Tax Notes

April 2021
Number 699

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Wolters Kluwer

A TAX SEASON LIKE NO OTHER

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In a recent news release, the CRA referred to the upcoming tax season as "a tax season like no other". My first thought when I read that was that this tax season was, in fact, going to be a lot like last year (at least post-March 15, 2020), but then I realized that there are some important differences that will likely make that statement true.

Perhaps the most important difference is that, as of the writing of this article, the CRA has still not given any indication that there will be an extension to the filing deadlines this year. Of course, that may change. If we have learned anything this past year, it is that nothing is certain.

It seems that the CRA assumes that everyone has now adapted to our "new normal". And yes, this will be our second tax season in the pandemic. But last year, because of the filing deadline extensions, firms did not have to figure out how to get hundreds or even thousands of T1 returns prepared in a few short weeks all the while dealing with inefficiencies related to staff working from home, and/or social distancing and sanitizing as well as managing "contactless" interactions with clients.

Not to mention, firms that helped their clients with T4 filings have already been feeling the pressure as they dealt with additional compliance requirements for the T4 slips (new information boxes were added to report income earned during specific periods last spring and summer) and reconciling their T4 filings with the Temporary Wage Subsidy.

And as happens every tax season, there are changes to the T1 that preparers must also contend with. Two areas in particular have generated questions from the T1 preparers: Working from Home Expenses and Electronic Signatures.

Working From Home Expenses — Is Your Tape Measure Handy?

Due to the large number of employees working from home ("WFH"), the CRA is allowing more leniency in claiming a deduction for employment expenses related to working from home due to COVID-19. While this is certainly welcome, it has also led to a lot of questions. In December, the CRA conducted a Q&A session on Home Office Expenses for tax professionals and there were over a hundred questions submitted.

For 2020, the CRA will allow eligible employees to claim a deduction of $2/day for each day that the employee worked from home (either full-time or part-time) up to a maximum of $400. If an employee chooses to use this temporary flat rate option, they are not required to keep receipts or have a signed T2200 or T2200S *Conditions of Employment* form. (As a matter of interest, the IRS in the US is not offering any concessions with respect to employees claiming WFH expenses.) An employee is eligible to claim the $2/day deduction if, in 2020, they worked from home due to COVID-19

more than 50% of the time for a period of at least four consecutive weeks. And eligibility extends to employees that chose to work from home as well as those that were required to work from home. This temporary flat rate method is claimed on the new form T777S, *Statement of Employment Expenses for Working at Home Due to COVID-19*. Note that Québec introduced parallel changes for taxpayers filing a TP1 return.

Eligible taxpayers that have more significant allowable expenses have the option of using the CRA's "Detailed Method". Under this option, they can claim their actual expenses incurred during the period(s) they were working from home. Expenses related to their workspace (e.g., utilities) are to be prorated for the size of the workspace and, if the workspace was a common area, also prorated for the amount of time the space was used for employment purposes. They must also have receipts and a signed T2200 or T2200S *Declaration of Conditions of Employment for Working from Home Due to COVID-19* from their employer.

The CRA has provided a comprehensive set of web pages to assist in the calculations, including an online calculator and something I have never seen on a tax website before: sample floorplans showing the appropriate measurement of the workspace.

Multiple People Working From the Same Home

Many of the questions that have arisen on the WFH expenses concerned situations in which there were multiple individuals working from the same home, whether it was a taxpayer and spouse, roommates, or adult children living with their parents. The FAQ on the CRA website indicates that "Each employee working from home who has paid home office expenses and meets the eligibility criteria can use the temporary flat rate method to calculate their deduction for home office expenses."

Some tax preparers asked about the scenario of an adult child working from their parents' home where the parents were paying the household expenses. Note that to be eligible to claim WFH expenses, even the $2/day, you must have actually incurred **some** WFH expenses. If the adult child paid "rent" to the parent, they could only claim that rent as a WFH expense if there was an actual landlord/tenant agreement in place. However, the CRA did indicate that where there were multiple individuals in the household working from home and sharing expenses (e.g., roommates), they were not concerned about whose name was on the lease or utility bill as long as there was a reasonable allocation of expenses. The CRA also confirmed that each individual could make their own choice as to which method to use: the temporary flat rate method or the detailed method.

Cost of Internet Service

There were also questions raised about the ability to claim the cost of internet service. Interestingly, in the 2019 version of Guide T4044 *Employment Expenses*, the CRA specifically indicated that an employee could **not** deduct the monthly access fees for home Internet service. The 2020 version of the guide indicates "Starting in 2020, employees who work from home can include reasonable monthly home internet access fees as part of their work-space-in-the-home expenses."

On the CRA form T777S, the cost of internet service is grouped with utilities such as electricity, heat, and water. As several preparers have pointed out, while it may make sense to determine the employment use of utilities with reference to the square footage of the workspace, that does not make much sense with respect to internet service. The CRA acknowledged this point and indicated that they did this for simplicity. However, they also indicated that they would accept an alternative method of allocating the internet fees between employment and personal use provided it was reasonable. During their Q&A session in December, the CRA cited other methods of allocation such as basing it on the number of users, the number of hours used for work, and any additional costs that were incurred (e.g., additional data charges or an upgrade to the internet service to improve speed).

Other Employment Expenses

Another frequently asked question related to employees that normally claim automobile expenses. The CRA has specifically indicated that an employee is not eligible to use the temporary flat rate method if they are claiming any other employment expenses. So, if an employee wants to claim automobile expenses **and** home office expenses, they can only use the detailed method to claim their home office expenses and they would require a T2200 signed by the employer as well as receipts for their expenses.

Number of Days Working From Home

Some tax preparers questioned the likelihood that a taxpayer would be asked to substantiate the number of days that they worked from home if they claimed the flat rate. There were 202 work days (i.e., calendar days excluding weekends and stat holidays) in Ontario from March 15, 2020 – December 31, 2020. The $2/day cannot be claimed for any days off, vacation days, sick days, or other leave of absence. Many taxpayers will therefore not be entitled to the maximum $400. And while the CRA did indicate that the employee does not require a letter from their employer to back up their claim, we don't yet know what kind of post-assessment review the CRA may conduct.

Transmitted Fields

Speaking of post-assessment review, it may be worth noting that only a handful of fields from the T777S are transmitted to the CRA when a T1 is electronically filed.

In our Wolters Kluwer T1 programs (*Personal Taxprep, Cantax T1, iFirm Taxprep T1*, and *iFirm Cantax T1*) we have included fields to assist the preparer in arriving at the percentage allocation for the employment use of the workspace. However, these calculations do not appear on the actual prescribed T777S nor are they transmitted to the CRA. The CRA will receive the gross amount of the expenses and the amount claimed for the workspace in the home, but no details as to how the percentage allocation was calculated. Preparers should therefore not be surprised if they receive requests to provide additional information as part of a post-assessment review.

Dealing With Clients

During our recent *Personal Taxprep* virtual seminars, we polled our attendees to ask them how they planned on handling home office expenses with their clients (e.g., are they going to ask that their clients make their own determination about whether to claim the flat rate or use the detailed method?). The majority of respondents indicated that they will likely ask their clients a few key questions to determine if they were likely to benefit from the detailed method.

For example, someone who rents their home rather than owns it will likely have higher allowable expenses, because while rent is an allowable expense, mortgage interest is not. And property tax and insurance are only allowable expenses for commission salespeople. As well, taxpayers in smaller homes likely use a higher percentage of the square footage of their home when they work from home. Taxpayers living in condominiums can only claim the portion of their condo fees that relate to utilities, so they would need to have received a breakdown from the condo board or property management company.

For many taxpayers, the difference between the flat rate option and the detailed option may be a small amount, and in some cases the flat rate method may even yield a larger deduction. But for other taxpayers, like those living in large urban centres like Toronto and Vancouver paying high rent for a small space, the difference between the two options could amount to thousands of dollars.

Electronic Signatures

The second topic that generated a large number of questions and comments was the use of electronic signatures. This may have been due, in part, to a lack of understanding of what constitutes an electronic (or digital) signature. An informal poll taken during our virtual T1 seminars indicated that more than half of the participants had never even used an electronic signature.

While most accountants may be familiar with the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") with respect to privacy protection, they may not realize that this legislation also covers the use of electronic signatures with respect to most government documents.

Signatures on a T183

In general, the Minister (or their delegate) can determine the information to be given and the manner of filing of any form that is prescribed under the *Income Tax Act* (the "Act"). However, subsection 150.1(4) of the Act, which applies when a T1 is electronically filed, specifically indicates that the person required to file the T1 must **sign** the information return (i.e., the T183).

In February 2020, the CRA held an online consultation on a proposal to allow taxpayers to use electronic signatures on the T183 and T183CORP. In order to do this, subsection 150.1(4) of the Act would need to be added to Schedule 2 of PIPEDA. Along with this change, regulations would be introduced to reflect that electronic signatures that meet specific requirements would be accepted for information returns (Form T183 and T183CORP) made under that subsection.

However, due to COVID-19, in March 2020, the CRA announced that as a "temporary measure", electronic signatures on the T183 and T183CORP that meet specific criteria would be accepted as having met the requirements of the Act. More recently, the CRA announced that they would be extending their temporary administrative measures to allow electronic signatures on the T183 and T183CORP for the 2021 tax filing season (although they did not clarify what exactly they meant by "filing season").

New Fields on the T183 for Electronic Signatures

For 2020, the CRA has added new EFILE fields related to the T183 that do not appear on the prescribed form itself but are transmitted to the CRA when the return is electronically filed. The CRA now requires you to indicate if an electronic signature was used, and if so, to provide the date and timestamp of the signature. This latter information could then be compared to the actual electronically signed T183 and/or electronic signature certificate if requested as part of the CRA monitoring program.

However, firms have indicated that if they are not using an integrated solution where the software provides this information automatically (e.g., *iFirm Taxprep, iFirm Cantax*, and *Personal Taxprep* provide an integrated solution for clients using CCH *iFirm Portal*), this new requirement would necessitate opening each tax return and entering the data after the signed T183 is returned, creating an extra step in their process. As a result, some firms may decide to delay implementing electronic signatures.

Use of Scanned Images

One of the most common questions asked during our virtual seminars related to scanned T183 forms.

In many firms, the client is sent Form T183 via email (hopefully secured with a password) or via a secure portal. Upon receipt, the client prints the T183, signs it, and returns a scanned image of the signed form back to the Efiler. The CRA does not require the Efiler to obtain the original signed copy of the T183.

Preparers ask whether this constituted an electronic signature. Since the taxpayer is still physically signing the T183 with a pen, the CRA does not consider this to be an electronic signature and the preparers will not need to complete the new electronic signature fields on the T183.

Conclusion

The preceding paragraphs describe just two of the issues facing T1 preparers this tax season. There are other changes as well. For example, there is still some uncertainty as to which subscriptions qualify for the new Digital Subscription Tax Credit. And preparers continue to deal with questions relating to the CERB, as some of the T4A and T4E slips issued do not reflect repayments of the CERB made in 2020.

In addition, clients may require ongoing help with COVID-19 benefit applications during T1 season, as news releases and legislative proposals keep "changing the rules".

So, this may indeed be a "tax season like no other".

COVID-19 UPDATE

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

Federal

CEBA Application Deadline Extended (March 22, 2021)

The deadline for Canada Emergency Business Account ("CEBA") applications is being extended from March 31 to June 30, 2021. This extension applies to any new applications for CEBA loans of $60,000 or to new applications from businesses that have already received the $40,000 loan and intend to apply for the additional $20,000.

New CRA Guidance on COVID-19 Benefits Reporting (March 10, 2021)

The CRA published new guidance about reporting COVID-19 benefits titled *Questions about your T4A? Here's what you need to know* (www.canada.ca/en/revenue-agency/news/newsroom/tax-tips/tax-tips-2021/questions-about-your-t4a-what-you-need-know.html). The document answers the following frequently asked questions:

- When should you receive your T4A?
- What if there is a mistake with the amounts reflected on your T4A?
- What should you do if you've already contacted the CRA about a mistake on your T4A?
- What if you have to contact the CRA about your T4A but can't get through to an agent?
- Should you file your 2020 income tax and benefit return if you are waiting for the CRA to resolve an issue with the T4A you received?

CEWS and CERS Extended to June 5 (March 3, 2021)

The federal government announced on March 3, 2021, that the Canada Emergency Wage Subsidy ("CEWS") and Canada Emergency Rent Subsidy ("CERS") will be extended to June 5, 2021. As a result, the additional qualifying periods are as follows:

- Period 14: March 14 – April 10
- Period 15: April 11 – May 8
- Period 16: May 9 – June 5

Current rate structures for the subsidies that are currently in place will also be extended to June 5, so the maximum subsidy rates will remain the same. To recap, the current rates are:

- Maximum base CEWS rate: 40%
- Maximum top-up CEWS rate: 35%
- Maximum base CERS rate: 65%
- Lockdown Support rate: 25%

The CEWS rate structure for furloughed employees will be unchanged in the extended periods. Employers can also continue to recover CPP, EI, QPP, and QPIP contributions in respect of furloughed employees.

Revenue Reference Periods

Currently, for the purpose of the CEWS and CERS, an organization's percentage decline in revenues is measured by comparing its revenue for the current calendar month to its revenue in the same calendar month of the previous year. Since nearly one year has passed since the crisis began in Canada, organizations would be comparing current-year revenues to pandemic-era revenues.

As a result, the government proposes that the prior reference periods for Periods 14 to 16 would be based on calendar months from 2019. An organization can still compare its revenue for the current month to the average of January and

February 2020 (the "alternative approach"). The Department of Finance backgrounder provided a chart to summarize the revenue decline tests in the extended periods:

Timing	Period 14 March 14 – April 10	Period 15 April 11 – May 8	Period 16 May 9 – June 5
General approach	March 2021 over March 2019 **or** February 2021 over February 2020	April 2021 over April 2019 **or** March 2021 over March 2019	May 2021 over May 2019 **or** April 2021 over April 2019
Alternative approach	March 2021 **or** February 2021 over average of January and February 2020	April 2021 **or** March 2021 over average of January and February 2020	May 2021 **or** April 2021 over average of January and February 2020

More Flexibility for Baseline Remuneration Periods

An employer's CEWS entitlement involves a calculation that depends on an employee's current and baseline remuneration. The government proposes to add another alternative baseline remuneration calculation which an employer can elect to use in Periods 14 to 16. An employer can elect for qualifying periods from March 14 to June 5, 2021, to use the period of March 1, 2019, to June 30, 2019, to calculate baseline remuneration. The existing alternative period from July 1, 2019, to December 31, 2019, can continue to be used as well.

Technical Amendments to CEWS and CERS (February 24, 2021)

The Department of Finance published draft legislation to increase accessibility to the Canada Emergency Wage Subsidy ("CEWS") and Canada Emergency Rent Subsidy ("CERS").

Technical Change for Period 11

Earlier this year the *Income Tax Regulations* (the "Regulations") were amended to address a timing mismatch that had been developing between claim periods (which correspond to fixed 28-day intervals) and reference periods (which correspond to calendar months). Had this gap continued to grow, the reference periods would be less economically relevant to the related claim period and would require eligible entities to wait longer to establish their change in monthly revenues to make a claim. To address this issue, the Regulations were amended such that the current and prior reference periods for Period 11 are the same as the reference periods for Period 10. Therefore, for both Periods 10 and 11, the current and prior reference periods are December 2020 and December 2019 respectively.

To provide certainty to employers, an entity's percentage revenue decline for a qualifying period cannot be less than its percentage revenue decline for the immediately preceding qualifying period. In other words, if the revenue reduction percentage in a period is lower than the percentage in the immediate prior period, the entity can compute their entitlement for the CEWS using the revenue reduction percentage from that immediately preceding period.

The draft legislation proposes to reconcile this revenue look-back rule with the recent change to the timing of reference periods. It proposes that an applicant's percentage revenue decline for Period 11 cannot be less than the applicant's percentage revenue decline for Period 9. Since Periods 10 and 11 use the same reference months (December 2020/2019), an entity's revenue reduction percentage will be the same for both periods.

Non-Arm's Length Rent and Lockdown Support

The Lockdown Support is a supplement to the CERS that is available where an entity is required under a public health order to cease some or all of its activities at a qualifying property. However, businesses cannot access the Lockdown Support when the entity that operates the business rents the property from a non-arm's length entity that owns the property. Since non-arm's length rent is ineligible for the subsidy, and the property owner's activities are not required to cease under a public health order, neither the tenant nor the owner is eligible for the subsidy.

Retroactive to September 27, 2020, the draft legislation proposes to amend the *Income Tax Act* so that the Lockdown Support is available to the entity that owns the property where activities of a non-arm's length party that rents the property from the entity are required to cease as a result of a "public health restriction".

Provincial

Alberta

New Benefit for Families (February 24, 2021)

The government is introducing the new Working Parents Benefit, which will support families that used child care — including licensed or unlicensed daycare, day homes, out-of-school care, or preschool — from April to December of 2020.

Families will be eligible to apply for the Working Parents Benefit if they have:

- Children in any form of childcare, including licensed or unlicensed childcare.
- A household annual income of $100,000 or less.
- Paid for three months of childcare between April 1 and December 31, 2020 (must provide receipts).

Applications can be made at alberta.ca/WorkingParentsBenefit starting March 1. Applications closed March 31. A MyAlberta Digital ID is needed to apply for the benefit.

British Columbia

Delayed Tax Measures Take Effect April 1 (March 8, 2021)

Two planned tax changes that were delayed due to the pandemic will take effect on April 1, 2021. The tax changes include the elimination of the provincial sales tax ("PST") exemption for carbonated beverages that contain sugar, natural sweeteners, or artificial sweeteners, and the addition of new PST registration and collection requirements for e-commerce businesses located outside BC.

Starting April 1, BC began charging PST on sweetened carbonated beverages. The PST will apply to all beverages that are dispensed through soda fountains, soda guns, or similar equipment, along with all beverages dispensed through vending machines.

All sellers of digital software and telecommunication services must collect PST on sales to BC customers if they have BC revenues of more than $10,000. As part of these new requirements, beginning April 1, all Canadian sellers of vapour products must register to collect PST on all online or mail-order sales to BC customers.

As BC businesses work to transition to a post COVID-19 economy, the government will open applications for two tax benefits to support businesses. These tax benefits include a temporary PST rebate on select machinery and equipment, and a refundable tax credit for employers, which encourages the creation of new jobs for BC workers or increases in payroll for existing low- or medium-income employees. Both measures were previously announced on September 17, 2020. Applications will open in the coming weeks.

Business Recovery Grant Program Expanded (March 4, 2021)

The time to apply for the Small and Medium Sized Business Recovery Grant program has been extended from March 31, 2021, to August 31, 2021. One of the main requirements has also been lowered to ensure more businesses are eligible. The previous requirement for a business to have experienced at least a 70% revenue loss at some point in March or April 2020 has been adjusted. Now, a business is required to demonstrate only a 30% revenue loss in any one month between March 2020 to the point of application.

Manitoba

Support for Hospitality Industry (March 16, 2021)

The Manitoba government is investing $8 million for the creation of a new Hospitality Relief Sector Program to provide financial relief to Manitoba's accommodation and tourism sector.

The new Hospitality Relief Sector Program, to be administered by the Manitoba Hotel Association and the Manitoba Lodges and Outfitters Association, will provide funding to hotels and full-time licensed resource tourism operators for fixed costs that have not been covered by other relief programs such as:

- property insurance,
- mortgage interest,
- property taxes,
- land leases,
- service fees,
- maintenance of camps, and
- resource retention costs.

Grants will be provided as a reimbursement for a percentage of eligible expenses incurred. More information on the Hospitality Relief Sector Program and how to apply will be available soon.

Tax Payment Deadlines Extended (March 5, 2021)

The Manitoba government is extending certain tax relief measures for businesses.

Small and medium-sized businesses with retail sales tax ("RST") remittances of no more than $10,000 per month are eligible for an interest- and penalty-free payment deferral to June 30, 2021. The deferral is for the January, February, March, April, and May 2021 return periods. Businesses are also eligible for an interest- and penalty-free payment deferral until June 30, 2021, for the March quarterly RST return.

As well, the Health and Post-Secondary Education Tax Levy returns for small and medium-sized businesses with remittances of no more than $10,000 per month are eligible for an interest- and penalty-free payment deferral to June 30, 2021. The deferral is for the January, February, March, April, and May 2021 return periods. The RST and tax levy deferrals are optional and for tax payments only. Businesses must continue to file returns by the required due dates.

The province has also extended the previous interest-and penalty-free repayment option set to expire March 31, 2021, until June 30, 2021.

Businesses can contact the collections unit at the taxation division to update payment arrangements.

Third Round of Manitoba Bridge Grant Payments (March 2, 2021)

The government is increasing its budget for the Manitoba Bridge Grant and making a third round of payments to help protect businesses in the province from the impacts of COVID-19.

Through a third round of payments, the province will provide up to $67 million in immediate support to eligible small and medium-sized businesses, not-for-profits, and charities impacted by the #RestartMB Pandemic Response System. This brings the total program investment to $215 million, which is $15 million above the province's original commitment of $200 million. The province has also extended the Manitoba Bridge Grant application deadline until March 31.

Eligible businesses that received a first and second bridge grant payment, each worth up to $5,000, will automatically receive a third equal payment beginning as early as March 5 and will be notified of the deposit via email. New program applicants will be eligible for a one-time immediate payment to a maximum of $15,000.

New Brunswick

Small Business Recovery Grant Expanded (March 2, 2021)

Changes have been made to the Small Business Recovery Grant program to expand its eligibility and improve access for sectors impacted by changing Public Health measures and restrictions.

In early February, the provincial government, through Opportunities NB, introduced a non-repayable grant of up to $5,000 to help owners of businesses cope with the impact of COVID-19. The program was originally open to small businesses located in zones that faced elevated Public Health measures (Orange, Red, or Lockdown) for at least one week between October 10, 2020, and March 31, 2021.

Under the new expanded criteria, tourism operators are now eligible within all zones in the province. Non-essential retail businesses are eligible if they were in a zone that experienced a lockdown.

Enhancements to the program include extending eligibility to:

- **Non-essential retail in lockdown zones**. This is defined as retailers that were forced to close due to Public Health measures and restrictions, as defined by the state of emergency mandatory order.
- **Tourism operators**, defined as businesses in one of the following categories: Accommodations, Outdoor Adventure Businesses, Festivals and Events, Tourism Recreational Facilities, Receptive Tour Operators, and Outfitter Services.

Nova Scotia

More Property Tax Relief for Tourism Accommodations (March 12, 2021)

The government announced the Tourism Accommodations Real Property Tax Rebate Program Part 2, which will provide qualified operators a 50% rebate on payment of the first six months of their 2021 – 22 commercial property tax.

This one-time payment will help ease some of the pressures experienced by operators resulting from the restrictions of the pandemic. Operators can use the rebate for any aspect of their business, such as hiring staff, paying down debt, paying utilities, or ordering supplies.

Operators who received payments under the first Tourism Accommodations Real Property Tax Rebate Program, which provided a 25% rebate on the payment of 2020 – 21 commercial property taxes, will be automatically eligible.

As municipalities issue property tax bills at different times, the program will remain open throughout the year.

Businesses must meet the definition of a roofed accommodation as set out in the *Tourist Accommodation Registration Act*, be registered as a host under the Act, have more than five rooms, not be in arrears of property taxes or property tax installment payments, and have experienced a year-over-year revenue loss of at least 30% from April 1 to October 31, 2020.

New operators who were not in business before March 30, 2020, may still be entitled to a rebate if they can demonstrate lower than 50% occupancy rate since opening their business.

Program information and eligibility criteria will be available at: novascotia.ca/coronavirus/support/#support-for-business.

New Grant for Students with Disabilities (March 16, 2021)

Recognizing that students with permanent disabilities have exceptional education-related and equipment requirements, the government is introducing the new COVID-19 Accessibility Grant. This grant will help about 3,000 Nova Scotia post-secondary students with permanent disabilities by providing them with $800 in financial assistance. The grants will be distributed to students starting in March. Eligible students do not need to apply.

Property Tax Relief for Small Businesses (March 2, 2021)

The government announced a $7 million rebate program to help the service sector weather the impact of the COVID-19 shutdowns. The Small Business Real Property Tax Rebate Program provides qualified businesses a one-time rebate of a portion of their paid property taxes. Qualified businesses can choose a rebate of $1,000 or 50% of the commercial real property taxes paid for the final six months of the 2020–21 tax year.

Nearly 3,300 businesses are eligible, including dine-in restaurants and drinking establishments; gym and fitness establishments; hair salons and barber shops; and spas, nail salons, and body art establishments.

More details are available at novascotia.ca/coronavirus/support/#support-for-business.

Ontario

Support for Tourism, Culture, Sport, and Recreation Organizations (March 16, 2021)

The Ontario government is investing $105 million through the new Community Building Fund to support non-profit tourism, culture, sport, and recreation organizations. The funding will be used to help these non-profits recover from the impacts of the COVID-19 pandemic and meet the needs of their communities.

The fund will be administered by the Ontario Trillium Foundation ("OTF") through two program streams:

- The $55-million operating funding stream will provide community non-profits with the support they need to help sustain their operations and create new experiences and events — such as trail systems, heritage attractions, winter activities, and local sport and recreation programming — that are critical to the economic and social well-being of their communities.
- The $50-million capital funding stream will go to municipalities and non-profit organizations to carry out sport-and recreation-facility infrastructure repairs, including retrofits and rehabilitation to meet COVID-19 public health protocol requirements and local community needs.

The operating stream of the Community Building Fund opened for applications on March 31, 2021, while the fund's capital stream will open later in 2021.

Prince Edward Island

Support for Workers (March 1, 2021)

The province is launching supports to help Islanders get through the latest modified red-level restricted measures related to COVID-19.

The Prince Edward Island Emergency Payment for Workers is a $500 payment for workers and self-employed Islanders who have completely lost their income or will have their hours reduced by at least 12 hours a week from February 28 to March 14, 2021.

The province is also re-launching the Prince Edward Island Impacted Worker Grocery Card Program. These $100 grocery gift cards are for workers laid off between February 28 and March 14, 2021. The employer must complete the application form for the program then distribute the cards to affected employees.

Additionally, the Government will launch a $1 million fund to help Islanders who are off sick, do not have access to paid sick leave, or are not eligible for Federal benefits.

Saskatchewan

Tourism Sector Support Programs Renewed (February 25, 2021)

The government announced the renewal of the Saskatchewan Tourism Sector Support Program ("STSSP") and the extension of the Saskatchewan Small Business Emergency Payment ("SSBEP").

The STSSP provides financial assistance to eligible tourism businesses in the accommodations, attraction and tours, events, and major event facility sectors. The STSSP targets businesses that experienced a loss of sales revenue of at least 30% in 2020 when compared to 2019. Applications are open from March 8 to April 30, 2021.

The SSBEP provides financial assistance to eligible small businesses in Saskatchewan that have been ordered to temporarily close or substantially curtail operations due to a public health order. Financial assistance in this extension includes a payment for both February and March 2021 of up to $5,000 per month that can be used for any purpose.

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.

6398316 Canada Inc. v. The Queen, 2021 DTC 1017 (Tax Court of Canada)

Introduction

On March 4, 2021, the Tax Court of Canada ("TCC") upheld loss determinations of 6398316 Canada Inc., carrying on business as Global Sustainable Solutions ("GSS"), denying claimed scientific research and experimental development ("SR&ED") expenditures and corresponding refundable investment tax credits under the *Income Tax Act* ("ITA").

The disallowed expenses were related to GSS's project to build an affordable, highly energy-efficient house in southern Ontario. The TCC concluded that the assembly of several known procedures with the objective of reducing cost, without evidence of scientific methodology, did not constitute SR&ED.

Background

In 2012 and 2013, GSS implemented a construction project with the goal of creating a home that did not require electricity, natural gas, or any other grid-tied fuel. Instead, it would utilize natural forces (i.e., sun, wind, rain, and temperature fluctuations) while remaining affordable for the average person.

The expense amounts in dispute represented payments made by GSS to subcontractors in connection with the construction of the house and were claimed by GSS as SR&ED under the "experimental development" category. According to GSS, the various natural force interactions (e.g., thermal mass, thermal bridging, passive cross-ventilation, passive heating and cooling, and air sealing) were the aspects of the project on which its SR&ED claim was based.

The end result of the construction project was a highly energy-efficient house, with an Energuide efficiency rating of 91 out of 100 (compared to 65–70 out of 100 for new construction built to minimum building code standards or 80+ for a highly energy-efficient home).

Issue

The sole question before the TCC was whether the Minister of National Revenue (the "Minister") erred in determining that the expenditures on the construction project were not SR&ED expenditures.

Decision

The TCC reiterated the five-step approach developed by Justice Bowman, as he then was, in *Northwest Hydraulic Consultants Ltd. v. R.*, 98 DTC 1839 (TCC) and approved by the Federal Court of Appeal in *C.W. Agencies Inc. v. R.*, 2002 DTC 6740 (FCA). The five steps are the following:

> (1) Was there a technological risk or uncertainty which could not be removed by routine engineering or standard procedures?
>
> (2) Did the person claiming to be doing SR&ED formulate hypotheses specifically aimed at reducing or eliminating the technological uncertainty?
>
> (3) Did the procedure adopted accord with the total discipline of the scientific method including the formulation, testing, and modification of hypotheses?
>
> (4) Did the process result in a technological advancement?
>
> (5) Was a detailed record of the hypotheses tested, and results kept as the work progressed?

With respect to the steps set out in (1) and (2), the TCC found that none of the various aspects of construction of the energy-efficient home were presented by GSS as new technological knowledge and no expert evidence regarding the state of technological knowledge in the industry suggested that GSS's project resulted in technological advancement.

The TCC did not accept GSS's contention that the technological advancement was the construction of such an eco-efficient house at such a low price. The TCC stated, "[c]onceptually there is no technological aspect implicit in the notion of an item costing or priced at 'x' rather than 'y' dollars." While the TCC recognized that a technological advancement could result in a lower cost, the question would remain what that technological advancement itself is.

The TCC also noted that the unique combination of already known procedures could constitute SR&ED, but such combination had to be accomplished through application of the scientific method contemplated by *Northwest*.

Regarding the step set out in (3), the TCC found that the only testing done by GSS was trying three different percentages of recycled material in a concrete mix and that such tests appeared to be based on trial and error, which did not satisfy the requirements of *Northwest*.

Finally, concerning the last of the five steps, the TCC considered that no scientific methodology testing was done and that no detailed compilation of hypotheses testing results were kept.

Conclusion

Since the five-step test elaborated in *Northwest* was not met, the TCC concluded that the work done by GSS was not SR&ED and, consequently, upheld the loss determinations denying the SR&ED expenditures claimed by GSS.

— *Sabrina Gravel, Associate, Dentons Canada LLP, Montréal*

Paletta Estate v. The Queen, 2021 DTC 1011 (Tax Court of Canada)

In *Paletta Estate v. The Queen*, 2021 DTC 1011 (General Procedure), Justice David Spiro of the Tax Court of Canada ("TCC") considered certain derivative straddle transactions that were entered into by an individual taxpayer during his taxation years 2000 to 2007 (the "Reassessed Years") to generate non-capital losses through forward foreign exchange transactions or straddle transactions.

The Reassessed Years were prior to the 2017 legislative changes relating to the income tax treatment of straddle transactions, which address the issue analyzed by the TCC in this case. However, this decision may still be of interest for taxpayers who are not subject to the 2017 legislative changes.

Background

In addition to reviewing the income tax treatment of the "straddle transactions", the TCC also considered whether the Reassessed Years (which were statute-barred) could be re-opened and if the taxpayer could be subject to gross negligence penalties under subsection 163(2) of the *Income Tax Act* ("ITA").

During the Reassessed Years, the taxpayer implemented a tax plan designed to generate non-capital losses through the use of forward foreign exchange trading (the "trading plan"). The taxpayer's plan included two forward exchange contracts, one long contract and one short contract, with two different value dates, and the taxpayer could decide to close the loss leg of the contracts before the end of his taxation year and then close the gain leg of the contracts at the beginning of his next taxation year. A particular brokerage firm would review the taxpayer's financial exposure with respect to his account at the end of each day and, to the extent that there was a positive balance in respect of the net value of the long and the short positions, the brokerage firm would not require additional margin from the taxpayer, but would require additional margin if the net value became negative. These transactions would be repeated in subsequent years with the goal of deferring the payment of income taxes. The CRA assumed that the foreign exchange contracts were not actually settled in a legal sense until their value dates. However, the TCC found that this assumption was wrong and showed a misunderstanding of how the foreign exchange market works, and overlooked the fact that the contracts may be closed out before their value dates.

Before entering into this plan, the taxpayer consulted tax lawyers who provided some verbal confirmations about the legality of the plan and the taxpayer was told that it was acceptable and legal, referring to the decision of the Supreme Court of Canada ("SCC") in *Friedberg v. Canada (MNR)* (1993), 93 DTC 5507.

In the Reassessed Years, to reduce his taxable income, the taxpayer claimed non-capital losses of approximately $49 million. The quantum of non-capital losses required by the taxpayer was reviewed every year in light of his expected taxable income.

In 2004 and 2005, an official of the Canada Revenue Agency ("CRA") was assigned to the taxpayer's file to determine if there was any basis to audit the taxpayer's 2002 and 2003 taxation years. After reviewing the file, the CRA determined that an audit was not necessary as the *Friedberg* decision was determinative.

In January 2014, outside the normal reassessment period for the Reassessed Years, the CRA reassessed the taxpayer in respect of each of those years on the basis that there were misrepresentations in his income tax returns attributable to neglect, carelessness, or willful default in claiming the losses. The CRA disallowed all of the losses claimed on the basis that the taxpayer's straddle transactions were a sham and there was no source of income. The CRA also imposed gross negligence penalties on the taxpayer under subsection 163(2) of the ITA for the Reassessed Years.

The taxpayer failed to report in his income tax return the gains realized in early 2002 that were part of the 2001 trading plan and the taxpayer knew he had to include such gains in his income for 2002. This was considered by the TCC in its determination of the application of the gross negligence penalties for the 2002 taxation year.

Issues

The issues considered by the TCC were: (1) Whether the CRA was allowed to reassess the Reassessed Years, which were statute-barred, and deny the losses claimed by the taxpayer because the taxpayer's trading plan was a sham and the taxpayer did not have a "source of income" against which to deduct the losses; and (2) Whether the taxpayer should be subject to the gross negligence penalties under subsection 163(2) of the ITA for any of the Reassessed Years.

Minister's Arguments

The Minister's main arguments changed at trial and focused on the taxpayer's trading plan not being a source of income because the plan's motive was the pursuit of tax losses and that tax loss scheme was not a business. Therefore, the Minister's view was that the taxpayer's incurred losses were not a result of carrying on a business and the taxpayer did not have a source of income against which to deduct the losses.

The Minister also argued that the taxpayer's documents relating to the straddle transactions were shams. The Minister argued that, if the straddle transactions were not considered a "sham" by the TCC, the straddle transactions were "window dressing", having the objective of generating losses while conveying the impression that the taxpayer was carrying on a business for profit.

The Minister argued that the taxpayer bore no risk as a result of his straddle transactions, and that absent such risk, he could not be considered to be carrying on a business.

Regarding the reassessment of the Reassessed Years beyond the normal statute of limitations period, the Minister considered that it was possible because the taxpayer knew that his trading losses were a sham and, on that basis, the Minister was also justified in reassessing those years and in applying the gross negligence penalties.

Taxpayer's Arguments

The taxpayer argued that the straddle transactions were not shams and that these transactions were legally effective.

The teachings of the SCC in *Friedberg* were that by closing out the loss leg of a straddle before the end of a taxation year, a loss will be realized for that taxation year and that such loss would not be diminished by the value of any related gain leg not closed out in the year. Since the taxpayer did the same transactions as in *Friedberg*, he argued that the same result should follow and that his trading plan was not a sham and that the transactions were legally effective.

The taxpayer relied on *Stewart* v. *Canada*, 2002 DTC 6969 (SCC), to support his position that, when an activity is clearly commercial and no personal element is involved, there is a source of income. The taxpayer argued that there was always a possibility of profit and a risk of loss, that the straddle transactions were inherently a commercial activity, and that given the absence of a personal element, there was a source of income for purposes of the ITA.

The taxpayer also argued that the Reassessed Years were prior to the new anti-avoidance rules on straddle transactions enacted following the 2017 Budget announcement and that these new rules cannot apply in this case.

The taxpayer further argued that the Minister was precluded from re-opening any of the statute-barred years because the taxpayer was not negligent or careless. He simply trusted and relied on his accountant to correctly report the transactions in his income tax returns.

In respect of the gross negligence penalties, the taxpayer argued that he had carefully reviewed the transactions, relied on professional advice on the proper reporting of the trades, reviewed the returns with his advisors, and received comfort from the CRA itself as the CRA had reviewed the transactions in a prior year.

Decision Rendered by the TCC

The TCC stated that, based on *Friedberg*, the "realization" method was acceptable under the ITA and that straddle traders may report the results of their trades on a basis that does not reflect the true economic results of such trades. The TCC also determined that the 2017 legislative changes that target straddle transactions cannot retroactively override the *Friedberg* decision and that the CRA was not allowed to reassess the taxpayer as if *Friedberg* "had never been decided".

Based on *Stewart*, the TCC determined that the taxpayer's straddle transactions were a source of income. The first step of the *Stewart* test is to assess whether the activity of the taxpayer is undertaken in pursuit of profit or is a personal endeavour. Where the activity is not a personal endeavour, the second step is to determine whether the source is business or property. The TCC stated that, for the purposes of this case, if one's activity is clearly commercial and no personal element is involved, there is a source of income. In that regard, the TCC determined that forward foreign exchange trading is by its very nature a commercial activity, and there would always be a positive or negative difference between the value of the loss leg and the value of the gain leg at any particular time. The TCC also found that there was no personal element involved in the taxpayer's straddle transactions.

The TCC also considered the decision of the SCC in *Walls v. Canada*, 2002 DTC 6960, in which the SCC concluded that the principles in *Stewart* apply, even if the activity of the taxpayer is entirely tax-motivated and not in the form of

carrying on a business.

The TCC disagreed with the Minister's position that the taxpayer's transactions were a sham or window dressing. The TCC also noted that, where the amount of risk is negligible, the amount of margin should be negligible as well, and dismissed the CRA's argument that the low margins support a sham trading scheme. The fact that the straddle transactions had no business purpose did not negatively impact the TCC's decision since the TCC stated that there is no business purpose test in Canadian tax law and the lack of a business purpose is not a sham. The agreements relating to the straddle transactions and the margin amounts did lead the TCC to conclude that the straddle transactions were not shams or window dressing.

Except for the 2002 taxation year where the taxpayer understated his income, the TCC determined that the Minister did not prove that the taxpayer had made misrepresentations in his income tax returns attributable to neglect, carelessness, or willful default. Accordingly, the statute-barred Reassessed Years could not be re-opened and gross negligence penalties under subsection 163(2) of the ITA could not be assessed.

— *Marc-André Bélanger, Partner, Dentons Canada LLP, Montréal*

Villa Ste-Rose v. The Queen, 2021 GTC 1005 (Federal Court of Appeal)

Introduction

On February 25, 2021, the Federal Court of Appeal ("FCA") confirmed the decision rendered by the Tax Court of Canada ("TCC") in *Villa Ste-Rose Inc. v. The Queen* (2019 GTC 12, the "decision under appeal") and concluded that the tax authorities were not justified in imposing interest and a penalty on the taxpayer.

Thus, like the trial judge, the FCA ruled that an unregistered taxpayer who remits an overdue amount of tax by filing its tax return for a given period late is not subject to interest and penalties under the *Excise Tax Act* ("ETA") if the taxpayer is otherwise entitled to a tax refund such that no amount of tax is actually owed to the tax authorities for the period. This key decision not only discusses the ETA's intent for fair and equal treatment between registrants and non-registrants, but provided the decision is not challenged before the Supreme Court of Canada, it should also lead the tax authorities to revise their current policies[1] in imposing interest and penalties on unregistered late filers in similar situations.

Background

Villa Ste-Rose Inc. ("Villa") operates a seniors' residence in Québec and, as such, it makes exempt supplies under the ETA. As a result, Villa is a non-registrant for Goods and Services Tax ("GST") purposes.

Following a fire that completely destroyed the building in which Villa operated its seniors' residence, Villa undertook the work to rebuild it and paid GST on the reconstruction work.

Completion of the work occurred during the period ending November 30, 2014. As a "builder", as defined in the ETA and as a result of the application of subsection 191(3) of the ETA, Villa was deemed to have made and received by way of sale a taxable supply of the building, and thus was required to remit GST in the amount of $736,864.18. Under the ETA, Villa was required to file its GST return and remit this GST amount to the tax authorities no later than December 31, 2014. However, during the same period, Villa was eligible, under subsections 256.2(3) and 257(1) of the ETA, to GST rebates totalling $860,665.48.

It was not until September 28, 2015, that Villa filed its GST return showing $736,864.18 in net GST to be remitted ("Net GST") and to which two rebate applications totalling $860,665.48 were attached.

On October 30, 2015, the Canada Revenue Agency ("CRA") issued a notice of assessment pursuant to which, while recognizing a credit in the amount of $860,665.48 in respect of the rebates, it imposed on Villa, under subsection 280(1) and section 280.1 of the ETA, interest totalling $27,984.09 and a penalty in the amount of $22,105.92 for failure to file its GST return and to remit its Net GST on or before December 31, 2014. The penalty and interest were calculated on the total Net GST payable of $736,864.18.

Villa objected to the assessment on the basis that no interest and penalty should have been imposed by the CRA, considering that it was entitled to a greater amount of GST refund in respect of the period ending on November 30, 2014, and that such amount should have been taken into account when assessing its Net GST for such period.

[1] Canada Revenue Agency, GST/HST Policy Statement P-194R2 (August 27, 2007).

Issue

The central question in this case was whether the CRA was required to take into account the rebates to which Villa was entitled for the period ending November 30, 2014, when calculating the interest under subsection 280(1) and the penalty under section 280.1 of the ETA when assessing Villa's Net GST included in its GST return filed on September 28, 2015.

TCC Decision

In the decision under appeal, Justice D'Auray of the TCC concluded that, despite the late filing by Villa of its GST return, the Minister was nevertheless required, for the purpose of calculating interest and penalties under subsection 280(1) and section 280.1 of the ETA, to set off the GST payable by Villa against the rebates to which it was otherwise entitled. As the resulting amount was negative, Justice D'Auray found that the Minister did not have the authority to impose on Villa the interest and penalty in dispute.

In reaching this conclusion, Justice D'Auray relied on the offsetting mechanism provided for in subsection 228(6) of the ETA to conclude that the interest and penalty under subsection 280(1) and section 280.1 should have been calculated on the net amount due by Villa to the tax authorities (i.e., the GST payable less the GST rebates to which Villa was entitled). Referring to the decision rendered by the TCC in *Humber College Institute of Technology & Advanced Learning v. The Queen* (2013 GTC 52 (TCC)) under the informal procedure, a highly similar case, Justice D'Auray noted that while she had reached the same result as Justice Miller in that case, she had done so by a different route — that of subsection 228(6) of the ETA.

FCA Analysis

The FCA did not discuss at length the meaning given by the TCC to subsection 228(6) of the ETA. While confirming that the issue was whether the interest and penalty that may be imposed under subsection 280(1) and section 280.1 of the ETA for late filing of a GST return should be calculated solely on the basis of the GST payable or on the basis of the Net GST amount owing by the taxpayer, the FCA narrowed the issue to be resolved to the analysis of the meaning of the term "amount" payable or remittable on which interest and penalty are to be calculated under these two provisions. In doing so, the FCA adopted an approach similar to the one developed by the TCC in *Humber College*.

After a thorough review of the interpretive rules applicable to tax statutes, the FCA was not convinced that subsection 280(1) and section 280.1 of the ETA were clear and unequivocal regarding the GST amount on which the interest and penalty should be calculated. Therefore, the FCA concluded that a review of these two provisions, in relation to the context, scheme, and purpose of the ETA, was necessary.

In its analysis, the FCA agreed with Justice D'Auray that the rebates to which the respondent was entitled were enacted by Parliament to prevent a non-registrant "builder" for GST purposes, such as Villa, from being at a tax disadvantage compared to a registered "builder" who may recover the GST paid in the course of their commercial activities by way of input tax credits. That intent expressed by Parliament was considered by the FCA as an important piece of context for the purposes of interpreting subsection 280(1) and section 280.1 of the ETA.

The FCA also noted that subsection 296(2.1) of the ETA (which forces the Minister to take into account, when assessing a taxpayer, all eligible rebates for which the taxpayer has not filed rebate applications), while not applicable in the case at bar (since Villa filed its rebate applications), was useful in the interpretive analysis of the context, scheme, and purpose of subsection 280(1) and section 280.1 of the ETA. The FCA agreed with Justice D'Auray that, in light of subsection 296(2.1) of the ETA, the CRA's interpretation that the interest and penalty that may be imposed for late filing of a GST return must be calculated, in all circumstances, on the basis of the amount of net GST payable, without regard to rebates otherwise payable, had to be rejected as it was likely to produce illogical or absurd results. The FCA noted that Parliament could not have intended, in enacting subsection 280(1) and section 280.1 of the ETA, to do more harm to a well-meaning taxpayer than to a less well-meaning one.

As a result, the FCA confirmed that the "amount" referred to in subsection 280(1) and section 280.1 of the ETA could only represent the amount of GST actually owed by Villa, namely the Net GST payable by Villa less the refunds it was entitled to at the time the Net GST becomes payable.

Conclusion

Since Justice D'Auray reached the right conclusion, namely that the Minister was required, for the purpose of calculating interest and penalty under subsection 280(1) and section 280.1 of the ETA, to set off the GST payable by Villa against the rebates to which it was otherwise entitled, the TCC's decision was affirmed by the FCA.

— *Camille Janvier-Langis, Partner, Dentons Canada LLP, Montréal*

CURRENT ITEMS OF INTEREST

Federal Budget Date Announced

On April 19, 2021, at approximately 4:00 p.m. ET, the Deputy Prime Minister and Minister of Finance, the Honourable Chrystia Freeland, will present the 2021–2022 federal Budget.

Interest Rates for Second Calendar Quarter

The CRA announced the prescribed annual interest rates that will apply to any amounts owed to the CRA and to any amounts owed by the CRA to individuals and corporations. These rates will be in effect from April 1, 2021, to June 30, 2021. For income tax purposes, the rates will be as follows:

- The interest rate charged on overdue taxes, Canada Pension Plan contributions, and employment insurance premiums will be 5%.
- The interest rate to be paid on corporate taxpayer overpayments will be 1%.
- The interest rate to be paid on non-corporate taxpayer overpayments will be 3%.
- The interest rate used to calculate taxable benefits for employees and shareholders from interest-free and low-interest loans will be 1%.
- The interest rate for corporate taxpayers' pertinent loans or indebtedness will be 4.10%.

More CRA Accounts Locked From Online Access

The CRA has locked out approximately 800,000 users from their online accounts. There has not been a breach of the CRA's systems, but the CRA has reason to believe that user IDs and passwords for these accounts were obtained by unauthorized persons. Impacted individuals will be notified of their account status by email or by mail if there is no email on file.

To regain access to their accounts, users can either log in using a different method or register for a new CRA user ID which requires them to receive a security code by mail. If neither of the two options are available because the address on file is incorrect and the user cannot access their account, the CRA asks users to wait until March 22, 2021, and try logging in again at that time. Afterwards, if they still cannot access their account, they should call the CRA.

If regaining access requires a user to register for a new CRA user ID, the user can still file their income tax return using NETFILE-certified software and apply for COVID-19 benefits while they wait for their security code to arrive.

EFILE Program Updates

With the commencement of tax season, the CRA has provided several updates and reminders for tax preparers. These updates relate to:

- additional information pertaining to e-signatures on Form T183,
- online transmission history,
- express notice of assessment,
- submitting documents for review programs online, and
- multifactor identification.

For the latest updates, see: www.canada.ca/en/revenue-agency/services/e-services/e-services-businesses/efile-electronic-filers/efile-news-program-updates.html.

RECENT CASES

Scholarship relating to part-time studies not exempt for Child Care Benefit calculation purposes

This appeal concerns objections to Notices of Determination issued by the Canada Revenue Agency ("CRA") with respect to the amounts of Child Care Benefit ("CCB") to which the appellant was entitled for fiscal years 2015 and 2016. The respondent also filed a motion to quash the appeal for fiscal year 2015 as, arguably, no Notice of Objection had been filed for that year. An acceptable Notice of Objection was received for fiscal year 2016. The main issue relates to the treatment, for CCB calculation purposes, of a scholarship received by the appellant. The respondent argued that the scholarship must be taken into account in establishing the Net Family Income used to determine the amount of CCB payable. The respondent states that the scholarship relates to "part-time" studies and therefore does not qualify for the exemption provided by regulation for scholarships and fellowships. The appellant argued that she qualified as a "full-time" student and therefore was entitled to the exemption since she also participated in related required internships. She also argued that the amount was not a scholarship but a refundable loan, although no evidence supporting this was presented.

The motion to quash the 2015 appeal was granted and the 2016 appeal was dismissed. After reviewing the facts, legislation, and regulations, including the T2202A document issued by the Université du Québec à Montréal stating the appellant was a "part-time" student, the judge agreed with the respondent since the appellant did not meet the required criteria relating to the attendance of 10 hours of courses per week to qualify for the exemption. In fact, the appellant followed two courses in the fall and winter semesters, which included three hours of courses per week. The respondent was therefore justified in taking into account the amount of the scholarship in establishing the family income used to determine the amount of CCB payable. Accordingly, the motion to quash was granted for 2015 and the appeal dismissed for 2016 as the appellant was not registered as a "full-time" student.

El Qandil c. La Reine

2021 DTC 1012

Court rules subsection 128.1(1) and the relevant tax treaty have no application

The appellant, a limited liability company incorporated in the Netherlands, operated a dairy farm in Ontario in partnership with Michiel and Marian Backx. On a reorganization of the ownership structure of the farm to implement a settlement with the Netherlands Tax Authority relating to the sale of a previous dairy farm in the Netherlands to the appellant to defer the accrued gain on that farm from Netherlands tax, Backx Limited as purchaser of the interest previously owned by the appellant provided notice to the Minister pursuant to subsection 116(5.02) claiming that the partnership interest in the dairy farm was "treaty-protected property" such that Backx Limited was not required to withhold tax pursuant to subsection 116(5) of the *Income Tax Act* (the "Act"). The initial Tax Court of Canada judgment was appealed to the Federal Court of Appeal, which concluded that the Tax Court had correctly determined that the appellant was a resident of Canada for the 2009 taxation year, but allowed the appeal and set aside the judgment, referring it back to the Tax Court for reconsideration as to i) the application of subsection 128.1(1) of the Act and ii) the application of the relevant tax treaty.

The original Tax Court decision was confirmed. Subsection 128.1(1) of the Act and the relevant tax treaty have no application in this instance. The appellant became a resident of Canada in 1998 as a result of the application of the central management and control test. Accordingly, subsection 128.1(1) cannot apply to deem the disposition and reacquisition of a property that the appellant did not own before it became a resident of Canada. The Court is not estopped from finding that the appellant was a resident of Canada during the 1998 to 2008 taxation years based on the facts and the applicable law, and there was no abuse of process. Article 4 of the *Canada–Netherlands Tax Treaty* is not engaged because, in the absence of a mutual agreement between the competent authorities, the appellant is "deemed not to be a resident of either state" such that it is not entitled to any treaty benefits including the exemption from capital gains pursuant to Article 13. It follows that the Minister was entitled to issue the reassessment in connection with the subject capital gain.

Landbouwbedrijf Backx B.V. v. The Queen

2021 DTC 1004

Motion to quash Notice of Appeal dismissed

This case concerns a Motion to Quash the Notice of Appeal to a GST/HST assessment filed by the Appellant at the Tax Court. The Motion is based on the Respondent's assertion that the Appellant did not file that Notice of Appeal within the 90-day period the *Excise Tax Act* (the "ETA") provides for so doing, nor pursuant to any order permitting an extension of time for filing. The corporate Appellant asserted through its two non-lawyer representatives that it never received a notice of confirmation pertaining to its December 22, 2016, objection to the November 2, 2016, assessment and thus, through no fault of its own, was unaware of the commencement of any 90-day period for filing its Notice of Appeal. Accordingly, the Respondent was required to prove that the Notice of Confirmation had been sent by registered or certified mail. To do so, the Respondent provided a detailed affidavit with attached documents outlining the process that occurred in this specific case.

The motion to quash the Notice of Appeal was dismissed. The Court found that the Respondent failed to comply with a requirement specified in subsection 335(1) of the ETA for evidencing that a notice was "sent by registered or certified mail". That requirement is the inclusion as an exhibit in a CRA officer's affidavit of "the post office certificate of registration of the letter or a true copy of the relevant portion thereof". In the view of the judge, none of the exhibits to the affidavit provided, individually, could reasonably be construed as being such a certificate or a true copy of the relevant portion thereof. In addition, the Judge was concerned that the Canada Post Customer Service Team identified the missing registered letter as ". . . this Registered Letter mailed May 24/17 to Raad Murad." The problem is that Raad Murad is not the correct taxpayer entity. Rather, the correct taxpayer entity is the corporate Appellant — Luxury Home Landscape Construction Inc. It is that corporation that is the entity to which registered mail, including the subsequent Notice of Confirmation, was to have been sent. Whether that actually happened is put in doubt by the language of this Canada Post email, identifying Raad Murad as the entity to whom the registered letter was mailed. A copy of the address envelope enclosing the Notice of Confirmation was not put in evidence. Given the two above-noted deficiencies, the judge was unable to grant the Respondent's motion that the Notice of Appeal be quashed and dismissed it. In the absence of an appropriate legal basis for identifying a 90-day period commencement date, the fate of the Notice of Appeal is determined by paragraph 305(5)(*a*) of the ETA. Per such, without any 90-day period being identified, there cannot be an immediately subsequent one-year period for applying for an extension of time to file. As the motion to quash has not succeeded, the Notice of Appeal remains unscathed. Further, absent establishment that the Notice of Confirmation was "sent", the March 15, 2019 filing of the subject Notice of Appeal was in conformity with the ETA. Paragraph 306(*b*) of the ETA allows for a Notice of Appeal to be filed any time post 180 days from the filing date of a Notice of Objection, provided the taxpayer had not been notified of a ministerial confirmation or reassessment before filing. That is the case here. More than 180 days passed from the December 22, 2016, filing of the Notice of Objection to the March 15, 2019, filing of the subject Notice of Appeal. Accordingly, the Appellant's appeal can be set down for hearing.

Luxury Home v. The Queen

2021 DTC 1008

Canadian resident working in Egypt liable for failure to make installment payments

The taxpayer was a resident of Canada in the 2016 taxation year and worked in Egypt for a non-Canadian petroleum company. He did not make any Canadian tax installment payments for this period and was assessed interest in the amount of $599.24 for the failure to do so. The taxpayer submitted that he should not be required to make Canadian installment payments because source deductions were taken by his employer on account of tax in Egypt. He sought reimbursement of the interest assessed, and also of a penalty. His appeal to the Tax Court was dismissed; the taxpayer subsequently appealed to the Federal Court of Appeal.

The appeal was dismissed. The taxpayer failed to prepare the appeal book in accordance with the agreement of the parties as to its contents and it did not contain the pleadings filed in the Tax Court. As a result, the Federal Court of Appeal did not take these pleadings into account. There was no basis to provide relief for a penalty as there was no evidence in the record that a penalty was imposed. The taxpayer submitted that the Tax Court erred because it lacked jurisdiction to dismiss the appeal since it had no authority to cancel the interest. The Appellate Court determined the Tax Court had the jurisdiction to determine whether an interest obligation was imposed under the *Income Tax Act* (the "Act"), but it does not have the authority to cancel interest that otherwise arises under the Act. The Tax Court judge correctly stated and applied this principle in his oral reasons. The taxpayer also sought relief pursuant to Article 23(1) of the *Income Tax Convention between Canada and the Arab Republic of Egypt* (the "Treaty"). His argument was that the Minister was required to take into account source deductions taken for tax in Egypt in calculating the installment payments that were required. The Appellate Court found no basis to provide the relief sought concerning the Treaty. Finally, the taxpayer relied on jurisprudence which acknowledged that source deductions reduce the amount of installments. However, these cases did not concern foreign source deductions, and the Tax Court judge provided detailed reasons for his conclusion that any source deductions for tax in Egypt did not affect the installments required under the Act. The Federal Court of Appeal concluded the Tax Court did not make any errors that warranted intervention.

Bhachu v. The Queen

2021 DTC 5010

TAX NOTES

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