12, 2022**	**Periods 27–28** **March 13 – May 7, 2022**
75% and over	50%	25%
50–74%	10% + [(revenue decline – 50%) × 1.6] e.g., 10% + [(60% revenue decline – 50%) × 1.6] = 26% subsidy rate	5% + [(revenue decline – 50%) × 0.8] e.g., 5% + [(60% revenue decline – 50%) × 0.8] = 13% subsidy rate
0–49%	0%	0%

Once the subsidy rate has been determined, the CEWS and/or CERS can be calculated per the existing rules.

Local Lockdown Program

If an organization does not qualify for the CEWS and CERS per the two streams discussed above, it still may qualify if it is subject to a local lockdown due to public health measures. The rules for this program are in flux because the federal government announced temporary changes on December 22, 2021. The government will implement these changes by passing regulations. Accordingly, the discussion below reflects these proposed changes.

To qualify under this program, the entity must experience a "qualifying public health restriction" in the qualifying period. For this to be the case, one or more qualifying properties of the eligible entity — or of one or more specified tenants of the eligible entity — must be subject to a "public health restriction" for at least seven days in the qualifying period. Also, it must be reasonable to conclude that at least approximately 25% of the qualifying revenues of the eligible entity — together with the qualifying revenues of any specified tenants of the eligible entity — for the prior reference period were derived from the restricted activities.

Generally, a capacity-limiting health restriction would not meet the criteria under the definition of a "public health restriction" (125.7(1)). Given recent public health measures due to the Omicron variant, the government will expand the Local Lockdown Program such that an organization can qualify if:

- one or more of its locations is subject to a public health order that has the effect of reducing the entity's capacity at the location by 50% or more, and
- activities restricted by the public health order accounted for at least 50% of the entity's total qualifying revenues during the prior reference period.

If an entity qualifies for the CEWS and CERS under the Local Lockdown Program, it is eligible for the same base rates as the previously discussed Tourism and Hospitality Recovery Program. However, for Periods 24 and 25 (December 19, 2021 – February 12, 2022), the proposed wage and rent subsidy rates under the Local Lockdown Program are slightly different and are outlined in the table below.

Current-Month Revenue Decline	**Base Subsidy Rate**
75% and over	75%
25–74%	Revenue reduction percentage (e.g., 50% revenue decline = 50% subsidy rate)
0–24%	0%

This proposed change to the rate structure effectively means that the minimum revenue decline required to access the Local Lockdown Program is temporarily reduced from 40% to 25%.

Once the subsidy rate has been determined, the CEWS and/or CERS can be calculated per the existing rules.

New CEWS Restrictions

The House of Commons Standing Committee on Finance made two notable amendments to Bill C-2 that will restrict access to the CEWS for publicly-traded organizations.

First, new subsection 125.7(2.01) was added to the bill. This subsection basically prohibits a publicly-traded company or a subsidiary of such a company from receiving a payment under the CEWS program, if in the qualifying period it paid taxable dividends to an individual who is a common shareholder of that company or the subsidiary.

Second, new subsection 125.7(14.1) was amended. Initially, this new rule effectively required a publicly-traded entity to repay the CEWS to the extent that its executive compensation in the current year exceeded that of 2019. Similarly, the amendment to subsection 125.7(14) requires an entity to repay the CEWS to the extent of the amount of taxable dividends paid by the publicly-traded company or its subsidiary to an individual who is a common shareholder. This amendment applies in respect of the 24th and subsequent qualifying periods.

CERS Dollar Limit Increase

When calculating the CERS amount for a given period, an entity (plus any affiliated entities) cannot claim more than $300,000 in total qualifying rent expenses. Bill C-2 increases this limit to $1 million, effective October 24, 2021.

CRHP Rate Increase

Bill C-2 increases the subsidy rate to 50%, effective from October 24 until the expiration of the program. The rate started at 50% when the program was introduced, but it has since declined to 30% in the period that ended on October 23.

What's Next?

Since the federal government has been continuously modifying these programs to meet the needs of organizations as the pandemic situation evolves, I make the two following predictions. First, the government will likely change these programs again, unless the situation finally allows some or all of the programs to end. Second, any changes to these programs will depend on the future state of the pandemic, and I certainly won't attempt to predict that.

COVID-19 UPDATE

Given the rapidly changing information related to COVID-19 we are providing continuously updated information at blog.intelliconnect.ca/.

Federal

Support for Audiovisual Industry (February 11, 2022)

The federal government announced a second extension of the Short-Term Compensation Fund for Canadian audiovisual productions. Telefilm Canada will continue to provide as much as $150 million in compensation until 2023 to production companies whose filming has been interrupted or abandoned because of a COVID-19 diagnosis or outbreak. The Fund will end on March 31, 2023.

Expanded Access to Local Lockdown Program Extended (February 9, 2022)

On December 22, 2021, the federal government announced that it would expand access to the Local Lockdown Program by reducing the revenue drop threshold and allowing organizations that are subject to a capacity-limiting restriction of 50% or more to access the program. On February 9, 2022, the government announced its intention to extend these changes by one month to March 12, 2022.

Eligibility criteria for the Canada Worker Lockdown Benefit will also be extended by one month to March 12, 2022. Eligibility would continue to include workers in regions with capacity-limiting restrictions of 50% or more.

The government intends to implement these changes by using its regulatory authority.

Support for Those With Reduced GIS Due to Pandemic Benefits (February 8, 2022)

The Canada Emergency Response Benefit ("CERB") and the Canada Recovery Benefit ("CRB") were intended to support people who lost their job through the outset of the pandemic. However, the government recognizes that some Guaranteed Income Supplement ("GIS") and Allowance recipients may face lower benefit payments because of the income they received from the CERB and CRB. As announced in the Economic and Fiscal Update, the government will provide up to $742.4 million for one-time payments. These payments will alleviate the financial hardship of those seniors who qualified for and received CERB and CRB in 2020 but who subsequently saw that they counted as income and impacted their GIS or Allowance benefits. This automatic, one-time payment will support those who saw a loss of GIS or Allowance by compensating them for the full, annualized loss amount. Seniors would not need to take any action to receive the one-time payment.

To ensure that this issue does not reoccur, Bill C-12 will amend the *Old Age Security Act* to exclude any income received under CERB, CRB, the Canada Recovery Caregiving Benefit, the Canada Recovery Sickness Benefit, and the Canada Worker Lockdown Benefit for the purposes of calculating the amount of GIS and Allowance payable beginning in July 2022.

CRA Sending More Letters To Verify CERB Eligibility (January 27, 2022)

According to the Canadian Press, the CRA is sending a new round of letters to CERB recipients to verify whether they were eligible for the support. These letters are targeting individuals who may have earned more than $1,000 per month, which would indicate that they may not have been eligible for the benefits that they received. The CRA will allow for flexible repayment plans without interest, but only if the recipients respond to the letter.

Provincial

British Columbia

Support for Business Events and Conferences Sector (February 10, 2022)

Business events and workforce support initiatives, such as hiring and retaining employees, in the tourism sector will receive more than $9.3 million over the next two years as part of the Tourism Recovery Initiatives Action Plan.

The new Business Events and Conferences Restart Fund will provide up to $5 million this fiscal year and up to $3 million next year to help restart business travel. Funding will be provided to city destination management organizations that were significantly involved in attracting and hosting business events, conferences, and exhibitions before the pandemic. Eligible organizations will be invited to submit proposals to access this funding.

Further, to help address serious challenges to recruit and retain workers in tourism and hospitality, BC is investing in human resources support for this sector. More than $1.3 million will fund dedicated human resources specialists in five tourism regions for two years. In partnership with the tourism industry's human resources association, go2HR, these individuals will provide expert advice to tourism operators in each region, including workforce strategy, recruitment, onboarding, compensation, training, health and safety, and interpreting employment legislation.

Prince Edward Island

Funding for Tourism Organizations (February 7, 2022)

Two funding programs are available again to help operators prepare for the 2022 tourism season. The Tourism Activation Grant assists operators with start-up costs associated with opening for the 2022 season. The Tourism Ignition Fund encourages operators to develop new and creative products for the 2022 season to meet emerging consumer demands. To learn more about the grant, application process, and dates, visit: www.cbdc.ca/en/programs/tourism-activation-grant. To learn more about the fund, application process, and dates, operators should contact their local Regional Tourism Association or Destination Management Organization. Tourism PEI is also waiving fees for the 2022 season. The following fees will be waived: accommodation licensing fees for existing and new applicants; highway signage fees for existing signage holders; and Canada Select star rating program fees.

New Support Grant for Small Businesses (January 27, 2022)

The province is launching a new support grant for small businesses that have been impacted by the public health restrictions. The COVID-19 Small Business Support Grant will provide a grant to eligible businesses ranging from $2,500 to $7,500 based on the businesses' November 2021 gross payroll or revenue.

Eligibility criteria include:

- Closed to in-person services restricted by the enhanced Public Health Measures introduced on January 18, 2022, including:
  - Gyms, group fitness classes and indoor recreational facilities, bingo halls, museums, casinos, theatres, and cinemas (excluding municipally-owned or operated facilities).
  - Full-service restaurants, bars, or other licensed premises closed to in-room dining (quick-service restaurants are ineligible).
- Must be operating/located in PEI.
- Franchises locally owned/operated.

Incorporated businesses that operate more than one eligible business establishment under a single corporate entity, may apply for a rebate for each business establishment.

Seasonal businesses not operating during the period are not eligible.

Gross Monthly Payroll (November 2021)	Gross Monthly Revenue (November 2021)	Grant Amount
$1,000 – $15,000	$2,500 – $45,000	$2,500
$15,001 – $25,000	$45,001 – $75,000	$5,000
$25,001 or more	$75,001 or more	$7,500

To apply, visit www.princeedwardisland.ca/en/service/covid-19-small-business-support-grant.

Québec

Harmonization with Federal Bill C-2 (February 4, 2022)

On December 17, 2021, Federal Bill C-2, *An Act to provide further support in response to COVID-19*, received Royal Assent. Part 1 of the bill amends the *Income Tax Act* and the *Income Tax Regulations* to extend the Canada Emergency Wage Subsidy, the Canada Emergency Rent Subsidy, and the Canada Recovery Hiring Program until May 7, 2022. Part 2 of the bill enacts the *Canada Worker Lockdown Benefit Act*. This Act provides a framework for the payment of a new lockdown benefit to workers in regions where a lockdown is imposed for reasons related to COVID-19. In addition to provisions relating to the implementation of this new benefit, the Act includes provisions specifying the tax treatment of the benefit. The consequential amendments to the *Income Tax Act* and the *Income Tax Regulations* are deemed to have come into force on October 24, 2021.

Specifically, the federal tax legislation is amended to, among other things, provide for the taxation of the Canada Worker Lockdown Benefit by including it in the calculation of a recipient's income. Also, the federal tax regulations are amended to specify that a payment made under the *Canada Recovery Benefits Act* or the *Canada Worker Lockdown Benefit Act* is subject to federal withholding tax at the rate applicable to a lump-sum payment.

Since Québec's tax legislation and regulations are generally harmonized with the federal tax legislation and regulations with respect to the tax treatment of COVID-19 benefits, the above-mentioned amendments to the federal tax system introduced by Part 2 of Bill C-2 will be adopted for the purposes of the Québec tax system, with adaptations on the basis of their general principles. In addition, the changes made to the Québec tax system will apply on the same date as the changes to the federal tax system with which they are harmonized. The measures provided for in Part 1 of Bill C-2 will not be retained, since the Québec tax system does not provide for similar provisions.

FOCUS ON CURRENT CASES

This is a regular monthly feature examining recent cases of special interest, coordinated by Tony Schweitzer of Dentons Canada LLP. The contributors to this feature are from Dentons Canada LLP, Montreal, Toronto, Calgary, and Vancouver.

Will return next month!

CURRENT ITEMS OF INTEREST

Subsidy Regulations Enacted

On February 16, 2022, *Regulations Amending the Income Tax Regulations* (SOR/2022-11) were published in the Canada Gazette. These new regulations implement the previously announced expansion of the Local Lockdown Program applicable to the 24th and 25th qualifying periods. However, this does not include the extension of these measures to the 26th qualifying period that was recently announced on February 9.

Progress of Legislation

Federal Bill C-8, *Economic and Fiscal Update Implementation Act, 2021*, received Second Reading in the House of Commons on February 10, 2022.

Income Tax Folio Update

On February 3, the CRA added to its website new Income Tax Folio S6-F4-C1, *Testamentary Spouse or Common-law Partner Trusts*. A newly updated version of Income Tax Folio S5-F3-C1, *Taxation of a Roth IRA*, was also added on the same day.

Draft Tax Proposals

The Department of Finance published a new set of draft legislative proposals for public comment on February 4. It includes the following measures:

- Allow for the immediate expensing of up to $1.5 million of eligible investments by Canadian-controlled private corporations, sole proprietors, and certain partnerships to help businesses invest in new technologies and move forward with capital projects, as further detailed in the backgrounder *Expansion of the Eligibility for Tax Support for Business Investments*;
- Reduce — by 50% — the general corporate and small business income tax rates for businesses that manufacture zero-emission technologies;
- Expand access to the accelerated capital cost allowance for certain clean energy equipment and implement certain restrictions;
- Improve access to the Disability Tax Credit;
- Include postdoctoral fellowship income in "earned income" for registered retirement savings plan ("RRSP") purposes;
- Enhance Canada's income tax mandatory disclosure rules, as further detailed in the backgrounders *Mandatory Disclosure Rules* and *Income Tax Mandatory Disclosure Rules Consultation: Sample Notifiable Transactions*;
- Increase flexibility for plan administrators of defined contribution pension plans to correct for both under-contributions and over-contributions;
- Improve the fairness of certain taxes applicable to registered investments;
- Improve administration of, and compliance with, electronic filing and certification of tax and information returns;
- Temporarily extend certain timelines for the Canadian Film or Video Production Tax Credit ("CPTC") and the Film or Video Production Services Tax Credit ("PSTC");
- Combat the avoidance of tax debts through complex transactions that attempt to circumvent the tax debt collection avoidance rule;

- Ensure that the Canada Revenue Agency ("CRA") has the authority it needs to conduct audits and undertake other compliance activities;
- Limit the amount of interest and other financing expenses that businesses may deduct for income tax purposes based on a proportion of earnings;
- Enhance the tax reporting requirements for trusts in order to improve the collection of beneficial ownership information;
- Update rules that address tax planning relating to allocations to redeeming fund unit holders in the mutual fund industry;
- Address an error in the current law for the COVID-19 GST Credit Top-up so that it is consistent with the original intent of the measure;
- Ensure the proper functioning of the revocation tax with respect to organizations that have their registration as a charity revoked due to being listed as a terrorist entity; and
- Clarify the GST/HST treatment of crypto asset mining by specifying that crypto asset mining would generally not be considered a "supply" for GST/HST purposes.

Comments on these proposals should be submitted to Consultation-Legislation@fin.gc.ca.

Submissions on the following measures should be received by April 5, 2022:

- Taxes applicable to registered investments;
- Mandatory disclosure rules;
- Avoidance of tax debts;
- Audit authorities;
- Reporting requirements for trusts;
- Mutual Funds: Allocation to redeemers; and
- Crypto asset mining.

Submissions specifically relating to the Interest Deductibility Limitation measure will be accepted until May 5, 2022.

Submissions on all other measures should be received by March 7, 2022.

RECENT CASES

Appeal allowed in a case relating to the tax payable by estate; Minister ordered to allow deduction of amount paid to beneficiaries pursuant to s. 104(6)

This case concerns an assessment raised by the Minister against the estate of Georges Robillard ("the Estate") with respect to the 2013 taxation year. At the time of his death, Mr. Robillard was the sole shareholder of Gestion Georges Robillard Inc. ("Gesco"), a Canadian private corporation holding company that held Mr. Robillard's investments. Mr. Robillard bequeathed the shares equally to his three universal legatees (beneficiaries). By reason of his death, Mr. Robillard is deemed to have disposed of his shares at their fair market value resulting in a capital gain of $1,912,467. The Minister also considered that subsection 84(2) of the *Income Tax Act* (the "Act") applied in the circumstances, resulting in a deemed dividend of $1,567,016 for the Estate. To avoid this double taxation issue, the liquidators, based on the advice of their tax advisor, had put in a place a post-mortem pipeline tax planning strategy. These operations intended to use the adjusted cost base related to the deemed disposition of Gesco's shares to distribute Gesco's assets as capital. The appellant argued that subsection 84(2) was not applicable. Both parties also asked the Court if, considering subsection 84(2), the Estate may deduct in its 2013 tax return sums paid to the beneficiaries pursuant to subsection 104(6) of the Act. These represented an amount totalling $759,000.

The appeal was allowed. The Minister's position regarding subsection 84(2) relied principally on a Federal Court of Appeal ("FCA") decision, *The Queen v. MacDonald* (2013 DTC 5091). The Tax Court stated that this case has created a lot of uncertainty and some confusion. In the case at hand, the TCC found some merit in the appellant's position that the *MacDonald* decision should not apply in these specific circumstances. The Tax Court judge found some ambiguities in the *Macdonald* case that could, in his opinion, warrant the case to be reviewed. Nevertheless, in view of the *stare decisis* rule, the TCC is subject to the conclusions reached by the FCA in the *MacDonald* decision. Only the FCA may re-examine the *MacDonald* decision. Therefore, subsection 84(2) was ruled applicable. On the other hand, the TCC agreed with the appellant's position that pursuant to subsection 104(6) the Estate should be able to deduct the $759,000 amount paid to the universal legatees. Accordingly, the appeal was allowed and the Minister ordered to reassess in order to allow the Estate the $759,000 deduction.

Robillard (Succession) v. The Queen

2022 DTC 1006

Application to extend the time to file a notice of objection dismissed

The applicant first came to Canada under a temporary work visa from 2011 to 2012. He worked for Tata Consultancy Services ("Tata"). Tata paid a housing allowance to the applicant during his residency in Canada. He filed his Canadian tax returns for 2011 and 2012. While he reported his Canadian income in Canada, he (like all other Tata work visa employees) did not claim the housing allowance. Tata did not issue a T4A to such employees. The Minister reassessed the applicant and other Tata employees, asserting that the housing allowance was taxable. Those assessments arose during the 2014–2015 period. Unlike other Tata employees, the applicant was no longer in Canada, having left in November 2012. Therefore, the notices of reassessment were sent to the applicant's last address in Canada on file with

the CRA. From 2013 to 2019, the applicant lived in various locations around the world. He returned to Canada in 2019 and has lived here since. After his return, he discovered the uncontested 2015 reassessment and the resulting outstanding tax debt and accrued interest in May 2020. He took action, objected, and received the Minister's response: any objection to the sent notices of reassessment was long overdue, nullifying any ability to appeal. The applicant applied for an extension of time to file a notice of objection.

The appeal was dismissed. The applicant's wages hover at subsistence and he's the sole wage earner for his family, including his aged and ill father in India. He cannot afford to pay the tax debt. Furthermore, the Minister reconsidered the taxable benefit concerning the housing allowance for other Tata employees who did object to the reassessed taxable housing benefit. Those successful resolutions occurred after specific taxpayers filed timely notices of objection. The evidence shows the applicant's last recorded address for service was the address in Canada to which the reassessments were sent. The applicant confirmed the address and that the reassessments were likely sent to him there. The *Income Tax Act* is clear on when and only when courts may grant an application to extend the time to file a notice of objection. Unless an application has been submitted before the expiration of the one-year period after the initial 90-day appeal period, the Court, like the Minister, is prohibited by Parliament from granting the application. Similarly, the sending by the Minister of the (re)assessment to the last known address on file is the critical event and date, not its receipt by the taxpayer. There is no legal or factual basis or combination thereof which affords the Court power to grant the application. The application was dismissed, even with the sympathetic circumstances, but the Court did suggest (it could not order) a voluntary reassessment by the Minister with the consent of the taxpayer or making a request for an interest waiver.

Rajagopala v. The Queen

2022 DTC 1004

Severance payment is "retiring allowance", cannot add to RRSP contribution room

After losing his job, the appellant negotiated a severance payment of some $165,000, which he received in 2014 and included in his taxable income. In February 2015, he made a contribution of $24,270 to his RRSP. In 2018, the CRA assessed the appellant for $1,106.28 in Part X.1 tax on the ground that he had overcontributed to the RRSP.

The Tax Court allowed the appeal and instructed the CRA to reconsider and reassess. The severance payment was not employment income and was not taxable on that basis. In response to an FCA decision to that effect, Parliament defined such payments as "retiring allowances" and made them taxable under subsection 56(1) of the *Income Tax Act*. In addition, the appellant argued that the CRA had made errors in calculating the tax. The Court agreed that there were errors and that the CRA had overlooked critical information, and calculated the tax due as $682.33.

Wyrstiuk v. The Queen

2022 DTC 1005

Tax Court allows challenge to net worth assessment

The Appellant, his father, and two cousins operated a successful barn painting business. The Appellant acted as the owner of the business and the other family members acted as subcontractors. The cousins were paid mostly in cash, the father via a credit card (to deter him from substance and gambling abuse). The upshot was that the business had no records. The CRA conducted a net worth assessment ("NWA") of the 2011 and 2012 taxation years that disallowed payments to the subcontractors ($84,000 and $110,000 respectively) as expenses, classifying them as business income and thereby increasing the Appellant's tax burden. This appeal sought the allowance of those expenses and remission of the gross negligence penalties resulting from the disallowance.

The appeal was granted. The Appellant's books and records were chaotic, demonstrating his "misunderstanding of even rudimentary accounting practices" and endangering his credibility in general; however, once he learned relevant accounting requirements he "changed his ways", even correcting his own testimony at the hearing. The Court took this flexibility to render other aspects of his testimony credible, and found that it was more probable than not that he employed subcontractors to perform his business. The NWA itself noted the necessity of subcontractors for the appellant to conduct a business, yet the auditor made no allowance for their compensation. The Court found for the appellant but had no way of determining the actual expenses he had incurred in subcontractor payments. It therefore relied on the amounts given in the NWA: $44,681.12 for 2011 and $65,775.25 for 2012. As for the penalties, given that the Appellant's business acumen represented "abject ignorance" rather than "wilful blindness", especially in 2011, the first year of the enterprise, the Court remitted the penalties for both years on a "one-time" basis."

Stewart v. The Queen

2022 DTC 1002

Court dismisses appeal of allegedly unfair application of the 36-month rule in the definition of GRE, suggesting also that a tax remission may be in order

This case relates to amounts payable by the pension plan for City of Montréal civil servants to the appellant's deceased spouse. The amount payable was established in 2015, but the payment was effected more than 36 months after the spouse passed away. The evidence shows that the delay was caused by the delay in deciding whether employees entitled to the pension plan's benefits had to pay for a part of the plan's reorganization. Payment to the estate was only made after the decision was made. The delayed payment and 36-month rule included in the definition of graduated rate estate ("GRE") in subsection 248(1) of the *Income Tax Act* resulted in income tax being assessed at the rate of 33% instead of being subject to the GRE since the payment was made more than 36 months after the appellant's spouse passed away. The only issue in the appeal is whether the GRE should apply in these particular circumstances.

The appeal was dismissed. The appellant argued that applying the 33% rate was an unintended, unfair, and unjust consequence resulting from a situation over which the deceased and estate had no control and asked the Court to confirm that the GRE should apply, exceptionally. The judge agreed that the application of the 36-month rule and consequential higher tax rate was unfair and unjust in these particular circumstances. Unfortunately, the Court said it could only rule on the law as enacted and could not change it. Accordingly, the judge had no alternative but to dismiss the appeal. The Court suggested the appellant file a tax remission request. Such requests are dealt with by the Minister

of National Revenue and the governor-in-council; the Tax Court is not involved at all in such requests and related procedures. The judge nevertheless expressed the wish that the Minister agree with him and the appellant and recommended that such a remission be granted.

Wenikajtys (Succession) v. The Queen

2022 DTC 1001

Request for judicial review of decision refusing the validity of disclosure made under the Voluntary Disclosure Program allowed in part; request that the Court issue an order of mandamus and rule on the validity of the disclosure denied

This case is a request for judicial review of a decision refusing the disclosure presented by the Appellant under the Voluntary Disclosure Program ("VDP") on the basis that the disclosure was not made voluntarily as it was presented after the audit of the Revenue Department had begun. The process was ambiguous and long, resulting in two decisions being rendered over time but with the same conclusion, i.e., the disclosure was not voluntary. The Respondent recognized that the first decision may have included procedural errors and possible reasonableness of partiality. Accordingly, the Respondent was open to review the case again. However, the Appellant sought instead not only that the decision be reviewed again, but also wished for a "directed verdict" ("verdict dirigé") under which the Court would substitute itself for the VDP and issue a declaration of validity of the disclosure through an order of mandamus. In view of the history of the case, the Appellant had doubts about the impartiality of the VDP and of being treated fairly. The Court is entitled to substitute itself for a governmental agency and issue an order of mandamus, but only in extraordinary circumstances. The Appellant also argued that, as part of the complex process, the fact that the Respondent had requested that supplementary information be provided signified, in accordance with the notion of promissory estoppel ("préclusion promissoire"), that the validity of the disclosure was accepted. Jurisprudence confirmed that promissory estoppel principles may apply in the context of a disclosure under the VDP. The Court was not convinced by the arguments of the Appellant in this respect. The Court stated that the fact that supplementary documents were requested for the years covered by the disclosure does not suggest a promise of accepting the voluntary disclosure; it merely allowed the file to be completed. It is not a tacit promise or a roadblock to procedural equity.

The appeal was allowed in part. The Court concluded that there was more than one possible reasonable issue to the case. The Appellant failed to establish exceptional circumstances justifying that the Court substitute itself for the Respondent in ruling on the validity of the disclosure. In effect, the Court did not agree with the Appellant that the VDP was incapable of reviewing the decision impartially and with procedural fairness. Accordingly, the Court only allowed the request to the extent of ordering the VDP to review its decision again by using individuals that had not been implicated previously in the case and treat the matter urgently. The request for the Court to issue itself a declaration of validity of the disclosure by order of mandamus was denied.

Christen v. CRA

2022 DTC 5003

TAX NOTES

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