## Tax Notes

Report No.: 712

**Date:** May, 2022

# FEDERAL BUDGET HIGHLIGHTS

The 2022 Federal Budget, *A Plan to Grow Our Economy and Make Life More Affordable* ("Budget 2022"), was tabled on April 7, 2022. After including net new spending of $7.4 billion from Budget 2022, the deficit for 2022–2023 is projected to be $52.8 billion. This is down considerably from the projected deficit of $113.8 billion for 2021–2022. Readers are encouraged to access the in-depth commentary by Dentons Canada LLP, which is available on IntelliConnect and AnswerConnect. That said, the following is a brief summary of the tax measures that were announced in Budget 2022.

## PERSONAL INCOME TAX MEASURES

**Tax-Free First Home Savings Account:** Budget 2022 proposes to create the Tax-Free First Home Savings Account ("FHSA"), a new registered account to help individuals save for their first home. Contributions to an FHSA would be deductible and income earned in an FHSA would not be subject to tax. The lifetime limit on contributions would be $40,000, subject to an annual contribution limit of $8,000.

**Home Buyers' Tax Credit:** Budget 2022 proposes to double the Home Buyers' Tax Credit amount from $5,000 to $10,000, which would provide up to $1,500 in tax relief to eligible home buyers.

**Multigenerational Home Renovation Tax Credit:** This new refundable credit would provide recognition of eligible expenses for a qualifying renovation. The value would be 15% of the lesser of eligible expenses and $50,000. Seniors and adults with disabilities would be considered eligible persons for the purpose of the credit.

**Home Accessibility Tax Credit:** Budget 2022 proposes to increase the annual expense limit of the Home Accessibility Tax Credit from $10,000 to $20,000.

**Residential Property Flipping Rule:** Profits arising from dispositions of residential property (including a rental property) that was owned for less than 12 months would be deemed to be business income.

**Labour Mobility Deduction for Tradespeople:** Budget 2022 proposes to introduce a Labour Mobility Deduction for Tradespeople to recognize certain travel and relocation expenses of workers in the construction industry, for whom such relocations are relatively common. This measure would allow eligible workers to deduct up to $4,000 in eligible expenses per year.

**Medical Expense Tax Credit for Surrogacy and Other Expenses:** Budget 2022 proposes to broaden the Medical Expense Tax Credit ("METC") to recognize circumstances that involve medical expenses for individuals other than the intended parents, such as medical expenses related to a surrogate mother or sperm, ova, or embryo donor; reimbursement of medical expenses incurred by a surrogate mother or sperm, ova, or embryo donor; and fees paid to acquire donated human sperm or ova.

**Amendments to the *Children's Special Allowances Act* and to the *Income Tax Act*:** Budget 2022 proposes legislative amendments to the *Children's Special Allowances Act* and its regulations and to the *Income Tax Act* to ensure that the special allowance, the Canada Child Benefit, and the Canada Workers Benefit amounts for families continue to support children in need of protection. Budget 2022 also proposes to amend the *Income Tax Act* to ensure consistent tax treatment of kinship care providers and foster parents who receive financial assistance from Indigenous communities.

## BUSINESS INCOME TAX MEASURES

**Canada Recovery Dividend and Additional Tax on Banks and Life Insurers:** Budget 2022 proposes to introduce the one-time Canada Recovery Dividend (a 15% tax on bank and life insurer groups) and an additional tax on banks and life insurers of 1.5% of the taxable income for members of bank and life insurer groups.

**Investment Tax Credit for Carbon Capture, Utilization, and Storage:** Budget 2022 proposes to introduce the investment tax credit for carbon capture, utilization, and storage, a refundable credit available to businesses that incur eligible expenses. The following rates would apply to eligible expenses incurred after 2021 through 2030:

- 60% for eligible capture equipment used in a direct air capture project;
- 50% for all other eligible capture equipment; and
- 37.5% for eligible transportation, storage, and use equipment.

**Clean Technology Tax Incentives—Air-Source Heat Pumps:** Budget 2022 proposes to expand eligibility under Capital Cost Allowance Classes 43.1 and 43.2 to include air-source heat pumps primarily used for space or water heating.

**Rate Reduction for Zero-Emission Technology Manufacturers:** Budget 2022 proposes to include the manufacturing of air-source heat pumps used for space or water heating as a zero-emission technology manufacturing or processing activity eligible for a reduced tax rate.

**Critical Mineral Exploration Tax Credit:** Budget 2022 proposes to introduce a new 30% Critical Mineral Exploration Tax Credit for specified minerals.

**Flow-Through Shares for Oil, Gas, and Coal Activities:** Budget 2022 proposes to eliminate the flow-through share regime for oil, gas, and coal activities by no longer allowing oil, gas, and coal exploration or development expenditures to be renounced to a flow-through share investor.

**Small Business Deduction:** In order to facilitate small business growth, Budget 2022 proposes to extend the range over which the business limit is reduced based on the combined taxable capital employed in Canada of the Canadian-controlled private corporation (“CCPC”) and its associated corporations. The new range would be $10 million to $50 million.

**International Financial Reporting Standards for Insurance Contracts (“IFRS 17”):** On May 28, 2021, the Government issued a news release to announce that it intends to generally support the use of IFRS 17 accounting for income tax purposes. Following extensive consultations with the insurance industry, Budget 2022 proposes to maintain the policy intent described in the May 2021 news release, but proposes to make certain relieving modifications, as well as consequential changes to protect the minimum tax base for life insurers.

**Hedging and Short Selling by Canadian Financial Institutions:** Budget 2022 proposes amendments to the *Income Tax Act* to:

- deny the dividend received deduction for dividends received by a taxpayer on Canadian shares if a registered securities dealer that does not deal at arm’s length with the taxpayer enters into transactions that hedge the taxpayer's economic exposure to the Canadian shares, where the registered securities dealer knew or ought to have known that these transactions would have such an effect;
- deny the dividend received deduction for dividends received by a registered securities dealer on Canadian shares that it holds if it eliminates all or substantially all of its economic exposure to the Canadian shares by entering into certain hedging transactions; and
- provide that in the above situations, the registered securities dealer will be permitted to claim a full, rather than a two-thirds, deduction for a dividend compensation payment it makes under a securities lending arrangement entered into in connection with the above hedging transactions.

**Application of the General Anti-Avoidance Rule ("GAAR") to Tax Attributes:** Budget 2022 proposes that the *Income Tax Act* be amended to provide that the GAAR can apply to transactions that affect tax attributes that have not yet become relevant to the computation of tax.

**Genuine Intergenerational Share Transfers:** Budget 2022 announces a consultation process for Canadians to share views as to how the existing rules could be modified to protect the integrity of the tax system while continuing to facilitate genuine intergenerational business transfers.

**Substantive CCPCs:** Budget 2022 proposes targeted amendments to the *Income Tax Act* to align the taxation of investment income earned and distributed by "substantive CCPCs" with the rules that currently apply to CCPCs.

**Deferring Tax Using Foreign Resident Corporations:** Budget 2022 proposes targeted amendments to the *Income Tax Act* to eliminate the tax-deferral advantage available to CCPCs and their shareholders earning investment income through controlled foreign affiliates.

## INTERNATIONAL TAX MEASURES

**International Tax Reform:** Canada is one of 137 members of the Organisation for Economic Co-operation and Development ("OECD")/Group of 20 ("G20") Inclusive Framework on Base Erosion and Profit Shifting that have joined a two-pillar plan for international tax reform agreed to on October 8, 2021. Pillar One is intended to reallocate a portion of taxing rights over the profits of the largest and most profitable multinational enterprises ("MNEs") to market countries. Pillar Two is intended to ensure that the profits of large MNEs are subject to an effective tax rate of at least 15%, regardless of where they are earned.

**Exchange of Tax Information on Digital Economy Platform Sellers:** Budget 2022 proposes to implement in Canada the OECD model rules for reporting by digital platform operators with respect to platform sellers.

**Interest Coupon Stripping:** Budget 2022 proposes an amendment to the interest withholding tax rules to ensure that the total interest withholding tax paid under an interest coupon stripping arrangement is the same as if the arrangement had not been undertaken and instead the interest had been paid to the non-resident lender.

## SALES AND EXCISE TAX MEASURES

**GST/HST Health Care Rebate:** Budget 2022 proposes that to be eligible for the expanded hospital rebate, a charity or non-profit organization must deliver the health care service with the active involvement of, or on the recommendation of, either a physician or a nurse practitioner, irrespective of their geographical location.

**GST/HST on Assignment Sales by Individuals:** Budget 2022 proposes to amend the *Excise Tax Act* to make all assignment sales in respect of newly constructed or substantially renovated residential housing taxable for GST/HST purposes.

**Taxation of Vaping Products:** The proposed federal excise duty framework for vaping products would come into force on October 1, 2022. Retailers may continue to sell until January 1, 2023, unstamped products that are in inventory as of October 1, 2022. A federal excise duty rate of $1 per 2 ml, or fraction thereof, is proposed for the first 10 ml of vaping substance, and $1 per 10 ml, or fraction thereof, for volumes beyond that. If a province or territory were to choose to participate in a coordinated vaping taxation regime administered by the federal government, an additional duty rate would be imposed in respect of dutiable vaping products intended for sale in that participating jurisdiction.

**Cannabis Taxation Framework and General Administration under the *Excise Act, 2001***: Budget 2022 proposes:

- To allow licensed cannabis producers to remit excise duties on a quarterly rather than monthly basis. This option would only be available in respect of a fiscal quarter, beginning on or after April 1, 2022, of a licensee that was required to remit less than a total of $1 million in excise duties during the four fiscal quarters immediately preceding that fiscal quarter.

- To allow the Canada Revenue Agency to approve certain contract-for-service arrangements between two licensed cannabis producers.
- To amend the penalty provision for lost stamps so that the higher penalty for losing stamps for a province or territory with an additional cannabis duty adjustment only applies if the adjustment rate is greater than 0%.
- That existing cannabis penalty provisions would also apply to situations where unlicensed parties illegally possess or purchase cannabis products, and where licensed parties illegally distribute cannabis products.
- To exempt holders of a Health Canada-issued Research Licence or Cannabis Drug Licence from the requirement to be licensed under the excise duty regime.
- To allow the CRA to issue licences that would be valid for up to the lesser of five years or the longest period for which the relevant Health Canada licence or licences are valid.

**General Administration—*Excise Act, 2001*:** Budget 2022 proposes to:

- Add all cancellation criteria for an excise licence, other than a proactive request by a licensee to cancel its licence, to the criteria that may be used to suspend an excise licence.
- Require all excise licensees and excise applicants to comply with federal and provincial legislation and regulations regarding the taxation and control of cannabis products.
- Remove cash and transferable bonds issued by the Government of Canada, and add bank drafts and Canada Post money orders, to the types of financial security that could be accepted by the CRA.
- Confirm the ability of the CRA to carry out virtual audits and reviews of all licensees, where the Agency deems it appropriate.

**World Trade Organization ("WTO") Settlement on the 100% Canadian Wine Exemption:** In 2018, the 100% Canadian wine excise duty exemption was challenged at the WTO. Canada reached a settlement on this dispute in July 2020, in which it agreed to repeal the excise duty exemption by June 30, 2022; as a result, Budget 2022 proposes to repeal the 100% Canadian wine excise duty exemption.

**Beer Taxation:** Budget 2022 proposes to eliminate excise duty for beer containing no more than 0.5% ABV.

## OTHER MEASURES

### Minimum Tax for High Earners

Budget 2022 announces the government's commitment to examine a new minimum tax regime, which will go further towards ensuring that all wealthy Canadians pay their fair share of tax. The government will release details on a proposed approach in the 2022 fall economic and fiscal update.

### Review of Tax Support to R&D and Intellectual Property

The Budget papers indicate that the government intends to undertake a review of the scientific research and experimental development ("SR&ED") program, first to ensure that it is effective in encouraging research that benefits Canada, and second to explore opportunities to modernize and simplify it. Specifically, the review will examine whether changes to eligibility criteria would be warranted to ensure adequacy of support and improve overall program efficiency.

As part of this review, "the government will also consider whether the tax system can play a role in encouraging the development and retention of intellectual property stemming from R&D conducted in Canada. In particular, the government will consider, and seek views on, the suitability of adopting a patent box regime in order to meet these objectives." No timeline was provided on the possible changes to the SR&ED rules.

### Annual Disbursement Quota for Registered Charities

Budget 2022 proposes to make a number of changes to increase expenditures by larger charities, and to improve the enforcement and operation of the disbursement quota (“DQ”) rules, including increasing the rate of the DQ from 3.5% to 5% for the portion of property not used in charitable activities or administration that exceeds $1 million.

### Charitable Partnerships

Budget 2022 proposes a number of changes to improve the operation of the rules relating to activities through an intermediary organization (other than a qualified donee), allowing charities to make qualified disbursements to organizations that are not qualified donees.

### Borrowing by Defined Benefit Pension Plans

Budget 2022 proposes to provide more borrowing flexibility to administrators of defined benefit registered pension plans (other than individual pension plans) by maintaining the borrowing rule for real property acquisitions and replacing the 90-day term limit with a limit on the total amount of additional borrowed money (for purposes other than acquiring real property) equal to the lesser of:

- 20% of the value of the plan’s assets (net of unpaid borrowed amounts); and
- the amount, if any, by which 125% of the plan’s actuarial liabilities exceeds the value of the plan’s assets (net of unpaid borrowed amounts).

### Reporting Requirements for RRSPs and RRIFs

Budget 2022 proposes to require financial institutions to annually report to the Canada Revenue Agency the total fair market value, determined at the end of the calendar year, of property held in each RRSP and RRIF that they administer.

## CURRENT ITEMS OF INTEREST

### MANITOBA BUDGET 2022

Manitoba's 2022 Budget: *Recover Together* ("Budget 2022") was presented on April 12, 2022, by Finance Minister Cameron Friesen. Budget 2022 projects a deficit of $548 million for 2022–2023. Budget 2022 included several tax changes, which are summarized below.

### Residential Renters Tax Credit

For 2022 and subsequent taxation years, Manitoba will introduce a new Residential Renters Tax Credit to replace the rent component of the Education Property Tax Credit. Renters of residential properties will be able to claim a fixed amount of $43.75 for each month they pay rent, for a maximum of $525 per year. This amount will not be income tested. Unlike the previous credit, it will also be available to Manitobans who receive non-Employment and Income Assistance (“EIA”) Rent Assist or who live in social housing.

### Small Business Venture Capital Tax Credit

Budget 2022 announced that the Small Business Venture Capital Tax Credit will be made permanent and will be expanded to support venture capital funds.

### Community Enterprise Development Tax Credit

The Community Enterprise Development Tax Credit, which was scheduled to expire on December 31, 2022, will be made permanent.

### Administrative Measures

Budget 2022 announced that the following administrative tax changes will be made:

- A minor change will be made to eliminate potential confusion regarding how federal provisions respecting the Tax on Split Income ("TOSI") are to apply to individuals in Manitoba.
- The Research and Development Tax Credit will be amended to align with extended filing deadlines made under the federal *Income Tax Act* in response to COVID-19.
- Minor changes will be made to the Film and Video Production Tax Credit to confirm that film producers are able to get advance credits prior to a film being completed provided that proper documentation is submitted.

### Health and Post-Secondary Education Tax Levy

Thresholds for the Health and Post-Secondary Education Tax Levy, commonly called the payroll tax, will increase effective January 1, 2023. The exemption threshold will increase from $1.75 million to $2.0 million of annual remuneration and the threshold below which employers pay a reduced rate will be increased from $3.5 million to $4.0 million.

### Education Property Tax Rebates

Budget 2022 announced that the education property tax rebate for residential and farm properties will increase from 25% in 2021 to 37.5% in 2022 and 50% in 2023, while other properties will continue to get 10% rebates. Property owners will continue to pay education property taxes but will automatically receive the Education Property Tax Rebate cheque in the same month that municipal property taxes are due. However, other education property tax credits and rebates will be proportionately reduced in line with increases to the Education Property Tax Rebate.

### Fuel Tax

Effective May 1, 2022, fuel used in off-road operation of peat harvesting equipment will be exempt from Manitoba's Fuel Tax.

## CRA EFILE NEWS AND PROGRAM UPDATES

The CRA updated its website to include several new updates that are of interest to tax preparers. These include:

- How to use the CRA's new two-step verification process for authorizing a representative using Represent a Client;
- New features recently added to the Change My Return service;
- The process for sending copies of forms T183 and T183TRUST, if requested by the CRA;
- A reminder that Form T2201, *Disability Tax Credit Certificate*, and supporting documents can be sent electronically via My Account or Represent a Client; and
- A reminder that the CRA has extended the service hours of its EFILE Helpdesks.

These updates are all available at: [www.canada.ca/en/revenue-agency/services/e-services/e-services-businesses/efile-electronic-filers/efile-news-program-updates.html](www.canada.ca/en/revenue-agency/services/e-services/e-services-businesses/efile-electronic-filers/efile-news-program-updates.html).

## ADMINISTRATIVE POLICY CHANGE FOR PLOI ELECTIONS

The CRA has announced an administrative change to filing an election for pertinent loans or indebtedness ("PLOI") and what information to report.

In interpreting the term "amount" in relation to a loan or indebtedness, and consistent with the CRA's historic view, each increase in the loan or indebtedness balance should be treated as a unique amount of indebtedness. As a result, the CRA's policy on PLOI elections was that, if the filing-due date was the same for electing PLOI treatment for more than one amount owing, a single written communication could be prepared and filed with the Minister which contained an election for each particular amount owing.

As of March 25, 2022, the CRA has adopted an administrative policy that requires only one election to be made in respect of each loan or indebtedness governed by the same agreement owing by each non-resident person. For example, a revolving loan will require one single election even if there have been or will be multiple amounts borrowed and repaid under the same loan or indebtedness instrument. In these circumstances, the loan or indebtedness will be considered to arise on the date of the first amount owing under the agreement.

This administrative policy will apply to all elections filed after April 11, 2022. In order to be eligible for this administrative policy, taxpayers will need to send to the CRA, along with the PLOI election, a copy of the agreement in respect of which the single PLOI is being filed for the multiple amounts owing under that legal instrument. The PLOI election must also include certain information which is listed under the heading *Information to be provided in respect of the PLOI election* at www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/corporation-payments/understanding-interest.html#infotobeprov.

This administrative policy does not modify the manner in which the imputed interest income in respect of a PLOI election must be computed.

As a reminder of your legal obligations to keep appropriate books and records for tax purposes, for each subsequent year after the initial year for which the single PLOI election is filed and for which the legal instrument remains in place, you must keep all information and documentation supporting the PLOI deemed interest income inclusion, including detailed information on the multiple amounts which were relevant for the PLOI income inclusion for that subsequent year, in case the CRA asks to see them.

## NEWFOUNDLAND AND LABRADOR BUDGET 2022

Newfoundland and Labrador Budget 2022: *Change is in the Air* ("NL Budget 2022"), was tabled on April 7, 2022, by Deputy Premier and Minister of Finance Siobhan Coady. NL Budget 2022 projects a deficit of $351 million for 2022–2023, with a return to surplus by 2026–2027.

Budget 2022 did not include any provincial tax or fee increases, but did announce several taxation changes, which are summarized below.

### Green Technology Tax Credit

NL Budget 2022 announced a 20% Green Technology Tax Credit for companies that invest in equipment for energy conservation and clean energy generation, use fuels from waste, or make efficient use of fossil fuels. The maximum credit is $1 million annually, of which 40% is refundable.

### Manufacturing and Processing Investment Tax Credit

NL Budget 2022 announced a new 10% Manufacturing and Processing Investment Tax Credit to support the manufacturing, fishery, farming, and forestry sectors to invest in capital equipment.

### All Spend Film and Video Production Tax Credit

NL Budget 2022 announced a new All Spend Film and Video Production Tax Credit. The 30% tax credit will apply to total qualified production costs with a maximum tax credit of $10 million annually per project.

### Pre-Natal Infant Nutrition Supplement

The Mother Baby Nutrition Supplement, for low-income pregnant mothers and families with children under age one, will increase from $100 per month to $150 and will be renamed as the Pre-natal Infant Nutrition Supplement.

#### Newfoundland and Labrador Income Supplement and Senior's Benefit

The Newfoundland and Labrador Income Supplement and Senior's Benefit, which are paid in quarterly instalments along with the federal GST/HST credit, will both increase by 10%.

#### Retail Sales Tax on Insurance Premiums

NL Budget 2022 announced that the 15% Retail Sales Tax on home insurance will be eliminated for a period of one year, beginning on April 7, 2022.

## COVID-19 UPDATE

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

### FEDERAL

#### COVID-19-Related Interest Relief on 2020 Taxes

The CRA is reminding taxpayers who filed their 2020 tax returns and qualified for interest relief that they have until April 30, 2022 to pay the amount owing to avoid any future interest charges. The CRA also offers the following relief options:

- If a tax debt cannot be paid in full, the person may be eligible for a payment arrangement. Payment arrangement options have been expanded to reflect current realities resulting from COVID-19.
- If a person is unable to meet their tax obligations because of circumstances beyond their control, they can request the cancellation of penalties and interest charged to their account.
- If a person is experiencing financial hardship and cannot meet their payment obligations, they can contact the CRA for further assistance.

## 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.

### NAGEL V. CANADA, 2022 DTC 5039 (FEDERAL COURT OF APPEAL)—TAX COURT HAS NO JURISDICTION TO DETERMINE PROVINCIAL RESIDENCE

#### Background

The taxpayer, Ms. Denise Nagel ("Ms. Nagel"), wished to be considered a resident of Saskatchewan, and not Nova Scotia, where she was located, for tax purposes.

When Ms. Nagel, filed her 2013 federal income tax return, she filed the Saskatchewan income tax forms, and not the Nova Scotia forms. Ms. Nagel received two notices after filing.

The first notice issued to Ms. Nagel for 2013 indicated that no tax was payable and accepted that she was a resident of Saskatchewan. Ms. Nagel objected to this notice because she did not agree with some statements concerning tuition tax credits.

Ms. Nagel was later issued another notice on the basis that she was a resident of Nova Scotia. The second notice also indicated that no tax was payable. Ms. Nagel appealed this notice to the Tax Court of Canada ("TCC"). Ms. Nagel's goals in appealing the decision were to challenge the conclusion that she was a resident of Nova Scotia, to challenge the tuition and education tax credit balances (including those balances for provincial purposes), and to obtain GST credits under section 122.5 of the *Income Tax Act* (the "ITA").

### Issues and Tax Court Decision

The issue before the TCC was whether it had jurisdiction to determine Ms. Nagel's residence for provincial tax purposes. The TCC determined Ms. Nagel did not receive an assessment for her 2013 taxation year. Rather, she received a notice that no tax was payable. As a result, the TCC quashed her appeal because she had neither an assessment of tax, interest, or penalties under the ITA nor any determination of her entitlement to GST credits to appeal. The TCC also determined that it had no jurisdiction to determine issues concerning provincial income tax matters. Thus, even if the TCC did not quash her appeal on the basis that no tax was payable, it could not determine where she resided for provincial income tax purposes.

### Federal Court of Appeal Decision

In a unanimous decision, the Federal Court of Appeal ("FCA") upheld the Tax Court's decision. The FCA noted that where a taxpayer is resident within Canada does not affect his or her liability for tax under the ITA, but it does affect liability for provincial income taxes, and may also affect eligibility for provincial credits or programs.

The FCA upheld the Tax Court's decision that it has no jurisdiction to determine issues concerning provincial income tax matters. As a result, the TCC could not determine residence for provincial income tax purposes.

Provincial income taxes are imposed under provincial income tax legislation. In Ms. Nagel's case, either Nova Scotia's *Income Tax Act*, R.S.N.S. 1989, c. 217 (the "NS Tax Act"), or Saskatchewan's *Income Tax Act*, 2000, S.S. 2000, c. I-2.01 (the "Sask Tax Act"), applied. Those provincial income tax statutes expressly make many provisions from the ITA—including section 165 (which relates to objections) and section 169 (which relates to appeals of assessments)—applicable, as if they were a part of the provincial statute. However, this does not mean that the ITA rather than the provincial income tax legislation applies. Instead, the provincial income tax statutes indicate how any ITA provisions made applicable are to be read when they are being applied for provincial income tax purposes.

For example, the Supreme Court of Nova Scotia has jurisdiction to hear appeals of assessments under section 64 of the NS Tax Act and the Court of Queen's Bench of Saskatchewan has jurisdiction to hear appeals of assessments under section 98 of the Sask Tax Act.

These statutes state that on such an appeal the relevant provincial court can determine an individual's residence for the purposes of the statute. The FCA noted that the provincial statutes, like the ITA, do not allow for an appeal of a notice that no provincial tax is payable.

### Conclusion

This case contains two important lessons. Firstly, a taxpayer cannot appeal a notice that no tax is payable (often referred to as a nil assessment) to the court. Secondly, the TCC does not have jurisdiction to determine the provincial residence of a taxpayer. Thus, taxpayers wishing to challenge a determination of their provincial residence will have to appeal that decision to the court granted jurisdiction over such determination in the applicable provincial income tax legislation.

—*Gergely Hegedus*

## NICOLE L. TIESSEN INTERIOR DESIGN LTD. V. THE QUEEN, 2022 DTC 5040 (FEDERAL COURT OF APPEAL)—SUBSECTION 256(2.1) FOUND TO APPLY TO A "SIDECAR" STRUCTURE

Subsection 256(2.1) of the *Income Tax Act* (the "ITA") was applied to a "sidecar" structure involving 30 different corporations, requiring the appellants to share a business limit for the purposes of the small business deduction ("SBD").

### Background

The appellants, who had originally operated an architecture and interior design business through a single corporation owned by 15 employee shareholders and their spouses, underwent a reorganization between 2010 and 2011 to establish a partnership to carry on their business (the "Partnership"). The Partnership consisted of 15 corporations ("PartnerCos"), each of which utilized a separate operating company that provided it with services and was controlled by the same employee shareholder ("ServiceCos").

In 2012 and 2013, after the reorganization took place, the appellants filed tax returns on the basis that: (a) the 15 PartnerCos shared a single $500,000 business limit to determine their proportionate eligibility to claim the SBD in respect of their share of the Partnership's active business income; and (b) each of the 15 pairs of PartnerCos and ServiceCos were exclusively associated with each other and therefore each pair was entitled to its own business limit for the purposes of the SBD. However, the CRA reassessed the appellants on the basis that all 30 corporations were associated pursuant to subsection 256(2.1) and therefore shared only one business limit for the purposes of the SBD.

### Issues and Tax Court Decision

Subsection 256(2.1) is an anti-avoidance rule that deems two or more corporations to be associated if it may reasonably be considered that one of the main reasons for the separate existence of those corporations in a taxation year is to reduce the amount of taxes otherwise payable (e.g., by multiplying access to the SBD). Therefore, the primary issue before the TCC was whether one of the main reasons for the separate existence of the 30 corporations was the reduction of tax. The TCC acknowledged that this is an issue requiring an analysis of the purpose of the structure, not the result.

To that end, the appellants submitted a number of business and personal purposes for the corporate partnership model, such as succession planning, asset protection, and simplification of operations. However, the TCC ultimately concluded that notwithstanding the reasons submitted by the appellants, SBD multiplication was still one of the main purposes of the reorganization. Moreover, the TCC found that the reasons for the separate existence of the corporations were "inextricably linked" to the reasons for undergoing the reorganization into the corporate partnership model. On this basis, the Court found that the evidence surrounding the decision to undergo the reorganization was not consistent with the appellants' purported reasons for the corporate partnership model. The evidence, which notably included a presentation prepared by the appellants' tax advisor, instead suggested that a primary motivation for implementing the reorganization into a corporate partnership model was the tax savings available to the appellants by multiplying the SBD.

### Federal Court of Appeal Decision

On appeal, the appellants contended that the anticipated tax reduction contemplated by subsection 256(2.1) for any particular appellant is influenced only by the existence of its respective pair of mutually controlled corporations (in other words, an associated PartnerCo and ServiceCo), and is not affected by the 28 other corporations controlled by the other appellants. Accordingly, subsection 256(2.1) should not have the effect of deeming all 30 corporations to be associated with each other. While the FCA acknowledged that this argument may contain some merit, it held that this issue should have been raised at the TCC level, and to raise such an issue on appeal was prejudicial to the Crown. Therefore, the FCA refused to consider the issue and the appeal was dismissed.

### Conclusion

Albeit on procedural grounds, the expansive view of the application of subsection 256(2.1) adopted by the TCC remains good law. Although moot in this particular context (given subsequent amendments to section 125 of the ITA), taxpayers and practitioners should remain aware of the potential onus on them to demonstrate that none of the main reasons for an arrangement that otherwise avoids association was a reduction of tax, and diligently document their dominant intentions.

—*Keaton Buchberger*

## MEDICLEAN INCORPORATED V. THE QUEEN, 2022 DTC 1023 (TAX COURT OF CANADA)—REBATE FOR TAX PAID IN ERROR ALLOWED DESPITE IMPROPERLY CLAIMED INPUT TAX CREDITS

### Background

*Mediclean Inc. v. The Queen* was a GST/HST dispute regarding input tax credits ("ITCs") the Appellant claimed between 2009 and 2015. In the result, Justice Owen allowed ITCs for amounts the Appellant paid to GST/HST registrants, the remaining "Disputed Payments" (claimed for amounts paid to non-registrants) were applied as a rebate to reduce corresponding net tax, and the assessed penalties were cancelled.

In an earlier decision, *Mediclean Incorporated v. MNR* (2009 TCC 340), the TCC determined that the Appellant's workers were independent contractors. Consequently, the Appellant entered into contracts with its workers stipulating that it would pay GST/HST on services rendered by the workers. Although the Appellant had the benefit of legal counsel in reviewing these contracts, accounting advice in preparing its GST/HST returns, and professional third-party payroll services, it overlooked the fact that many of the workers were non-registrants in keeping with the small supplier exception. The Appellant also relied on a version of the Canada Revenue Agency ("CRA") website that omitted the *Input Tax Credit Information (GST/HST) Regulations* (SOR/91-45) requirement that the recipient of a supply must collect a supplier's registration number in order to claim ITCs in respect of that supply. As a result, the Appellant did not ask its workers for their registration numbers, made GST/HST payments to all of the workers regardless of their registration status, and claimed ITCs in the corresponding periods.

In 2015, the CRA audited the Appellant and discovered that GST/HST was paid in error and ITCs were improperly claimed. Additionally, the CRA found that the Appellant did not file GST/HST returns for 2009. The Appellant located and filed the missing 2009 GST/HST returns. The Minister of National Revenue (the "Minister") reassessed the Appellant for each of its GST/HST reporting periods between January 1, 2009 and June 30, 2015 to disallow the ITCs and to assess penalties under section 285 of the *Excise Tax Act* (the "ETA").

### Issues and Decision

Broadly speaking, the issues were:

(1) whether the Appellant was entitled to the ITCs claimed or the deduction of a rebate in computing net tax,
(2) whether the 2010–2012 reassessments were statute barred, and
(3) whether the Appellant was liable for penalties under section 285 of the ETA.

The Respondent conceded that the Appellant was entitled to ITCs totaling $76,291.61 for payments made to workers that were GST/HST registrants. The Respondent also conceded that penalties were only applicable to the 2009 reporting periods. The remaining $765,398.30 of ITCs claimed for payments made to non-registrants were disputed (the "Disputed Payments"). Additionally, the Respondent argued that it was too late for the Appellant to claim ITCs for 2009 because the four-year limitation period under subsection 225(4) of the ETA had expired.

Justice Owen decided that the Appellant was not entitled to ITCs because it failed to provide the prescribed information (i.e., the workers' GST/HST registration numbers). He did not address the Respondent's limitation period argument because he had already found that the ITCs could not be claimed.

However, the Court determined that the Appellant was entitled to a rebate for tax paid in error under subsection 261(1) of the ETA. The Respondent argued that the Appellant was responsible for making mistakes that led to the payment of tax in error and therefore it should not be entitled to the rebate. Justice Owen found that subsection 261(1) of the ETA is broadly worded and does not include such limitations. The legislation does not disqualify a taxpayer from receiving a rebate because they made the payment in error.

Although the two-year limitation period for claiming a rebate had expired, Justice Owen found that subsection 296(2.1) of the ETA "requires the Minister to assess a person to deduct a rebate under subsection 261(1)". Thus, the Appellant was entitled to a deduction in computing its net tax in the appropriate reporting periods.

Concerning the Appellant's limitation period argument, the Court found that the 2010–2012 reporting periods were statute-barred. Justice Owen accepted the Appellant's evidence that it had made *bona fide* efforts to determine its entitlement to ITCs and that its mistakes were not due to carelessness, neglect, or wilful default.

Similarly, the Court cancelled the penalties under section 285 of the ETA. Although the Appellant was wrong in claiming ITCs, the scheme of the ETA allows taxpayers to recover amounts paid on account of tax to small suppliers that are not GST/HST registrants. The Appellant merely used the wrong mechanism to recover tax paid in error and should not have been penalized as a result.

### Conclusion

The ETA includes a robust rebate mechanism intended to help taxpayers recover tax paid in error. Taxpayers who make *bona fide* efforts to comply also receive a measure of legislative protection from their mistakes. However, taking a proactive approach to GST/HST issues will save the trouble of relying on these provisions. This case is a reminder to lawyers and accountants that GST/HST issues should be flagged for clients in advance. The small supplier exception is a well-known concept to tax specialists, but the nuances of indirect tax are often invisible to others and can lead to serious issues in cases like this one.

*—James C. Konopka*

## HERRING V. THE QUEEN, 2022 DTC 1025 (TAX COURT OF CANADA)— A CHARITABLE DONATION REQUIRES OBJECTIVE DONATIVE INTENT

When examining if a charitable donation is made, there must be sufficient objective indicators of donative intent. When a taxpayer participates in a leveraged donation program, where they receive a loan on favourable terms or with the ability to retract the donation if the loan is not granted, donative intent will not be present and the donation will not be eligible for a charitable receipt.

### Background

The Appellants participated in a leveraged donation program (the "Program") through which they pledged to donate amounts (the "Pledged Amounts") in favour of a registered charity, the Banyan Tree Foundation (the "Foundation").

Over the course of the Program, the Appellants' Pledged Amounts consisted of cash from their own resources and loans from a third-party lender. The initial loans were interest-free loans, with a 25-year term. Subsequent loans had a 10-year term and were interest-bearing only prior to the expiry of the term. To obtain the loans, the Appellants paid security deposits to the lender (the "Security Deposits"). The Security Deposits were to be invested for the purposes of ultimately repaying the loans and any income taxes that may be owed by the Appellants on the returns generated by the Security Deposits. Ultimately, the Pledged Amounts were contingent upon approval of the loan by the lender, failing which the cash component and Security Deposits of the Pledged Amounts would be refunded to the Appellants.

The Appellants claimed charitable tax credits for the Pledged Amounts, notwithstanding the loan proceeds were never advanced by the lender to the Foundation. The Minister contended that:

(1) the donations were not gifts under the common law,
(2) the cash gifts and Security Deposits were not eligible for split gifts under the common law,
(3) subsections 248(30)–(32) of the *Income Tax Act* ("ITA") did not assist the Appellants and the donations were not eligible for split receipting,
(4) the Pledged Amounts were not eligible capital losses, and
(5) if the Appellants were entitled to any tax credits, such tax credits should be denied as the donation receipts did not contain the prescribed information.

**Issues and Decision**

The primary issue on appeal was whether the Appellants possessed the requisite donative intent such that the Pledged Amounts could be considered gifts and thus eligible for a charitable receipt.

The Court noted that the term "gift" is not defined in the ITA, but has been frequently examined in jurisprudence. Applying the *Friedberg v. R.*, 92 DTC 6031 (SCC), decision, the Court held that as long as there has been (i) a voluntary transfer of property owned by the donor, (ii) to a donee, (iii) in exchange for which no benefit or consideration has flowed to the donor, there will be a gift at law.

Consistent with the previous decision of *Maréchaux v. The Queen*, 2009 DTC 1379 (TCC) affirmed 2010 DTC 5174 (FCA), the Court noted that an interest-free loan or loan on similarly favourable terms is a significant benefit. Further, as the Pledged Amounts were conditional on the granting of the loans, in-line with the *Markou v. The Queen*, 2018 DTC 1056 (TCC) ("*Markou*"), decision, it cannot be said that the Pledged Amounts were made with donative intent.

Although the Appellants testified that they participated in the Program due to philanthropic objectives, the Court attached no weight to this testimony as the taxpayer's "charitable frame of mind" is not relevant. Instead, the Court looks to the objective manifestation of purpose with due regard for all its circumstances in determining whether the taxpayer had the requisite donative intent. Here, the Court held that no donative intention was present because the entire Pledged Amounts were contingent upon the loan approval. In addition, the Court held that the Appellants participated in the Program for the purpose of obtaining a benefit (i.e., the loans).

In the alternative, the Appellants submitted that the cash gifts and the Security Deposits should be eligible for charitable receipting. The Court, however, rejected this argument as the Security Deposits were not directed to the Foundation, but were paid to the lender instead. Further, as in *Markou*, the refund of the cash component and Security Deposits if the loans were not granted precluded a finding that the cash and Security Deposits were gifts.

The Appellants also attempted to submit that the Pledged Amounts should be eligible for split-receipting. However, in-line with the previous jurisprudence, the Court held donative intent was lacking because the Pledged Amounts were contingent on the receipt of a contractual benefit (i.e., the granting of the loan). As a result, the transfer could not be considered "voluntary" or "gratuitous" and neither the cash component nor the Security Deposits could be considered a split gift. The absence of donative intent was fatal and split-receipting as set out in the ITA was not available.

In the further alternative, the Appellants attempted to claim capital losses on the Security Deposits. The Court denied these claims and held that, while the Appellants were led to believe that the Security Deposits would be invested and held for their benefit, representations were made to the Appellants that they would not really be responsible for the loans because the lender was relying primarily on the investment performance of the Security Deposits for repayment. The Court held that the fact that the loan proceeds were never advanced to the Foundation, and the loans were not valid loans, were further evidence that the Security Deposits were "intended as a charge or fee for participation in the Program. It was never intended to be an investment." As such, the Appellants never acquired any "capital property" and therefore no capital loss could be claimed.

Lastly, if the Pledged Amounts were eligible for split-receipting, the Court held that the receipts did not contain the prescribed information as required by the ITA. The tax receipts submitted by the Appellants did not indicate the correct amount of the donation, as they reflected the total Pledged Amounts, including loan proceeds that were not advanced. Additionally, as the Court concluded that the granting of the loan constituted an “advantage” pursuant to subsections 248(30)–(32), the receipts were also deficient, as they did not reflect either the “amount of the advantage” or the “eligible amount of the gift”, both of which are required for a valid receipt. As a result, the Court found that the receipts were spoiled as they did not meet the prescribed requirements

### Conclusion

In summary, the Court upheld the Minister’s decision that none of the Pledged Amounts were considered gifts as the Appellants lacked the requisite donative intent. The purpose of the Program was to offer the Appellants loans on highly favourable terms, resulting in a substantial benefit. While the Appellants may have been motivated by philanthropy in joining the Program, their participation was predicated on the benefit offered to them. As a result, the Court concluded that the Pledged Amounts were not voluntarily payments, or gratuitously made, but instead were consideration paid in relation to an interconnected transaction or arrangement.

*—Adam Kotlowitz*

## RECENT CASES

### TAX COURT GRANTS APPELLANT'S DOCUMENT REQUEST IN "CAROUSEL SCHEME" CASE

The CRA accused the appellant, whose business was refining scrap gold, of engaging in a "carousel scheme," debasing pure gold (not subject to GST) to scrap gold (subject to GST), collecting the GST upon the sale of the scrap gold, and, instead of remitting it, distributing it to the participants in the scheme. Here, on appeal of the resulting reassessments, the appellant moved that the CRA produce a list of documents not previously listed for some 81.2 gigabytes of documentation, along with two other requests involving smaller amounts of documents; the CRA objected that such production would be burdensome.

The Tax Court ordered the respondent to review the Scrap Gold Audit Documentation for the purposes of Rule 82 (*Tax Court of Canada Rules (General Procedure)*) listing, keeping in mind that the threshold for relevance is a low bar, and that on the spectrum of relevancy only “clearly irrelevant” documents should be considered not relevant and produce supplemental lists for all three requested categories. The Court noted that the concept of relevance is extremely broad, establishing that only questions that are clearly abusive, clearly a delaying tactic, or clearly irrelevant should be precluded. The CRA documents already produced indicate that the request contained a "significant measure of relevant documentation." The CRA acknowledged that this is a complex file with millions of dollars in reassessments at stake. Proportionality, which the CRA urged as a reason to dismiss the appellant's motion, is important, but the Court found that relevancy is the key driver. The Court noted that the Scrap Gold Audits Documentation, which the respondent resists listing and thus producing, specifically were identified by CRA personnel on the basis they were potentially relevant. The Court added: "As asked by EGR, how can the respondent, without review or sampling, take the position that none of this mass of documentation ought to be listed per Rule 82?” The Court also approved the appellant's two other requests.

*Express Gold Refining Ltd. v. The Queen*

2022 DTC 1018

### FEDERAL COURT REJECTS AMENDED VALUATION OF INTERCORPORATE TRANSFER AS RETROACTIVE TAX PLANNING

The applicant owned two sets of oil and gas properties that it transferred in January 2015 to a limited partnership, of which it was the general partner, for an elected value of $1 each. In November 2016, it applied to the CRA, under subsection 97(2) of the *Income Tax Act*, to increase the elected values to $30.9 million and $786,000 for the respective properties. Ultimately, in February 2020 the CRA denied the amended elections. In the Federal Court, the applicant sought judicial review.

The application was dismissed. After dismissing a preliminary objection to the use of the CRA's Auditor's Report, the Court held that the CRA's denial of the elections was reasonable. The applicant objected to the CRA's reliance on one of two Information Circulars for its analysis. The Court held that reliance on both was reasonable, particularly since both mentioned retroactive tax planning as a reason for denying an election amendment. Although there is no clear definition of "retroactive tax planning" in the legislation or jurisprudence, the applicant's argument that retroactive tax planning must involve a "changing legal relationship" is unsupported. Moreover, the applicant's failure to explain the "error" that necessitated the amendments was enough by itself to make rejecting the application reasonable. The CRA's decision was justified, transparent, and intelligible.

*Glenogle Energy Inc. v. Canada (AG)*

2022 DTC 5022

## WIFE NOT ENTITLED TO ACCESS EX-HUSBAND'S TAX RECORDS

The Applicant sought judicial review of an order passed by the Canada Revenue Agency ("CRA") which refused to grant her access to records relating to her ex-spouse's income and businesses. The Applicant sought this information under the *Access to Information Act*. The CRA refused to release this information to the Applicant as it was prohibited from sharing the taxpayer's information without his consent, and none of the exceptions to that requirement in the *Income Tax Act* (the "ITA") was applicable under the circumstances.

The application was dismissed. In deciding whether the CRA erred in not providing the records, the Court held that subsection 241(5) of the ITA allows disclosure of taxpayer information to the taxpayer themselves or to someone else with the taxpayer's consent. In this case, the Applicant was not seeking her own taxpayer information, nor did she have the consent of the taxpayer, so the CRA was justified in denying her the information. The Court further held that the list of exceptions provided by the ITA to this general prohibition on providing taxpayer information to others who are not the taxpayer, without their consent, also does not apply to the Applicant's circumstances. Spouses, even those who are still married, do not have a right to obtain their spouse's tax information without their consent; there is no "right" to have access to taxpayer information about income that was generated by one spouse during one's marriage. The Court concluded that the CRA was correct in finding that it was prohibited by its governing legislation to provide the requested records of the Applicant's husband and dismissed the application for judicial review.

*Moshinsky-Helm v. Canada (MNR)*

2022 DTC 5020

## COURT RULES THAT AN INDIVIDUAL WHO WORKED ONLY SIX MONTHS PER YEAR AND HAD ONLY ONE CLIENT WAS ENTITLED TO THE WORKING INCOME TAX BENEFIT

This case is an appeal of assessments raised against the Appellant by the Minister in respect of the Appellant's 2015, 2016, and 2017 taxation years. The assessments alleged that the Appellant was not entitled to the Working Income Tax refundable tax credit because he did not actively operate a business or earn employment income. The sole issue was whether or not the Appellant was entitled to the Working Income Tax Benefit. The Appellant argued that he operated a small construction and renovation business. His representative in the case was a tax expert who also happened to be the Appellant's sole client. Of relevance were the facts that the Appellant had no books and records and was paid in cash. The Appellant also only worked in the summer, as he spent his winters on a sailboat in the Bahamas, which resulted in low living costs. The Appellant is a "Jack-of-all trades" who held many different jobs or operated different construction or renovation businesses. The income tax returns that were reassessed were prepared by the Appellant's representative and sole client.

The appeal was allowed. At the hearing, the Respondent only argued that the Appellant's declared income was not linked to the operation of a business. The Respondent also argued that the testimony of the Appellant and his witness (the representative/client) and evidence presented were not credible and incoherent. Accordingly, the Respondent argued that the Court should reject this testimony and dismiss the appeal. Thus, the issue of credibility was of primary importance. If, on a balance of probabilities, the Court accepts the content of the witnesses' testimonies, the Appellant would succeed in demolishing the Respondent's presumptions underlying the assessments. The Court addressed the issues of lack of documentation, absence of witnesses, and of cash-based accounting. The Court distinguished the facts of the case from a similar case where the same judge rejected an appeal (2020 DTC 1077). The Respondent felt the Court should rely on this case. However, the judge noted that a much larger company was involved in that case and that the company was thoroughly audited, which was not the case in these instances where the appellant was not audited and the assessments arbitrarily established. Therefore, based on all the evidence available, the judge concluded the declared income did relate to the operation of a business. The judge stated that although the Appellant operated only six months per year and had only one client, this did not mean that he did not operate a business. The Appellant's testimony was confirmed by his client/representative and the Court accepted it. Accordingly, the Court found that the Appellant was entitled to the Working Income Tax Benefit and allowed the appeal.

*Fyfe v. The Queen*

2022 DTC 1015

## DEVELOPMENT OF TRANSPORTABLE MODULAR CONCRETE PANELS AND IMPROVEMENT OF CONCRETE FLOORING MIXING AND POURING PROCESS DID NOT QUALIFY AS SR&ED

This is an appeal of an assessment against the appellant by the Minister of National Revenue in respect of the appellant's 2015 taxation year. The assessment denied the appellant's deduction claimed in respect of scientific research and experimental development ("SR&ED") expenses and the related investment tax credit claim. These were the first SR&ED claims made by the appellant and related to two projects: the development of transportable concrete modular panels and the improvement of the mixing process and pouring of concrete flooring. The modular concrete panel project involved developing such transportable panels whose thickness would be reduced by half. The concrete flooring project consisted of improving the mixing and pouring process of polished concrete flooring and diminishing the visibility of aggregates while retaining other properties. The review by the Canada Revenue Agency concluded that the activities involved in these projects did not qualify as SR&ED for income tax purposes, resulting in the assessment under appeal.

The appeal was dismissed. At the hearing, the respondent presented an independent expert who stated that, in his opinion, neither of the two projects conformed with the definition of scientific research and experimental development in subsection 248(1) of the *Income Tax Act*. In such cases, the onus is on the appellant to demonstrate, on the balance of probabilities, that his activities meet the requirements of the definition and that the expenses are deductible for the purposes of section 37. Jurisprudence has determined that five criteria must be met for activities to qualify as SR&ED deductible expenses. Based on the facts of the case, the Court confirmed that neither project met the five required criteria. Namely, based on the facts and evidence presented, the Court found that neither project comprised any scientific uncertainty which could allow the experimental work undertaken to qualify as SR&ED. Review of the other criteria resulted in the same conclusion. Accordingly, the Court concluded that the projects did not qualify as SR&ED and dismissed the appeal without costs.

*Atelier Béton Inc. v. The Queen*

2022 DTC 1010