Tax Notes

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FEDERAL TAX INCENTIVES FOR ZERO-EMISSION VEHICLES

- –Cameron Mancell, CFP®, Senior Technical Writer, Wolters Kluwer Canada

There has been a lot of activity lately regarding climate change initiatives. This is not new, as the topic came up as far back as the February 18, 1997, federal budget which included some limited environmental initiatives. However, the pace has picked up recently as the effects of climate change are becoming more and more apparent, costly, and deadly. One of these initiatives is the shift from fossil fuel-burning vehicles to electric vehicles. In that regard, with all the recent changes in that field, we at Wolters Kluwer thought it would be useful to provide a summary of where Canada currently stands in terms of the tax incentives for zero-emission vehicles.

The cost of a zero-emission vehicle is temporarily eligible for a full deduction under the capital cost allowance ("CCA") rules. A zero-emission vehicle is a motor vehicle that is a plug-in hybrid with a battery capacity of at least 7 kWh, or is fully electric or hydrogen-powered. Vehicles that are subsidized by the federal purchase incentive are excluded from the definition of a zero-emission vehicle, and are thus ineligible for the preferential tax treatment. The vehicle must be acquired after March 18, 2019, and before 2028. "Zero-emission vehicle" is defined under subsection 248(1) and clarified by Regulation 1102(26).

Prior to March 2, 2020, a vehicle was ineligible for the fast write-off if it was used or acquired for use for any purpose before it was acquired by the taxpayer, or if it was subject to deduction for CCA or a terminal loss by another person or partnership, which excluded used vehicles. However, the definition of a zero-emission vehicle was expanded to include used vehicles acquired on or after March 2, 2020.

Accordingly, for vehicles acquired on or after March 2, 2020, a vehicle is eligible for the accelerated CCA only if it would otherwise be "accelerated investment incentive property" which is defined by Regulation 1104(4). Essentially, this definition requires that the vehicle was not acquired on a tax-deferred rollover basis, nor was it previously owned or acquired by the taxpayer, or a non-arm's length person or partnership. Therefore, used vehicles acquired in the usual arm's length way on or after March 2, 2020, are eligible for the accelerated CCA.

ZERO-EMISSION VEHICLE CLASSES

A depreciable asset must be included in the appropriate CCA class and there are multiple classes for zero-emission vehicles. A zero-emission vehicle will most likely be included in Class 54, which includes passenger vehicles that would otherwise be included in Class 10 or 10.1. However, if a zero-emission vehicle would otherwise be included in Class 16, (a truck or tractor designed to haul freight, a taxicab, or a vehicle acquired for short-term rental or leasing), it is included in Class 55.

Off-road zero-emission automotive equipment is included in Class 56. For example, off-road zero-emission automotive equipment could include trolley buses, equipment designed or adapted for use on rails, aircraft, and watercraft. The class was introduced effective for equipment acquired on or after March 2, 2020. To be included in Class 56, the property must be automotive equipment (other than a motor vehicle) that is fully electric or powered by hydrogen, or an addition or alteration made by the taxpayer to automotive equipment (other than a motor vehicle) to the extent it enables the automotive equipment to become fully electric or powered by hydrogen. Property is included in Class 56 only if it would otherwise be "accelerated investment incentive

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property", which is defined under Regulation 1104(4). Basically, this requirement prohibits equipment that was acquired by the taxpayer on a tax-deferred rollover basis, or was previously owned or acquired by the taxpayer or a non-arm's length person or partnership.

A taxpayer can elect under Regulation 1103(2j) to exclude a zero-emission vehicle from Class 54, 55, or 56 so it is instead included in Class 10 or 10.1 (in the case of Class 54), Class 16 (in the case of Class 55), or another applicable class (in the case of Class 56).

CALCULATING CCA

The CCA deduction is determined on a declining balance basis, which means that the CCA is computed by multiplying the CCA rate by the undepreciated capital cost ("UCC").

Vehicles that are available for use before 2024 are eligible for a 100% CCA deduction with no half-year rule, so the full cost is deductible. Vehicles that become available for use in 2024 and 2025 are eligible for a phased-out first-year deduction at a rate of 75%, and vehicles that become available for use in 2026 and 2027 are eligible for a phased-out first-year deduction at a rate of 55%.

Where a vehicle is acquired during the phase-out period and thus not fully written-off in the first year, the CCA is computed in subsequent years by multiplying the regular rate by the remaining UCC. The regular rates are 30% for Class 54, 40% for Class 55, and 30% for Class 56.

Where a taxpayer has a non-calendar taxation year and acquires a zero-emission vehicle during the phase-out period, Regulation 1100(2.01) prorates the percentage used to compute the accelerated CCA for that year. Specifically, Regulation 1100(2.01) applies to non-calendar taxation years that straddle 2023 and 2024 or 2025 and 2026. For a year straddling 2023 and 2024, the rate is a blend of 100% and 75% and is prorated based on the cost of properties acquired in each calendar year. For a year straddling 2025 and 2026, the rate is a blend of 75% and 55% and is also prorated based on the cost of properties acquired in each calendar year.

CAPITAL COST LIMIT FOR PASSENGER VEHICLES

Paragraph 13(7)(i) limits the capital cost for a zero-emission passenger vehicle, which is a zero-emission vehicle that is included in Class 54. Regulation 7307(1.1) prescribes the capital cost limit to be $59,000, effective for vehicles acquired on or after January 1, 2022. Prior to 2022, this limit was $55,000. Where a taxpayer's cost of a zero-emission passenger vehicle exceeds $59,000, the capital cost is deemed to be $59,000 plus applicable federal and provincial sales tax.

Recall that the GST/HST paid and recovered should be considered when determining the capital cost of a zero-emission vehicle. GST/HST input tax credits ("ITCs") are considered government assistance for CCA purposes, so the amount of an ITC reduces the capital cost of the asset. The ITC for zero-emission vehicles is also subject to a $59,000 cost limit for GST/HST purposes.

The $59,000 limit resembles the $34,000 capital cost ceiling for Class 10.1 passenger vehicles. However, unlike Class 10.1, there is no requirement that the zero-emission passenger vehicle be included in a separate class. There are no limitations to the recapture of CCA, or the recognition of a terminal loss on the disposition of a zero-emission passenger vehicle, which also differs from the limitations applicable to Class 10.1.

Normally, when a taxpayer disposes of a depreciable asset, the UCC of the class is reduced by the lesser of the proceeds of disposition of the asset or the asset's capital cost. However, if a Class 54 zero-emission passenger vehicle is disposed of and its capital cost exceeded $59,000, subparagraph 13(7)(l)(ii) reduces the proceeds for tax purposes. This provision prorates the proceeds by a factor equal to the capital cost of the vehicle divided by the actual cost of the vehicle. This formula also adjusts the actual cost to account for government assistance received or repaid. The reduction ensures that any computation of CCA recapture or terminal loss accurately reflects that a portion of the asset's cost was not depreciable for tax purposes.

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CHARGING STATIONS AND RELATED EQUIPMENT

CCA Classes 43.1 and 43.2 include fixed location electric vehicle charging stations (and related equipment) and electrical energy storage property (i.e., batteries, compressed air storage, flywheels, ancillary equipment, and related structures) that are acquired after March 21, 2016, that had not been used or available for use before March 22, 2016.

If the cost of the charging station or related equipment is not eligible for a 100% write-off under the Immediate Expensing rules, it may still be eligible for a 100% write-off under the Accelerated Investment Incentive. Currently, Class 43.1 or 43.2 equipment that is acquired after November 20, 2018, and that is available for use before 2024 (and that meets the definition of "accelerated investment incentive property") is eligible for CCA deduction for the entire cost of the asset.

Class 43.1 or 43.2 equipment that becomes available for use in 2024 is eligible for a first-year 75% CCA deduction. Class 43.1 equipment that becomes available for use in 2025 is eligible for a 75% CCA deduction (Class 43.2 is closed for property acquired after 2024). For Class 43.1 equipment that becomes available for use in 2026 or 2027, the first-year rate is reduced to 55%.

CURRENT ITEMS OF INTEREST

WHAT YOU NEED TO KNOW FOR THE 2023 TAX-FILING SEASON

On February 21, 2023, the Canada Revenue Agency published "What You Need to Know for the 2023 Tax-filing Season" highlighting important information for taxpayers. New or updated benefits, credits, and services include:

- Climate Action Incentive Payment – The Climate Action Incentive Payment ("CAIP") is a tax-free amount paid to help individuals and families offset the cost of the federal pollution pricing. Individuals may be eligible for the CAIP if they are a resident of Alberta, Saskatchewan, Manitoba, or Ontario. This year, individuals may also be eligible for the CAIP if they are a resident of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island; however, they will not be eligible for the April 2023 payment because the federal fuel charge will only apply to these provinces as of July 1, 2023. Eligible individuals in those provinces will automatically receive their first payment in July 2023.
- Canada Dental Benefit – The new interim Canada Dental Benefit is available to eligible families earning less than $90,000 per year. It provides financial support for parents and guardians of children under 12 years old if they receive dental care in Canada and do not have access to private dental insurance. In order to receive this benefit, individuals need to have filed their 2021 tax return.
- One-time top-up to the Canada Housing Benefit – The government introduced a one-time $500 payment to help lower-income renters facing housing affordability challenges. Applications are open until March 31, 2023. To obtain the one-time payment, individuals need to have filed their 2021 tax return.
- Simplified Northern Residents Travel Deduction – The CRA is launching the Simplified Northern Residents Travel Deduction, a pilot project to make it easier for northern residents to determine the lowest return airfare, one of the three amounts required to claim the travel deduction. Available on canada.ca/lowest-return-airfare, the simplified version features tables that identify the lowest return airfare amount found from airports with regularly scheduled commercial flights to a designated city.
- Disability tax credit –
  - For 2021 and later tax years, an individual diagnosed with type 1 diabetes is deemed to have met the two times per week and an average of at least 14 hours per week requirements for life-sustaining therapy.
  - The CRA has launched a fully digitalized web application for medical practitioners for the disability tax credit. This will make the application process easier for persons with disabilities.

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- First-time home buyers' tax credit – The amount used to calculate the first-time home buyers' tax credit has increased to $10,000 for a qualifying home purchased after December 31, 2021.
- Home accessibility tax credit – The annual expense limit of the home accessibility tax credit has increased to $20,000 for the 2022 taxation year.
- Labour mobility deduction – The labour mobility deduction provides eligible tradespeople and apprentices working in the construction industry with a deduction for certain temporary relocation expenses. Eligible individuals may be able to deduct up to $4,000 in eligible expenses per year.
- Medical expense tax credit (for surrogacy and other expenses) – The list of eligible medical expenses has been expanded to include amounts paid to fertility clinics and donor banks in Canada to obtain donor sperm or ova to enable the conception of a child by the individual, the individual's spouse or common-law partner, or a surrogate mother on behalf of the individual. In addition, certain expenses incurred in Canada for a surrogate or donor may be considered medical expenses of the individual if they are of a type that would be otherwise permitted as medical expenses of the individual.
- Request to deduct federal COVID-19 benefits repayment in a prior year – Individuals should complete and attach Form T1B, Request to Deduct Federal COVID-19 Benefits Repayment in a Prior Year, to their 2022 income tax and benefit return to request to have the amount of federal COVID-19 benefits they repaid in 2022 deducted on their 2020 or 2021 return or split between their 2022 return and the return for the year they received the benefit. The CRA will then automatically reassess the return(s) to apply the deduction so individuals do not need to make a separate request to change prior year return(s).
- Zero-emission vehicles – A used vehicle may now qualify as a zero-emission vehicle and may be included in Class 54 or Class 55, provided it is acquired after March 1, 2020, and becomes available for use prior to 2028 (and meets other criteria). The capital cost allowance ("CCA") rate for class 54 is 30% and the CCA rate for class 55 is 40%. For such property, a higher deduction (up to a maximum of 100%) may apply for certain eligible vehicles (phase out starting after December 31, 2023).
- Change My Return modernization – Improvements have been made to the Change My Return service in My Account including a new layout, improved search functionality, new interfaces, and fewer restrictions.
- Email notification - Change My Return & ReFILE supporting documents notification – When using Change My Return or ReFILE, the CRA may ask for supporting documents. Individuals will receive an e-notification and a letter will be automatically generated (in the preferred official language on file) advising that supporting documents are required. The letter will be available in the Mail section in My Account.
- Payment arrangements – If an individual cannot pay an existing debt in full, they may be eligible for a payment arrangement. Payment arrangement options have been expanded to reflect current realities. The Payment Arrangement Calculator has also been added to My Account and My Business Account. This self-service tool allows individuals to submit a potential payment arrangement without having to contact the CRA. If the proposed payment arrangement does not meet the CRA payment policy, a CRA officer will reach out to complete the arrangement.
- Taxpayer self-service – A new "Available payment(s)" section is available on the "Accounts and payments" page in My Account. A "Transfer payment(s)" option is available to taxpayers and their authorized representatives to transfer available payments to an existing tax balance or to a current year instalment within the Individual tax account, in real time.
- Underused Housing Tax – Services for Underused Housing Tax will be added in both My Account and My Business Account for those who need to manage taxes on properties within Canada and do not meet the usage requirements.

DEPARTMENT OF FINANCE RELEASES ANNUAL REPORT ON FEDERAL TAX EXPENDITURES

The Department of Finance Canada released its annual estimates of the fiscal cost of federal tax measures in the *2023 Report on Federal Tax Expenditures—Concepts, Estimates and Evaluations*. This annual report helps ensure Canadians' tax dollars are put to good use by an efficient and responsible federal government. In addition to providing transparency about Canada's tax system, this year's report contains three analytical papers

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that evaluate the impact and efficacy of various tax measures designed to support persons with disabilities, Northern residents, and post-secondary students. The release of the report coincides with the tabling of the Main Estimates in the House of Commons by the President of the Treasury Board.

You can read the full report here: www.canada.ca/en/department-finance/services/publications/federal-tax-expenditures/2023.html.

ELECTRONIC FILING OF SPECIAL ELECTIONS AND RETURNS IS NOW AVAILABLE

The CRA is digitizing the Special Elections and Returns ("SERs") forms which will allow taxpayers to file these requests electronically using Submit Docs or certified software. The forms that are currently online in their new format include the T217, T2 Schedule 89, and T2054.

To ensure requests are processed in a timely manner, the CRA strongly encourages taxpayers to use these new updated forms. Using the old forms may cause delays in processing your election and the CRA may need to contact you to request additional information.

As the CRA continues to update SERs forms, the new versions of the T2057, T2058, and T2059 will be available online as of March 1, 2023. They **must** now have a valid account number when they are filed with the CRA. If the account number is missing, or is zero, the election may be returned to the taxpayer for the missing information.

The remaining 40 election/return forms will be digitized over the next few years. Digital access to SERs forms will help the CRA improve its service to taxpayers, by giving them more timely access to important information. Additionally, taxpayers and/or their representatives will immediately receive a confirmation number upon filing to verify the SERs form has been received by the agency.

Since some taxpayers will still want to use paper forms, they will continue to have access to the paper versions of the SERs forms after they are digitized.

MEAL AND VEHICLE RATES USED TO CALCULATE TRAVEL EXPENSES FOR 2022

The CRA officially published its meal and vehicle rates used to calculate travel expenses for 2022. These amounts are used for claiming travel costs via the simplified method for the medical expense tax credit, the moving expense deduction, and the northern residents deduction. We previously reported the kilometric distance rates in *Tax Notes* issue 718, but the simplified meal amounts for 2022 have just become available.

The meal rates for 2022 are the same as for 2021. If you choose the simplified method, claim in Canadian or US funds a flat rate of $23 per meal, to a maximum of $69 per day (sales tax included) per person, without receipts. Although you do not need to keep detailed receipts for actual expenses if you choose to use this method, the CRA may still ask you to provide some documentation to support your claim.

FOCUS ON CURRENT CASES

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

BÉRUBÉ V. THE KING, 2023 DTC 1011 (TAX COURT OF CANADA), AND D'AUTEUIL V. THE KING, 2023 DTC 1010 (TAX COURT OF CANADA) —TAXPAYERS' POKER WINNINGS HELD TO BE BUSINESS INCOME

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When examining if poker income is business income, the subjective intention of the taxpayer to make a profit, the use of expertise, and whether the taxpayer has other sources of income are all relevant factors. When a taxpayer plays poker with a subjective intention to make a profit and earns a living playing poker through utilizing their skill and expertise, the indicia of business income are present and the income derived from poker is taxable as business income.

Background

The decisions of *Bérubé* and *D'Auteuil* were heard simultaneously by Justice Réal Favreau.

Antoine Bérubé and Philippe D'Auteuil (together, the "Taxpayers") were both successful poker players and earned income from their poker activities. The Taxpayers played poker both online and in person and primarily participated in tournament play.

The Taxpayers' online poker activities were audited and it was determined that the Taxpayers frequented poker websites for an average of 274 days per year, participating in online poker games for over 20 hours a week. In addition to auditing the playing hours, the audit also revealed the Taxpayers depositing over $1,000,000 each on the poker sites during the relevant years.

In addition to playing poker, the Court noted that the Taxpayers devoted time to training in poker. Such training included the review and analysis of the hands in which they participated, listening to broadcasts devoted to poker, watching poker-related content, and utilizing software to track poker analytics for their playing.

As a result of their poker winnings, the Minister of National Revenue (the "Minister") assessed and reassessed the Taxpayers' income as follows:

Year	Antoine Bérubé	Philippe D'Auteuil
2008	$1,648,676	N/A
2009	$884,323	$305,661
2010	$454,867	$1,410,320
2011	$231,208	$1,920,558
2012	N/A	$736,848

In addition to the reassessments, the Minister applied gross negligence penalties under subsection 163(2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "ITA"); however, a settlement agreement was reached and the penalties were vacated.

Following a partial consent judgment entered into between the parties, it was agreed that if the Court found the poker winnings were business income, the following expenses incurred by the taxpayers were deductible:

Year	Antoine Bérubé	Philippe D'Auteuil
2008	N/A	N/A
2009	$206,920	$305,661
2010	$48,939	$3,550
2011	$3,367	$1,648
2012	N/A	$952,629

The Taxpayers submitted that they began playing poker in a recreational manner and did not intend to play poker in a business-like fashion. They played poker for entertainment purposes, seeking out competition, adrenaline, and thrills. They did not use bookkeeping or proper accounting methods, and they had no strategy to develop a viable business. Their ability to make a profit was unpredictable and unstable.

Further, the Taxpayers stated they did not engage in behaviour that minimized risk. Instead, they played poker while under the influence of alcohol and other drugs, and played at all hours of the day and night. Lastly, the Taxpayers submitted that the number and frequency of bets were more indicative of compulsive behaviour and addiction, as opposed to sustained commercial poker playing.

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In addition to playing poker, Philippe D'Auteuil also took “stakes” in other poker players' tournaments, meaning he purchased shares in the participation of a player such that if the player won Mr. D'Auteuil would receive a share of the winnings.

Issues and Decision

The sole issue before the Court was whether the net winnings from the Taxpayers' gambling activities should be included in computing their respective incomes as income from a business under sections 3 and 9 of the ITA.

The Taxpayers attempted to argue, unsuccessfully, that poker is a game of luck and chance such that paragraph 40(2)(f) of the ITA is applicable and the reassessments should be set aside. However, the Court held that as the poker winnings were not derived from a lottery or collective bet, paragraph 40(2)(f) is not applicable.

A variety of experts provided testimony on whether poker is a game of chance or skill. The experts disagreed on this point; however, the Court concluded that whether poker is a game of chance or skill is ultimately not relevant in determining whether or not the Taxpayers carried on a business during the years in dispute.

The Court analyzed the Taxpayers' activities using the two-pronged approach set out in the Supreme Court of Canada *Stewart v. Canada*, 2002 DTC 6969, decision. Under the *Stewart* approach, the first step is to determine whether the poker activity is undertaken with a view to making a profit or whether it is a personal endeavour.

The Court, citing *Moldowan v. The Queen*, 77 DTC 5213 (SCC), used the following four criteria to determine whether a taxpayer has a reasonable expectation of profit:

(a) the statement of profits and losses for previous years;
(b) the taxpayer's training;
(c) the taxpayer's intended course of action; and
(d) the capability to make a profit.

As this is not an exhaustive list of criteria to be considered, the Court will also look to additional factors, such as the minimization or management of risk, to determine whether the taxpayer is carrying out their activities with a view to making a profit.

In accordance with the *Cohen v. The Queen*, 2011 DTC 1195 (TCC) decision, for gambling winnings to be taxable there must be more than a hope or desire to win. As all gamblers have an intention of winning, a gambler must also conduct their business as a serious businessperson to have their winnings treated as taxable income.

The Court held that during the relevant years, the Taxpayers' poker activities were more than entertainment. The Taxpayers earned a living playing poker, such that their lives and vacations were organized around poker.

At the level of earnings made by the Taxpayers over long periods of time, the Court was satisfied that the Taxpayers could reasonably expect to be able to earn a living by playing poker and have careers as professional gamblers. Given their level of earnings, poker formed the Taxpayers' principal source of income.

Therefore, the Court concluded that, on a balance of probabilities, the Taxpayers had a subjective intention to earn a profit through poker while using their expertise and skill. As such, the poker activities were considered to be derived from business income and were taxable.

The Taxpayers' expenses and losses were allowed, resulting in a reduction of their taxable income and an allowable business loss for Mr. D'Auteuil in relation to his 2012 taxation year.

Counsel for the Taxpayers have indicated that they will be seeking an appeal of the decisions and as a result the Taxpayers are waiting to see if they “hit on the turn”.

Conclusion

When a taxpayer plays poker with a subjective intention to make a profit and earns a living playing poker through utilizing their skill and expertise, the indicia of business income are present and the income derived from poker is taxable as business income.

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—Adam Kotlowitz

ALEXANDER V. THE KING, 2022 DTC 1108 (TAX COURT OF CANADA)—COURT CONSIDERS SCOPE OF MINISTER'S UNDERTAKING TO PRODUCE DOCUMENTS

This case dealt with the question of whether the Minister was required to produce all relevant documents that support her position when responding to an undertaking, or just some of the documents that supported her position.

Background

The Appellant participated in a leveraged donation program promoted by Berkshire Funding Initiatives Limited and Talisker Funding Limited. The taxpayer made purported donations to the Ideas Canada Foundation in the amounts of $164,000 in 2000 ("2000 Donation") and $446,000 in 2001 ("2001 Donation"). The taxpayer funded 20% of the donations by cash and 80% of the donations with a 25-year, non-interest-bearing loan.

For the 2000 Donation, the taxpayer claimed a charitable donation credit in her tax return for part of the 2000 Donation and transferred the remainder of the donation to her spouse. In 2001, she claimed a donation tax credit for the 2001 Donation, carried forward part of the donation to 2002, and transferred the balance of the donation to her spouse. The Minister disallowed 80% of the charitable donation tax credit to the taxpayer and her spouse for each taxation year. In 2005, the Minister further reassessed the 2001 and 2002 taxation years for the 2001 Donation to deny 100% of the charitable donation tax credit.

The taxpayer's lawyer conducted an examination for discovery of the Minister's nominee. During the examination for discovery, the Minister granted an undertaking to provide copies of *all* documents in the Minister's possession pertaining to the decision to allow the charitable donation credit for the cash amount of the gift in the first instance, subject to solicitor/client privilege or any other privilege.

In response to the undertaking, the Minister stated that she had already provided a position paper which set out the Minister's position regarding the allowance of 20% for the gift and attached a few other documents. The Minister later provided additional documentation, but did not provide all relevant documents, as her understanding was that she was only required to provide some documents that explained the Minister's rationale for allowing part of the gift.

Issues and Decision

The issue before the Court was whether the Minister properly answered the undertaking by providing some documents that explained the Minister's rationale for allowing the gift rather than all relevant documents in her possession.

Justice Lafleur stated that it is "the examinee's role to provide a 'full and binding answer' in the examinations for discovery or in response to undertaking". He went on to state that the "examinee has to provide answers to the best of the examinee's knowledge, information and belief, to any proper and relevant question."

He noted that there is no definition of the term "undertaking" in the General Procedure Rules of the Tax Court of Canada; however, jurisprudence has defined that term as an "unequivocal promise to perform a certain act" (see *Towne v. Miller*, [2001] O.J. No. 4241 (Ont. C.J.), at para. 9). He went on to state that when "an undertaking to produce documents has been given in an examination for discovery, relevance is acknowledged".

He determined that the Minister had not properly answered the undertaking in this case since she had not provided all the documents in her possession pertaining to the decision to allow 20% of the donations in the first instance. As a result, he ordered the Minister to conduct another review of the documents in her possession and provide copies of all documents in her possession pertaining to the decision to allow the gifts in the first instance, subject to privilege, relevance, and the existence of such documents.

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The taxpayer argued that the Minister's nominee provided evasive and dishonest answers during examinations for discovery and that costs should be awarded against the Minister for the examination for discovery process. The Tax Court disagreed with the taxpayer and did not award any costs against the Minister for the discovery process; however, the Court did award costs for the motion to the taxpayer.

In obiter, the Tax Court noted that there was no real distinction between whether any benefit was received by a donor or whether the donor had "donative intent" in making a gift. The judge stated that the "expression 'donative intent' describes the requirement that a donor should not receive any benefit or consideration in order to find that he or she had made a valid gift under the Act."

Conclusion

This case underscores the importance of carefully considering and understanding a request for an undertaking before it is granted. If a party agrees to produce a document, then he or she is admitting the relevance of that document. If a party agrees to provide all documents that pertain to a matter, then he or she must provide all of these documents and not just some of the documents that support their position.

—*Gergely Hegedus*

KEEHN V. THE KING, 2023 DTC 1007 (TAX COURT OF CANADA)—A DECISION TO DENY PARKING COSTS ASSOCIATED WITH MEDICAL TREATMENT

Background

The appellant, Lin L. Keehn ("Mr. Keehn"), appealed a reassessment pertaining to the denial by the Minister of National Revenue that the amount Mr. Keehn's spouse had paid for parking at a hospital constituted a "medical expense" pursuant to section 118.2 of the *Income Tax Act* (the "ITA"). As a result of the denial, the amount was excluded from the calculation of the balance of the medical expense tax credit ("METC") that Mr.Keehn was entitled to.

Mr. Kheen and his wife lived approximately 22 km away from the hospital in Edmonton, Alberta where Mr. Kheen's wife was obtaining dialysis three times per week. Paragraph 118.2(2)(h) of the ITA provides that "reasonable travel expenses" incurred to obtain medical services in a place that is not less than 80 km from the locality where the patient dwells may be considered a medical expense.

Mr. Kheen took the position that this paragraph discriminates against people who are only required to travel less than 80 km for medical treatment.

Issue and Decision

The issue before the Tax Court was whether paragraph 118.2(2)(h) of the ITA should be considered discriminatory for the purposes of subsection 15(1) of the *Canadian Charter of Rights and Freedoms (Constitution Act, 1982)*.

The Tax Court held that paragraph 118.2(2)(h) applies equally to any and all individuals seeking to claim a METC, while containing an express limitation on travel not exceeding 80 km. Furthermore, citing *Auton (Guardian ad litem of) v. British Columbia*, 2004 SCC 78, the Tax Court held that Parliament is entitled to make such distinctions in the ITA, provided that the benefit being conferred on the taxpayer that meets the conditions set out in section 118.2 of the ITA is not conferred in a discriminatory manner.

Conclusion

Parliament's decision to deny parking costs associated with medical treatment when the taxpayer has not met the conditions set out in section 118.2 of the ITA is not discriminatory.

—*Keaton Buchberger*

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RECENT CASES

COUPLE'S CONTINUED ADHERENCE TO EXPIRED SEPARATION AGREEMENT MADE IT "WRITTEN AGREEMENT," ALLOWING SPOUSAL SUPPORT DEDUCTION

Appellant's claimed deduction for spousal support in his 2018 taxation year was denied by CRA on the ground it did not meet the definition of "spousal support" under ITA s. 56.1(4), in particular that it was not made pursuant to a written agreement. In 2011, Appellant and his ex-spouse entered into a self-drafted separation agreement without benefit of counsel, which provided that Appellant would pay his ex-spouse $3,500 per month through December 2014; after that expiration date the parties continued to abide by the agreement, though they did not update it. Before the Tax Court Appellant argued that the parties' continued compliance created an implied contract, in the alternative that the 2011 contract was still in force. Respondent argued that the 2011 contract expired in 2014 and had not been renewed, so that there was no written instrument pursuant to which the payments were made.

The Tax Court allowed the appeal. Though the appeal suffered from several formal defects, and the Court rejected Appellant's argument that an implied agreement could be a written agreement in the sense of the statute, it accepted Appellant's second argument, that the couple's continued adherence to the 2011 contract terms meant there was a meeting of the minds giving continuing effect to that contract.

Vohra v. The King

2023 DTC 1005

WAGE LOSS REPLACEMENT PLAN PAYMENTS ARE INSURABLE EARNINGS

The CRA assessed the Appellant's 2018 return, including his wage loss replacement plan payments from the Toronto Transit Commission ("TTC"). The issues raised on appeal were whether it was correct to include these payments in the Appellant's income, and whether his employment insurance premiums were properly deducted from his earnings. From 2001 to 2011, Sun Life, the plan administrator, reported the payments on a T4A slip. In 2012 and through 2021, the TTC changed its procedure and began reporting the payments on a T4. The Appellant argued that the payments were sick benefits, not employment income.

The Tax Court dismissed the appeal. Under paragraph 6(1)(f) of the *Income Tax Act*, amounts received pursuant to a sickness or accident plan, a disability insurance plan, or an income maintenance insurance plan are employment income; under subsection 153(1), plan payors are required to withhold an appropriate amount; under *Income Tax Regulations* paragraph 200(2)(f), they are required to submit an information return. Thus, the amounts are to be reported on a T4; Sun Life's mistaken use of a T4A does not alter the conclusion. As for the EI premiums, the Court held that under subsection 5(1) of the *Employment Insurance Act* and paragraph 2(3)(*d*) of the *Insurable Earnings and Collection of Premiums Regulations* they are insurable earnings, thus reportable on a T4, thus taxable.

Manderla v. The King

2023 DTC 1004

COURT RULES THAT THE REAL FISCAL EFFECTS OF AN ESTIMATED (I.E., FICTITIOUS) ASSESSMENT COULD NOT BE CONSIDERED AS A REAL INVESTMENT LOSS

This case is a request for judicial review of a decision rendered against the applicant by the Minister. The only issue was whether the decision rendered was reasonable. Mr. Roy, the Applicant, a certified professional accountant, effected in his 2008 taxation year a large number of transactions in his brokerage account with

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Courtage direct Banque Nationale inc ("CBN"). CBN sent information about the state of operations to the CRA as required by law through Form T5008. Notably, by April 2015 Mr. Roy had not filed his income tax returns for the years 2008, 2009, 2010, 2013, and 2014. In such cases the policy of the CRA is to issue estimated assessments. Accordingly, on April 17, 2015, an estimated assessment for 2008 was issued by attributing to Mr. Roy a capital gain representing 20% of the disposition income related to transactions made in 2008. An assessment was also issued for 2009. Mr. Roy finally filed his returns in 2019. Mr. Roy had requested in 2020 an adjustment for 2009 on the grounds that the loss of interest income and other investment income should be treated as a capital loss, which would affect the amount of tax owed for 2008. The 2008 year could not be reassessed as it was beyond the 10-year statutory limit.

The application was dismissed. The Federal Court noted the taxpayer's adjustment request was made after the decision had been rendered and therefore was not a valid reason to make the decision unreasonable. Furthermore, the Court stated the need to separate fiction from reality. For 2008, Mr. Roy was assessed $116,301 pursuant to the estimated assessment which was not contested and crystallized once the 10-year statutory delay had passed. The Court ruled that Mr. Roy's counsel was never able to supply a source either in the law or jurisprudence to support his argument that a taxpayer affected fiscally in reality by a fictitious capital gain could transform this fictitious gain into a real loss. The Court stated that Mr. Roy, realizing that he could no longer modify his 2008 return, attempted to do indirectly what he could not do directly. Essentially, the taxpayer failed to demonstrate the decision rendered was unreasonable. Accordingly, the Court dismissed the request.

Roy v. MNR

2023 DTC 5004

TFSA OVERCONTRIBUTION WITHDRAWN IN REASONABLE TIME IN LIGHT OF PANDEMIC-RELATED ABSENCE

In December 2019 and January 2020, on the advice of a Scotiabank representative, the Appellant deposited an amount in her TFSA that turned out to be an overcontribution. She left the country at the end of January intending to spend three weeks abroad, but thanks to COVID was not able to return until July 2021. The friend she had designated to forward her mail had failed to transmit the CRA's June 4, 2020, "Education Letter" informing the Appellant of the overcontribution and requiring its removal. The Appellant did not know the situation until she returned to Canada, but withdrew the excess contribution promptly. She explained her situation to the CRA but was twice rebuffed because she had not withdrawn the excess "within a reasonable timeframe". She appealed the second review, arguing that (1) it did not take her COVID-caused delay into account; (2) it did not explain why the overcontribution was not reasonable; (3) the rationale was not transparent, lacking analysis or justification; and (4) it affected her personal circumstances, but did not give "complete and thorough" reasons. The Respondent countered by arguing that being unaware of contribution limits was unreasonable even if the unawareness was due to third-party error, and that its conclusion that the delay was unreasonable was supported by the case law.

The Federal Court allowed the appeal. The decision that the overcontribution was not a reasonable error because it was based on the advice of a third party was "a conclusion made without reasons". And the decision that the Appellant failed to withdraw the excess contribution within a reasonable time did not take account of her situation and the effect of the pandemic. The Court noted that the Respondent's first argument amounted to saying an error made because of erroneous advice given by an advisor can never be a reasonable error. "Here, there is quite simply no chain of analysis at all," rendering this argument unreasonable. As to the second argument, the Court agreed with the Appellant that the Respondent had failed to take the pandemic and the unanticipated failure to forward the Education Letter into account; had it not been for these circumstances, the Appellant would have removed the excess contribution when she received the letter (as, in the event, she did). The Court remanded the matter to a different CRA examiner.

Howard v. Canada (AG)

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2022 DTC 5121

LARGE GAINS EARNED PLAYING TEXAS HOLD'EM POKER RULED AS BUSINESS INCOME

These appeals cover taxation years 2008, 2009, 2010, 2011, and April 2013 of the Appellant. The Minister added gains earned by the Appellant in poker games (both online and in person) as income (business income) and penalties pursuant to subsection 163(2) of the *Income Tax Act*. In view of an agreement between the parties, at the outset of the trial the subsection 163(2) penalties were cancelled; the appeal for taxation year 2008, made outside of the normal assessment period, was also allowed. The parties also agreed that a sum of $279,830 should be deducted from the 2011 taxation year assessment; this sum represents the Appellant's share of gains earned by Jonathan Duhamel in the 2010 Las Vegas World Series Poker tournament. The Appellant argued that the Court must determine if poker is a game of chance or a game of skill. Should the Court agree it's a game of chance the appeals must be allowed. The Respondent stated that games of chance are taxable when a person uses his or her own expertise and skills to earn a living from a game of chance where skills are necessary, and that the Appellant's poker activities were in this category and thus qualified as business income.

The appeal was allowed in part. Three expert witnesses (two from the Appellant and one from the Respondent) were heard. As the Court stated, these witnesses agreed that the Texas Hold'em poker game is a game of chance and skill. It disagreed with the Respondent's witness' conclusion that skill was more important than chance. The Court stated that while this matter is interesting it is not relevant to the issue of determining whether the Appellant carried on a business. In contradiction with the Appellant's position, the Court stated that poker is not a game in the nature of a "bet" that provides the chance to win a prize as contemplated by paragraph 40(2)(f). The Court, after reviewing all the facts and evidence, noted that poker was essentially the Appellant's unique source of income, and that he employed strategies to maximize his gains and minimize risks. The Court noted that over the four taxation years, his gains exceeded $1,450,000 and allowed him to purchase properties and pay for his travelling costs. The Appellant also referred to himself as a "professional poker player". He also used software which allowed him to gain information on his opponents. The Court found that, based on the balance of probabilities, the Appellant had a subjective intention of profit and used his expertise to earn a living by playing poker, a game where skills are important. Regardless of his unusual lifestyle (the Appellant partied significantly), the Court found he behaved like a serious businessman and played poker to win, allowing him to earn a living. Accordingly, the appeals for 2009 and 2010 were dismissed and the appeal for 2011 was only allowed in respect of the partial amount agreed to by the Respondent. The Court was aware that a different decision was rendered in the case of Jonathan Duhamel, another poker player, but explained that this was justified by different facts.

Giguère v. The King

2022 DTC 1111

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