Tax Notes

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Wolters Kluwer

COVID-19 UPDATE

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

Canada

CRA Provides Relief From Late-Filing Penalty (May 22, 2020)

The deadline for most individuals (not self-employed) to file their 2019 taxes was previously extended to June 1, 2020. The deadline to pay amounts owed has also been extended, to September 1, 2020. Penalties and interest will not be charged if payments are made by the extended deadline of September 1, 2020. The CRA has now clarified that the late-filing penalty will not be applied for a return filed after the June 1, 2020 deadline as long as the return is filed by September 1, 2020.

CRA Extends Return Filing Deadline for Corporations and Trusts (May 22, 2020)

On May 22, 2020, the CRA extended the filing deadlines for corporations and trusts. The CRA is deferring the deadline for T2 corporation income tax returns otherwise due in June, July, or August to September 1, 2020. The deadlines for T3 trust returns that would otherwise be due in June, July, or August are also extended to September 1, 2020.

Previously, the CRA extended the deadline to June 1, 2020 for corporations that would otherwise have a filing due date after March 18 and before June 1, 2020. Similarly, the date was extended to June 1, 2020 for trusts that would otherwise have a filing due date on March 31, or in April or May 2020. Also, the filing date was extended to May 1, 2020 for trusts that had a year end of December 31, 2019.

CEWS: Government Extends, Expands, and Clarifies (May 15, 2020)

The federal government has announced that it plans to extend the Canada Emergency Wage Subsidy ("CEWS"), expand it so that additional types of employers are eligible, and make a few clarifying amendments.

First, though originally applicable for the 12-week period from March 15 to June 6, the CEWS will be extended for another 12 weeks to August 29, 2020. The government will also consult with stakeholders with respect to any adjustments that could be made with a view to incentivize growth and job creation. The only potential adjustment that the Department of Finance's backgrounder mentions is an unspecific adjustment to the requirement that the revenue of a business decline by 30%.

Second, the government has prescribed additional types of employers that qualify for the CEWS by enacting new regulations. The new types of eligible entities are:

- Partnerships that are up to 50%-owned by non-eligible members;
- Indigenous government-owned corporations that are carrying on a business, as well as partnerships where the partners are Indigenous governments and eligible employers;
- Registered Canadian amateur athletic associations;
- Registered journalism organizations; and
- Non-public colleges and schools, including institutions that offer specialized services, such as arts schools, driving schools, language schools, or flight schools.

And third, the government proposes to make a few technical changes to the existing CEWS rules to ensure that the CEWS meets its objectives. Each change is briefly discussed below.

Seasonal Staff and Employees Returning From Leave

The CEWS for a specific employee is limited to 75% of their weekly pre-crisis remuneration. Pre-crisis remuneration is the weekly average remuneration of an employee that was paid between January 1 and March 15, but it excludes any seven-day periods in respect of which the employee was not remunerated. An unfortunate result of this computation is that certain employees may not qualify for the CEWS because they had insufficient pre-crisis remuneration. More specifically, the government is concerned for employees who work on a seasonal basis or who are returning from parental, disability, or unpaid leave. To prevent an unintended outcome, employers can alternatively compute an employee's baseline remuneration using the average weekly remuneration paid between March 1, 2019 and May 31, 2019. Therefore, an employer can calculate baseline remuneration using the average weekly remuneration from either January 1 to March 15 of 2020, or from March 1 to May 31 of 2019. An employer can choose whichever period to use on an employee-by-employee basis. This change will apply retroactively to the first qualifying period that began on March 15.

Amalgamations

A corporation formed by the amalgamation of two or more predecessor corporations (an "Amalco") might not qualify for the CEWS by virtue of not having benchmark revenues to compare to in order to determine if the corporation has realized a 30% decline in revenue. To fix this potential issue, the government proposes to allow an Amalco to determine its qualifying revenue using the combined revenue of the predecessor corporations, unless it is reasonable to consider that one of the main purposes of the amalgamation (or a winding-up) was to qualify for the CEWS. This change will apply retroactively to the first qualifying period that began on March 15.

Tightening Rules for Trusts

To better align the tax treatment of trusts to that of corporations (at least in respect of the CEWS), the government intends to add the following exceptions:

- Where the trust is a tax-exempt entity (other than a public institution), it would qualify for the CEWS only if it is a registered charity or one of the other types of eligible tax-exempt entities.
- Where the trust is a public institution, it qualifies only if it is a prescribed organization.

This change will apply in respect of the third qualifying period (May 10 to June 6) and the periods thereafter.

CCB and GST/HST Credit Payments Extended (May 15, 2020)

The federal government announced that Canadians who are presently receiving the GST/HST credit and/or Canada Child Benefit ("CCB") payments will continue to receive these payments until the end of September 2020 — a three-month extension. Therefore, benefit payments starting in July 2020 and those scheduled for August and September will not be interrupted if an individual takes advantage of the extended filing deadline of June 1, 2020. If the 2019 tax return is not assessed, and to allow time to calculate benefits and/or credits for the July to September 2020 payments, payment amounts will be based on information from 2018 tax returns.

If an individual receives an estimated benefit and/or credit payment based on the 2018 tax return, they are still required to file a return for 2019. If the CRA is unable to assess the 2019 return by early September 2020, the estimated benefits and/or credits will stop in October 2020 and the individual must repay the estimated amounts that were paid beginning in July 2020. The CRA encourages Canadians to file their tax returns by June 1, 2020 or as

soon as possible in order to receive the right amount of benefits based on their 2019 tax return, and in order to ensure continuity of benefits beyond September 2020.

CCB Amount Increased (May 16, 2020)

The federal government announced that the Canada Child Benefit ("CCB") will increase again, beginning in July 2020. For the 2020–21 benefit year, the maximum benefit will increase to $6,765 per child under age 6, and $5,708 per child aged 6 through 17. This increase is in addition to the one-time $300 per child special payment that was made to parents for the month of May.

CRA Provides Guidance on International Tax Issues (May 19, 2020)

The CRA has added a page to its website that provides guidance on international income tax issues raised by the COVID-19 crisis (https://www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html). Domestic and international travel restrictions could create specific income tax issues, so this document describes each potential issue and outlines the CRA's approach to the issue. The tax issues considered are:

- Income tax residency;
- Carrying on business in Canada/permanent establishment;
- Cross-border employment income;
- Waiver requests — payments to non-residents for services provided in Canada; and
- Disposition of taxable Canadian property by non-residents of Canada.

Expanded Eligibility for the CEBA (May 19, 2020)

The federal government has revealed that it will expand the eligibility criteria for the Canada Emergency Business Account ("CEBA") to include many owner-operated small businesses. To qualify under the expanded eligibility criteria, applicants with payroll lower than $20,000 would need:

- A business operating account at a participating financial institution.
- A Canada Revenue Agency business number, and to have filed a 2018 or 2019 tax return.
- Eligible non-deferrable expenses between $40,000 and $1.5 million. Eligible non-deferrable expenses could include costs such as rent, property taxes, utilities, and insurance.

Expenses will be subject to verification and audit by the Government of Canada. Funding will be delivered in partnership with financial institutions. More details, including the launch date for applications under the new criteria, will follow.

Tax Court Cancels More Sittings and Conference Calls (May 20, 2020)

In a new Notice to the Public and Profession, the Chief Justice of the Tax Court of Canada, Eugene Rossiter, advised that he will issue a new Practice Order and Direction by May 27, 2020. Furthermore, the Chief Justice has cancelled all sittings and conference calls scheduled between June 1, 2020 and July 3, 2020, inclusively. Affected parties should contact registry staff in the coming days. The Court and its Registry offices remain closed for the transaction of business until further notice. However, sittings that are scheduled beyond July 3, 2020 are currently expected to proceed.

Large Employer Emergency Financing Facility Opens (May 20, 2020)

The government announced the opening of the application process for the government's Large Employer Emergency Financing Facility ("LEEFF") on May 20, 2020. The program will support Canada's largest employers, whose needs during the pandemic are not being met through conventional financing. The LEEFF will be delivered by a subsidiary of the Canada Development Investment Corporation ("CDEV"), in cooperation with Innovation, Science and Economic Development Canada ("ISED") and the Department of Finance. Additional information on the application process is available on the CDEV website. Broader sectoral dynamics for LEEFF applicants will be considered through processes led by ISED.

CECRA Opens, Criteria Update (May 25, 2020)

Applications for the Canada Emergency Commercial Rent Assistance ("CECRA") opened on May 25, 2020. Moreover, additional information pertaining to the criteria has been added to the Canada Mortgage and Housing Corporation ("CMHC") website.

Provincial

Alberta

Tourism Levy Relief (May 19, 2020)

The Alberta government is providing a new abatement for hotels and other lodging providers that allows them to keep tourism levy amounts collected between March 1 and December 31, 2020. Amounts collected prior to March 1, 2020 that are being deferred under the previously announced deferral program can continue to be deferred until August 31, 2020. The abatement does not apply to amounts collected by operators from persons paying the tourism levy on accommodation purchased before March 1, 2020 (remitting these amounts may be deferred until August 31, 2020). Operators that have already remitted the tourism levy collected in respect of accommodation purchased on or after March 1, 2020 are entitled to a refund of those amounts. Deferral does not apply to any amounts of tourism levy that have already been remitted for accommodation purchased before March 1, 2020, and refunds will not be issued for these amounts.

British Columbia

Support for Aquaculture and Seafood (May 15, 2020)

On May 15, 2020, the Ministry of Agriculture and Agri-Food announced that agriculture, seafood, and food processing businesses in British Columbia can begin to access consulting and planning services to help with COVID-19 response and recovery, through a program offered by the federal and provincial governments. The latest intake of the B.C. Agri-Business Planning Program is open to applications and has been expanded to include aquaculture and seafood companies in developing COVID-19 business recovery plans. BC agriculture, seafood, and food processing business owners are encouraged to apply if their revenues have decreased by at least 30% as a result of COVID-19. The funding available includes up to $5,000 in business planning services and coaching for individuals, and up to $20,000 for groups, from a qualified business consultant, to develop an immediate and long-term recovery plan. Eligible applicants may also apply to the specialized business planning stream of the program to further strengthen their business. Information and application details for the B.C. Agri-Business Planning Program is available at: www2.gov.bc.ca/gov/content/industry/agriculture-seafood/programs/agri-business-planning-program.

Manitoba

Manitoba Works Capital Incentive (May 16, 2020)

On May 16, 2020, Economic Development and Training Minister Ralph Eichler announced the new Manitoba Works Capital Incentive, a new approach to tax increment financing ("TIF") that levers incremental education property tax rebates to stimulate economic growth and job creation. A new or existing business interested in getting established or expanding in Manitoba may apply to the program if:

- the business is prepared to make a minimum capital investment of $10 million to a specific property, which will be designated for tax increment financing benefits;
- a minimum of 65% of total project costs are from private sources; and
- there is demonstrable potential to create and/or maintain jobs in Manitoba, or the new business activity will have a substantial and measurable net economic benefit to the province.

The Manitoba Works Capital Incentive carries no risk in that it provides no up-front money to the developer, and the province pays only what is collected in incremental education property tax as a result of the development. For more information contact Manitoba Government Inquiry: 1-866-626-4862 or 204-945-3744.

Miscellaneous Changes to Government Services (May 14, 2020)

On May 14, 2020, the province introduced the following temporary measures:

- extending deadlines to apply for the 2019 farmland school tax rebate and to appeal tax assessments to the earlier of September 21, 2020 or the end of the state of emergency associated with COVID-19;
- providing exemptions to current license requirements for child care so that early childhood educators can offer child care in their homes and in the community; and
- introducing temporary suspensions for in-person commissioning and witnessing provisions related to oaths, affirmations, statutory declarations, health-care directives, powers of attorney, land titles documents, and wills.

Newfoundland and Labrador

New Hiring Grants (May 15, 2020)

On May 15, 2020, the Minister of Advanced Education, Skills and Labour announced $300,000 in funding to launch a new Students Supporting Communities Program. The program provides a $3,500 grant to organizations that enables them to hire students to help seniors and other vulnerable groups facing social isolation during the COVID-19 pandemic. This includes:

- $2,880 to hire a 30-hour-per-week position for eight weeks at $12.00/hour (this can be one position at 30 hours or two part-time positions);
- $432 for mandatory employment-related costs; and,
- $188 for incidentals related to position (e.g., gas allowance, long distance charges).

The call for applications from employers, including community organizations, opened May 15, 2020. For more information or to submit an application, visit www.gov.nl.ca/aesl/students-supporting-communities/.

Quebec

Support for Aquaculture (May 13, 2020)

The Minister of Agriculture, Fisheries and Food ("MAPAQ") and the Minister of Forests, Wildlife and Parks ("MFFP") announced the launch of an initiative to reduce the spring stocks of aquaculture companies that supply the stocking market. This measure is accompanied by a budgetary increase of $450,000 shared equally between the MAPAQ and the MFFP. The initiative, managed by the MAPAQ, consists of offering support to Quebec businesses in the freshwater aquaculture sector as well as to the clientele who buy the fish in order to promote the sale of seed fish to traditional private customers who have currently ceased their activities. The measure also provides for the possibility of stocking fish in public access water bodies. See www.mapaq.gouv.qc.ca/fr/Peche/md/Programmes/Pages/Initiative-ministerielle-entreprises-piscicoles-ensemencement.aspx for additional information.

Temporary Continuance of Solidarity Credit Payments (May 15, 2020)

For individuals who are unable to file their 2019 income tax return on time, the solidarity tax credit will be calculated using their 2018 income tax return and the information in Revenu Québec's files. The individuals in question will continue to receive payments until September 2020, unless Revenu Québec determines that they are no longer entitled to them.

Relief for Tax Credit for Home-Support Services for Seniors (May 15, 2020)

Individuals receiving the tax credit for home-support services for seniors were given an extension to apply for renewal of their advance payments. This measure will remain in effect until Revenu Québec decides otherwise, depending on how the current situation evolves. Advance payments of the tax credit will continue in the meantime, even if a 2019 income tax return was not filed. However, Revenu Québec may end the payments following a review of the applicable information.

Shelter Allowance Program Renewal Deadline Extended (May 15, 2020)

The deadline for filing a renewal application has been extended by two months. The new deadline is therefore December 1, 2020. There will be no impact on program beneficiaries if they file their 2019 income tax return by October 1, 2020.

PACME Budget Increased (May 15, 2020)

The Programme actions concertées pour le maintien en emploi ("PACME") program was introduced April 6, 2020, to provide grants to employers for employee training (language, digital training, professional training, and so on) and to improve human resource management. Applications to the program will be accepted until September 30, 2020, or when the budget is exhausted. On May 16, it was announced that the budget is being increased from $100 million to $150 million. Applications are made directly by the companies themselves or through collective promoters (www.cpmt.gouv.qc.ca/reseau-des-partenaires/comites-sectoriels.asp).

Saskatchewan

SSBEP Extended (May 11, 2020)

The Saskatchewan Small Business Emergency Payment ("SSBEP") has been extended to the month of May to provide payments to businesses that continue to be ordered to temporarily close or significantly curtail operations through a public health order following May 19, 2020. Businesses that previously applied and qualify for the SSBEP will automatically receive a second payment after May 19.

FOCUS ON CURRENT CASES

This is a regular monthly feature examining recent cases of special interest, coordinated by *John C. Yuan* and *Christopher L.T. Falk* of McCarthy Tétrault LLP. The contributors to this feature are from McCarthy Tétrault LLP, Montreal, Toronto, Calgary, and Vancouver.

Federal Court of Appeal Confirms Minister's Obligation To Honour Settlement Agreements

***The Queen v. CBS Canada Holdings Co.*, 2020 DTC 5009 (Federal Court of Appeal)**

This was an appeal of the Tax Court of Canada's decision to issue an order requiring the Minister to reassess the taxpayer in accordance with the terms of a settlement that the taxpayer and the Minister had reached prior to trial. In this case, one month after the parties had executed the settlement agreement, the Minister took the position that it would not issue the implementing reassessments, as it appears the Crown wanted to audit the numbers underlying the settlement despite having advised the taxpayer before agreeing to the settlement that the CRA had reconciled the numbers internally. The taxpayer was successful in its motion in the Tax Court for an order requiring the Minister to reassess in accordance with the settlement and, as discussed below, the Federal Court of Appeal dismissed the Minister's appeal of the Tax Court decision.

This dispute began as a Tax Court appeal of the Minister's reassessments of the taxpayer's March 7, 2007 and December 31, 2007 taxation years. Separate issues raised in the appeal were (i) the amount of prior-year, non-capital losses that were available to carry forward and deduct in the two 2007 taxation years, and (ii) whether predecessor corporations were entitled in prior years to deduct rent in accordance with the rental expense for the year computed in accordance with generally accepted accounting principles rather than the actual expense incurred in the year.

In April 2014, the taxpayer made a written offer to the Minister to settle the dispute. Simplified, the taxpayer's proposal provided that the taxpayer would abandon the rental expense issue, and the Minister would reassess to make adjustments increasing the taxpayer's non-capital loss carryforward allowed in the March 7, 2007 taxation year by approximately $24 million but decreasing the taxpayer's capital loss carryforward allowed in the two 2007 taxation years in issue by approximately $16 million in total. In May 2014, the Minister advised taxpayer's counsel that the CRA was having difficulty verifying the amount of available non-capital losses appearing in the schedule to the taxpayer's written offer with the CRA's internal records, but there seems to have been subsequent internal discussions on the government side that allowed the Minister to eventually report to the taxpayer in September 2014 that the CRA was in agreement with the proposed settlement numbers. The finalized settlement agreement (which included the schedule detailing the loss carryforward balances and their application) was executed by the parties in January 2015.

Beginning in February 2015, the Crown began asking the taxpayer about the amount of non-capital losses appearing in the schedule to the settlement agreement. After taxpayer's counsel reiterated to the Minister that the parties were bound by the terms of their agreement to resolve the dispute, the Minister advised that it would be taking the position that the reassessments contemplated by the settlement would not be issued unless the taxpayer provided

documentation demonstrating to the CRA that the relevant non-capital loss carryforward balances were the amounts appearing in the schedule appended to the settlement agreement. It was this state of affairs that led the taxpayer to bring its motion in the Tax Court for an order requiring the Minster to reassess in accordance with the settlement, which the Tax Court granted.

In the Federal Court of Appeal, the Minister raised two substantive arguments in support of its appeal. First, the Minister argued that the reassessment for the March 7, 2007 taxation year contemplated by the settlement was factually and legally indefensible and, therefore, the Minister was precluded from issuing a reassessment in such circumstances in accordance with prior jurisprudence, namely the Federal Court of Appeal's earlier decision in *Galway* (74 DTC 6355). Second, the Minister asserted that, because the settlement contemplated that the reassessment for the December 31, 2007 taxation year would result in more tax being payable for that taxation year than the amount in the reassessment under appeal, the Minister was also precluded by law from reassessing that year since the normal reassessment period for the Minister to assess additional tax for that year had already lapsed.

The Federal Court of Appeal (*per* Woods JA for a unanimous panel) rejected the Minister's arguments.

With respect to the Minister's reliance on the *Galway* decision, the Court began by noting that the *Galway* decision emphasized the limited role that the courts should play when parties have reached an agreement on the disposition of their dispute. It then concluded that the *Galway* decision, which it confirmed as good law despite being authored more than 50 years ago, was distinguishable as made in a very different context. In that case, the parties were seeking to have the Federal Court of Appeal issue a consent judgment to dispose of the taxpayer's appeal of the Federal Court's decision. The Federal Court of Appeal in *Galway* acted on its own to refuse to issue the consent judgment that both parties wanted because it was clear to the Court that the settlement did not purport to apply the *Income Tax Act* to the facts that were established at trial. By contrast in this case, one of the parties and not a court was seeking to set aside the settlement and, more importantly, there was nothing to suggest that the parties had been doing anything other than seeking to apply the law to what they mutually understood to be the facts at the time they negotiated the settlement.

The Court then moved on to discuss the Minister's assertion that the settlement could not be implemented because one of the reassessments would increase tax payable for a statute-barred taxation year. The Minister sought to rely on case law involving situations in which the Minister purported to use the objection/appeal process to appeal its own assessment to increase tax payable to an otherwise statute-barred tax year. Since the settlement in this case was one in which the taxpayer was agreeable to having the Minister reassess to increase the amount of tax payable in a year under appeal, the case law precluding the Minister from appealing its own assessment was not relevant and could not be relied on by the Minister as a basis for repudiating the settlement.

The Court perhaps best summarized the essence of this case when it stated the following:

> The Crown entered into the settlement agreement believing that it was in its best interest to do so. It should be required to live up to its bargain. In my view, it would not be appropriate for the Court to wade into the merits of the agreement.

In many ways, this was simply a reinforcement of the well-known legal maxim *pacta sunt servanda* — agreements must be kept.

— *John Yuan*

How Broad Is the Protection From Penalties Afforded by a Voluntary Disclosure?

***Grewal v. MNR*, 2020 DTC 5030 (Federal Court)**

Grewal is a very interesting case in which a taxpayer who had made a successful voluntary disclosure under the CRA's voluntary disclosure program ("VDP") was subsequently audited for taxation years that formed part of the period covered by the voluntary disclosure. As a result of the subsequent audit, the Minister of National Revenue reassessed to include not only additional amounts in the taxpayer's income, but also to impose very substantial gross negligence penalties notwithstanding that the transactions giving rise to the additional income had been expressly referred to in the voluntary disclosure submission made by the taxpayer.

The original voluntary disclosure had been made by the taxpayer in 2014 in respect of his 2004 to 2013 taxation years. As part of the disclosure, the taxpayer had provided the CRA with a submission that included a letter and a

spreadsheet detailing T1 adjustments to the taxpayer's income for the years 2004 to 2013. The letter included information about the taxpayer's business dealings, his interests in Panamanian and Canadian corporations, and dealings between the corporations in which the taxpayer had interests. The letter referred to a number of loans made between Panamanian corporations in which the taxpayer held shares, and various individuals and entities. Some of the loan amounts were included as income, but other than items listed on the spreadsheet, the taxpayer had not disclosed any benefits that he received, either directly or indirectly, in respect of the loans.

Following some back and forth between the taxpayer and the voluntary disclosure officer, the Minister notified the taxpayer in 2015 that the voluntary disclosure had been accepted. As a result, reassessments were issued in 2016 for 2006 to 2012, and an assessment was issued for 2013 (together, the "Initial Reassessments"). Given that the CRA had accepted the taxpayer's voluntary disclosure, no penalties were imposed in the Initial Reassessments.

Some time after the voluntary disclosure had been accepted, the taxpayer was audited in respect of his 2007 to 2013 taxation years, in conjunction with the audit of a pharmaceutical sales company of which the taxpayer was the CFO. As a result of this audit, the Minister further reassessed the taxpayer, in 2018, for the taxpayer's 2007 to 2013 taxation years (the "2018 Reassessments"). The 2018 Reassessments added substantial amounts to the taxpayer's income pursuant to section 246 of the *Income Tax Act* (the "Act") in respect of benefits relating to the loans that had been referred to in the voluntary disclosure submission. The 2018 Reassessments also included more than $3 million in gross negligence penalties. The penalties imposed were in respect of only the additional amounts that were reassessed in 2018, rather than any of the taxable income that had been added as part of the 2014 voluntary disclosure.

Following issuance of the 2018 Reassessments, the taxpayer brought an application to the Federal Court for judicial review of the imposition by the Minister of penalties. Although the taxpayer subsequently filed notices of objection to the 2018 Reassessments with the CRA Appeals Division, it is important to note that the judicial review application that resulted in the decision discussed in this comment was restricted to the question of whether the Minister was precluded under administrative law principles from imposing penalties as part of the 2018 Reassessments. In other words, the question of whether the additional tax and penalties under the 2018 Reassessments were supportable on the basis of the facts and applicable law was not a matter that was before the Federal Court. In this regard, the taxpayer may deal with the questions of whether he received benefits includable in income pursuant to section 246 of the Act and, if so, whether he was grossly negligent in failing to report such amounts as income, separately pursuant to his notices of objection, and through filing an appeal to the Tax Court if necessary.

The taxpayer's position before the Federal Court was that the matters giving rise to the 2018 Reassessments had been disclosed as part of the voluntary disclosure made in 2014. Although the taxpayer had not included the amounts in income pursuant to section 246, and although the taxpayer was an experienced accountant, he maintained that, whether or not section 246 was applicable, section 246 is an obscure provision that not all accountants are familiar with. Accordingly, the taxpayer maintained that the Minister had acted unreasonably in imposing penalties and, in particular, that the Minister:

- failed to observe a duty owed to the taxpayer of procedural fairness; and
- was estopped from imposing penalties.

In respect of the taxpayer's core position, that the matters had been disclosed as part of the 2014 voluntary disclosure, the Court stated as follows:

> The additional income assessed [. . .] under the Penalty Reassessments was "disclosed" in the [. . .] application to the VDP in the broader sense of the word, but was not reported on his adjusted T1 forms as part of his application. The Applicant had characterized these amounts as non-taxable loans. The Minister took the position that these amounts represented taxable benefits under subsection 246(1) of the Act.

The taxpayer's position was that the imposition of penalties was unreasonable and breached the duties of procedural fairness owed to him once the voluntary disclosure had been accepted. In this regard, the taxpayer maintained that he held a legitimate expectation that penalties would not be assessed in respect of matters that had been disclosed as part of the voluntary disclosure.

In respect of this position of the taxpayer, the Court noted generally that:

- the CRA's letter confirming that the voluntary disclosure had been accepted expressly stated that the CRA "reserves the right to open these years for audit or verification in the future";
- the Minister is not normally bound by prior determinations; and, most importantly,

- ". . . the Minister did not ignore the prior decision to grant relief on the VDP when assessing penalties from the audit. The Minister did not revoke the decision to waive penalties that would have normally applied on the Applicant's income, as disclosed under the VDP. As a result, the Minister's decision to issue penalties was not unreasonable."

In respect of the taxpayer's claim as to his legitimate expectation regarding penalties in matters disclosed in the voluntary disclosure, the Court stated simply that:

> . . . it seems disingenuous for the Applicant to have included taxable benefits as non-taxable loans in his VDP to avoid penalty on those amounts.

The Court rejected the notion that a voluntary disclosure that had been accepted would protect a taxpayer from penalties on amounts that had been disclosed but characterized by the taxpayer as non-taxable. The Court agreed with the Minister's position that to interpret the voluntary disclosure process "as promising protection from penalties even on the non-taxable amounts disclosed by the taxpayer would put taxpayers applying to the VDP in a better position than [. . .] ordinary taxpayers."

In noting the accounting and business sophistication of the taxpayer, the Court suggested that the taxpayer "may have been attempting to avoid penalties on his loans by characterizing them as non-taxable, but including them in his VDP application." This suspicion may have contributed to a sense by the Court that the taxpayer had sought to misuse the voluntary disclosure process to provide penalty protection in respect of amounts that the taxpayer was aware might be income, but which the taxpayer was not disclosing as income, or possible income, in the voluntary disclosure.

In rejecting the taxpayer's additional argument that the Minister was estopped from imposing penalties, the Court noted generally that to establish promissory estoppel one must show:

- a promise that the promisor will conduct itself a certain way;
- reliance on that promise by the promisee; and
- action on the promise to the promisee's detriment or the promisor's benefit.

The Court agreed with the Minister that an accepted voluntary disclosure does not provide a blanket protection from penalties but, rather, protection only from penalties on amounts otherwise payable (i.e., amounts disclosed as income in the voluntary disclosure). The Court noted also that at the time that the taxpayer made his voluntary disclosure, he had not been promised that the voluntary disclosure would be accepted. In this regard, the Court explained that:

> The Applicant understood that if his application was accepted, penalties would be waived. However, I find that the Applicant had not relied on any promise of waived penalties at the time of disclosure, since he would not have known whether his application would be accepted.

Accordingly, in addition to having determined that the Minister had not breached any duty of procedural fairness in assessing penalties, the Court found that the Minister was not estopped from doing so.

In light of the above, the Court dismissed the taxpayer's application for judicial review, finding that the Minister's decision to impose gross negligence penalties was reasonable.

— Chris Falk

Subjective Knowledge of Income Tax Consequences Is Not Necessary for a Property To Be a Tax Shelter

***Krumm v. The Queen*, 2020 DTC 1008 (Tax Court of Canada)**

This case considers the test for determining whether an investment constitutes a tax shelter, and affirms that an investor's subjective knowledge of the tax implications that flow from purchasing a particular property is unnecessary for a finding that a particular investment is a tax shelter.

In this matter, Mr. Krumm, the taxpayer, had entered into an asset purchase agreement to purchase from Intersports Acceleration Corp. ("Intersports") a 50% interest in computer software. Of the $2.8 million purchase price, $700,000 was payable by cheque and the remaining $2.1 million was payable pursuant to a long term promissory note. Concurrently, Mr. Krumm and Intersports entered into a joint venture agreement whereby Intersports would pay Mr. Krumm a percentage of net sales over a number of years. Intersports represented that the payment to Mr. Krumm would total at least 200% of the principal sum of the promissory note plus all interest payable under the note, failing which Mr. Krumm was entitled to damages which, in effect, would allow Mr. Krumm to offset the shortfall against the

amount payable by him under the note.

Mr. Krumm claimed capital cost allowance ("CCA") in respect of the software for 1997, the year of his purchase, and for 1998. He was able to deduct the full purchase price over the two-year period on the basis that the software was a Class 12 property, deductible as CCA at 100%, but subject to the half-CCA rule in the year of acquisition.

The CRA reassessed Mr. Krumm for 1997 and 1998 to deny the CCA claim on the basis that Mr. Krumm's investment in the software was an unregistered tax shelter pursuant to section 237.1 of the *Income Tax Act*, such that subsection 237.1(6) applied to prohibit the CCA deduction (as it would any other deductions that would have been available in respect of the property). Following unsuccessful objections to the reassessments, Mr. Krumm appealed to the Tax Court.

The Court found that Mr. Krumm's investment was indeed an unregistered tax shelter, so he was precluded from deducting the CCA claimed. In determining that the investment was a tax shelter, the Court relied extensively on Justice Ryer's decision in *Baxter* (2007 DTC 5199 (FCA)). In reaching this determination, the Court followed the general approach of Justice Ryer in *Baxter*, in considering each of the following issues:

(a) Was there a property marketed to prospective purchasers?

The Court determined that the property marketed to prospective purchasers, including Mr. Krumm, was the software owned by Intersports.

(b) Were there statements or representations made with respect to the amount that a prospective purchaser could deduct in computing income as a result of purchasing the property? Were these representations made by a "promoter" as defined in subsection 237.1(1) to prospective purchasers?

The Court noted that, in this case, Intersports commissioned a valuation report in respect of the software to determine its value for the purpose of marketing to prospective investors. The valuation report stated that the "Computer Program is application software and is available for use as those terms are defined in the *Income Tax Act*." The report further stated that each module of the program qualifies as a "Class 12 asset for the purposes of the [*Income Tax Act*] and the [regulations thereto]." This report, the Court noted, contained statements or representations which were made or proposed to be made with respect to the purchase and sale of the computer software to investors. Mr. Krumm received a copy of the report during negotiations with Intersports. Therefore, the Court considered that those statements or representations had been received by Mr. Krumm.

In respect of those statements or representations, Mr. Krumm testified that he did not understand or rely upon the representations as to tax matters set out in the valuation report. Although the Court found that Mr. Krumm was a credible witness, based upon *Baxter*, the Court did not consider it relevant that Mr. Krumm had not understood or relied upon the representations. In summing up Baxter, the Court stated that it stood for the proposition that "the subjective knowledge of the purchaser is not relevant because the test must be applied in respect of a prospective purchaser prior to any actual sale".

(c) Can the statements or representations "reasonably be considered" to have led to the conclusion that the mathematical component of the definition of tax shelter would have been met in relation to prospective purchases of the property?

The mathematical component is met if, generally, it can reasonably be considered that at the end of any taxation year that ends within four years of the time at which the property was purchased, the aggregate amount represented to be deductible equals or exceeds the cost of the property less "prescribed benefits" expected to be enjoyed by the purchaser in respect of the property. (Prescribed benefits, very generally, are amounts that the purchaser reasonably expects to receive that will reduce the impact of any loss sustained in respect of the purchaser's interest in the property; prescribed benefits do not generally include profits, but include certain limited-recourse amounts.)

The Court noted that although the valuation report specified that the software was Class 12 property and was available for use, it did not explicitly specify that a purchaser could deduct for tax purposes the purchase price of the software. Relying upon *Baxter*, however, the Court found that:

> . . . [t]he tax opinions and representations set out in the Valuation Report were intended to advise a prospective purchaser as to the tax treatment they could expect if a purchase of Software was made. It is also my view that the representations were of sufficient detail such that it could reasonably be considered that a prospective purchaser could deduct the full purchase price of the Software over a two year period.

Importantly, the "can reasonably be considered" test is an objective one. As determined by the Court in *Baxter*, a prospective purchaser's subjective knowledge of the tax implications of investing in a property is not relevant given that

the test refers to a prospective purchaser prior to any actual sale, as opposed to the particular purchaser's knowledge. The reasoning behind this may be that the class of prospective purchasers may be unidentifiable, such that it may be impossible to ascertain the subjective knowledge of each prospective purchaser.

Accordingly, from the Court's perspective, it was irrelevant whether Mr. Krumm, an *actual* purchaser, did or did not have subjective knowledge that his investment in the software would lead to a 100% deduction of the purchase price within the four-year window.

In the view of the writer of this comment, where the test may raise practical concern is in respect of what is objectively "reasonable". The Court relied on *Baxter* in determining that the valuation report's statements that the software constituted Class 12 property for income tax purposes and that it was "available for use" were sufficient to pass the "can reasonably be considered" test, even if the purchaser was not aware of the significance of those terms. Although the report did not explicitly specify that a purchaser could deduct the purchase price, the Court found that the report contained sufficient detail to reasonably conclude that a prospective purchaser could deduct the full purchase price over two years given that the capital cost of Class 12 properties generally can be fully deducted over a two-year period.

This may be concerning for unsophisticated purchasers of capital property who are not represented by a tax practitioner, as such purchasers may well be unaware of the implications of "classes" of property or of the phrase "available for use". Such purchasers may be even less likely to be aware of the mathematical component in the definition of tax shelter than the purchaser in this case. As a result, such purchasers may unwittingly invest in tax shelters and then be denied capital cost allowance (or interest deductions), thus effectively suffering an unanticipated loss. However, Mr. Krumm has appealed the Court's decision to the Federal Court of Appeal. It will be interesting, therefore, to see how that Court deals with this matter having regard to its prior decision in *Baxter*, in which the taxpayer was a tax lawyer who clearly understood the tax implications associated with his investment.

— *Emily Leduc Gagne, Articling Student*

Bringing Together Merchants and Credit Card Processors Is a GST/HST-Exempt Financial Service

***Zomaron Inc. v. The Queen*, 2020 GTC 7 (Tax Court of Canada)**

In *Zomaron*, the Tax Court of Canada held that the composite bundle of services provided by an Independent Sales Organization ("ISO") or Member Service Provider ("MSP") to two credit card transaction payment processors was an exempt "arranging for" financial service. As a result, the ISO/MSP was not required to collect GST/HST from the payment processors.

Summary of Facts

The arrangements that enable credit or debit cards to be used to purchase goods and services from merchants are very complex, and involve multiple participants and money flows. Financial institutions issue credit cards to cardholders. Cardholders present their credit cards to merchants for payment. Acquirers/payment processors connect merchants and their sales transactions to the payment network infrastructure, which is provided by Visa, MasterCard, American Express, or Interac. Once the card issuer (the financial institution) approves the transaction, funds flow from the card issuer to the merchant, via the processor, less the applicable fees. The cardholder completes the flow of funds by paying his/her credit card bill to the card issuer.

Zomaron's role was to solicit merchants and connect them to acquirers/processors (Elavon Canada Company and First Data Loan Company, Canada) and, in some cases, to provide customer support to merchants on behalf of the acquirers/processors. Zomaron received fees from the acquirers/processors (a share of the total fees paid by the merchants to the acquirers/processors on each transaction).

Under its agreements with the acquirers/processors, Zomaron was found to have provided the following services:

- locating and soliciting prospective merchants to receive card processing services from the acquirers/processors;
- gathering and analyzing merchant-related information;
- negotiating fees with merchants for the processing services;
- assisting merchants with completion of the application for processing services;

- in the case of merchants who entered into arrangements with one of the two acquirers/processors, providing ongoing support services; and
- verifying merchant compliance with payment network requirements.

Position of Each Party

In the Minister's view, Zomaron provided essentially promotional or referral services for the acquirers/processors, and such services were taxable. The Minister argued that Zomaron's services were taxable by virtue of being excluded from the definition of "financial service" in subsection 123(1) of the *Excise Tax Act* (the "ETA") by paragraph (*r*.4) of that definition.[1] Paragraph (*r*.4) excludes from financial service status services that are preparatory to the provision or the potential provision of, or that are provided in conjunction with, what would otherwise be a financial service, if the services are either collecting, collating, or providing information or (among other things) promotional services.

Zomaron argued that it was an intermediary that played a critical role in bringing together merchants with acquirers/processors that provided exempt credit card processing services. Accordingly, Zomaron's services were exempt "arranging for" services, within the meaning of paragraph (*l*) of the definition of "financial service" in subsection 123(1). Paragraph (*l*) gives exempt financial service status to a service of "arranging for" the provision of one of several of the listed financial services in subsection 123(1).

Justice Lyons held that the services were exempt "arranging for" services.

The Court's Analysis

Justice Lyons began her analysis by agreeing with the parties that the processors/acquirers themselves provided exempt financial services to merchants. This meant that if Zomaron was found to have "arranged for" the provision of those processing services, Zomaron's services would also be exempt under paragraph (*l*) of the definition of "financial services" in subsection 123(1). She then applied principles from leading cases on single versus multiple supplies[2] to determine that the various services provided by Zomaron constituted a composite single supply because none of the individual elements of the services Zomaron provided had commercial efficacy on its own:

> Applying common sense, the Agreements and undisputed facts suggest that the services Zomaron provided were inextricably intertwined and integrally connected to one another to the degree it must be considered a single supply as none of the elements would have commercial efficacy on its own and Zomaron received a single consideration (portion of the mark-up on each transaction processed by the Processors).

Having found that Zomaron provided a single composite supply, it was necessary to characterize that supply by determining its predominant element. It is the predominant element of a composite single supply that is relevant for determining whether the supply is a financial service.[3] In this case, based on all the evidence and despite references in the agreements to marketing and referral activities, which as a matter of fact were found not to reflect accurately the essential nature of Zomaron's services,[4] Justice Lyons concluded that Zomaron was an intermediary and provided no (or few) promotional services:[5]

> In my view, the vital element of Zomaron's supply was as an intermediary "arranging for" payment processing services leading to Processors successfully acquiring merchants. Without this, there would be no point to the constituent elements. Accordingly, the end product, the final result, the essence for what the Processors is paying Zomaron for is to "arrange for" merchants to use the Processor's card payment services. This, I find, is the predominant element of the supply provided by Zomaron to Elavon and First Data. As such, the predominant element of "arranging for" falls within paragraph 123(1)(l) of the definition of financial service.

Given this view of Zomaron's services, Justice Lyons appeared to have little difficulty concluding that Zomaron's services constituted "arranging for" services. Justice Lyons indicated that "arranging for" means "bringing together

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[1] Unless otherwise noted, statutory references in this article are to the ETA.

[2] *Calgary (City) v. R*, 2012 GTC 1030 (SCC); *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40; and *Global Cash Access (Canada) Inc. v. The Queen*, 2013 GTC 1030 (FCA).

[3] *Global Cash Access*, *supra*, and *Great-West Life Assurance Co. v. The Queen*, 2016 GTC 1039 (FCA).

[4] The Court's analysis of the agreements and *viva voce* evidence was extensive. It is evident throughout the decision that the credibility of the taxpayer's witnesses was critical to the Court's conclusion that Zomaron's services were exempt "arranging for" services.

[5] Interestingly, the Court concluded first that Zomaron's supply was an "arranging for" financial service, and then that the predominant element of the supply was to act as an intermediary between the processors/acquirers and the merchants rather than to perform promotional activities. One might have expected the analysis to be sequenced the other way around — that is, to determine first what is the predominant element of Zomaron's supply, and then to determine whether that predominant element is an "arranging for" supply or an excluded promotional activity. In any event, the result would have been the same.

parties to a service", and this is precisely what Zomaron did. Zomaron was extensively involved in delivering to the processors/acquirers "fully negotiated merchants requiring card payment processing services", Justice Lyons stated, and had autonomy in negotiating most of the key terms of a merchant's agreement with the acquirers/processors:

> Zomaron was involved in facilitating the entire negotiation process. It has complete autonomy in calculating and negotiating the applicable fee that is charged on every transaction during the term of the relationship with the merchant. Zomaron receives a portion of that fee paid for each transaction processed by the Processors. It is responsible for: setting, establishing, and adjusting rates and pricing in respect of each and every card type; length of contract; some terms and conditions; and a multitude of other factors outlined . . . [in] these reasons as part of the negotiation process.

Since the predominant element of Zomaron's services was to act as an intermediary, and given Justice Lyons' factual conclusion that Zomaron did not perform promotional activities for the acquirers/processors, paragraph (*r*.4) of the definition of "financial service" in subsection 123(1) could not apply:

> Given my findings on the promotional activities, these would not even form part of the constituent elements of the supply and paragraph (r.4) would not apply. Even if the supply provided by Zomaron to the Processors involved services of a promotional nature, since these do not represent the predominant element of the supply, paragraph (r.4) has no application based on the Court's comments in *CIBC* that, "[paragraph] (r.4) encapsulating ancillary elements of the supply being provided is not sufficient for the exception to be satisfied, as the services listed in the definition must include the predominant element of the supply."

Conclusion

Zomaron is an important contribution to the jurisprudence on financial services. The case provides additional guidance on the relationship between the financial services inclusions (including paragraph (*l*) of the definition of "financial services") and certain of the relatively recently enacted exclusions from that definition (including paragraph (*r*.4)). It also highlights the importance of marshaling persuasive *viva voce* and documentary evidence in order to convince a judge that a supply is an exempt "arranging for" service because a supplier's intermediary functions far outweigh any promotional activities.

— *Salvatore Mirandola*

RECENT CASES

Property sold by taxpayer subject to a charge for the payment of tax owing by the taxpayer

The taxpayer was the sole shareholder of 8188 Quebec Inc., a corporation that owned all of the shares of Boily Ltee. P was the taxpayer's former spouse and 2592 Quebec Inc. was a corporation wholly owned by her. The taxpayer and P also jointly owned a certain property (the "Property"). Following an audit, the Minister determined that the taxpayer had appropriated funds from Boily Ltee by personally cashing cheques payable to Boily Ltee, which constituted unreported income in Boily Ltee's hands. The Minister assessed the taxpayer accordingly, and registered a certificate under section 223 of the *Income Tax Act* evidencing a tax debt owing by the taxpayer. In proceedings in the Federal Court based on the Paulian Action provisions in article 1631 of the *Quebec Civil Code*, the Minister subsequently obtained, *ex parte*, a declaration: (a) that, at a time when he was insolvent, the taxpayer and P had sold the Property to 2592 Quebec Inc. for P's benefit; (b) that this sale granted a preference to P, and hence could not be set up against the Minister; and (c) that the foregoing declarations were subject to any evidence which the taxpayer might adduce. The Minister's position, in essence, was that the taxpayer sold the Property to 2592 Quebec Inc. with the intention of avoiding payment of the tax owing by him at the time of that sale. The taxpayer applied to the Federal Court for an order setting aside the *ex parte* declaration obtained by the Minister, arguing, in part, that: (a) he was not insolvent at the time of the sale of the Property to 2592 Quebec Inc.; (b) his sale of the Property was not made with any fraudulent intention; and (c) this sale was intended to reimburse P.

The taxpayer's application was dismissed. Article 1633 of the *Quebec Civil Code* stipulates that a gratuitous contract is deemed to be made with fraudulent intent where the debtor is or becomes insolvent at the time the contract is formed. Also, article 1015 of the *Quebec Civil Code* creates a presumption that the shares of co-owners are equal where the documentation creating those shares is silent as to what those co-owners' proportionate shares are. In this case, the unequal distribution of the proceeds of sale of the Property between the taxpayer and P justified the Minister's conclusion concerning the taxpayer's fraudulent intention (i.e., his intention to confer a benefit on P and on 2592 Quebec Inc. without receiving proper consideration in return). The evidence also showed, on a balance of

probabilities, that the taxpayer was insolvent when the Property was sold, or, at the very least, that the sale rendered him insolvent. As a result, the Property was subject to a charge for the payment of the tax owing by the taxpayer.

La Reine c. Boily

2020 DTC 5035

Corporate taxpayer not liable for PST on trailers purchased by it for resale to customers placing those trailers on sites leased by taxpayer from related corporation

The corporate taxpayer purchased 39 trailers from Amco Homes Limited ("Amco") and resold them to its customers who entered into agreements under which they and their newly acquired trailers would occupy sites (the "Sites") on property leased by the taxpayer from a related corporation. The taxpayer paid no PST on its purchase of the trailers on the ground that they had been purchased for resale. It did, however, charge and remit GST and PST collected by it from its customers on the resales of its trailers to them and on the monthly occupancy fees charged to them for occupying the Sites. Both Amco and the taxpayer acted under the belief that the taxpayer was exempt from PST on its purchase of the trailers from Amco, under the resale provisions in subsection 37(3) of the *Provincial Sales Tax Act* (the "Act"). The Minister assessed the taxpayer under subsection 37(1) of the Act for PST on its original purchase of the 39 trailers, on the ground that these trailers, allegedly, were not purchased for resale, as the taxpayer had contended, but were purchased by the taxpayer "as a developer for installation to improve real property", and thus had "lost their character as tangible property". The taxpayer appealed to the Supreme Court of British Columbia.

The taxpayer's appeal was allowed. One of the taxpayer's submissions was that the trailers remained tangible personal property, were not affixed to the Sites, and did not otherwise become fixtures. This position was in keeping with the weight of authority in British Columbia as set out in *Atlin Air Ltd. v. Milikoviic* [1976] W.W.R. 329 (BCSC) and *Burlington Administration Group Ltd. v. Nikkel et al* (1979) 17 B.C.L.R. 229. Conversely, the Minister's assumption that the contracts by which the taxpayer sold the trailers and leased the Sites (the "Contracts") were "real property contracts" or "real property improvement contracts" was less defensible. These Contracts did not oblige the taxpayer to affix or install an improvement to real property. Nor did the surrounding circumstances in which the trailers were set up on the Sites suggest that the taxpayer was contractually bound to affix or install the trailers as improvements to real property. The Minister's argument that the taxpayer was required to pay a tax under subsection 37(1) of the Act therefore failed. The taxpayer conceded, however, that it had collected and remitted all but $5,250 in PST on each of the trailers sold by it to its customers. Accordingly, apart from this $5,250, which was still owing, the Minister had received the full amount of PST to which it was entitled.

Chemainus Gardens v. The Queen

2020 DTC 5033

Corporate taxpayer's application for judicial review of Minister's requirement for information struck in its entirety

The corporate respondent, Valero, manufactured and marketed transportation fuels. It imported and paid for crude oil products from foreign non-resident carriers into Canada without withholding 15% tax on those payments. Its justification was the alleged existence of a well-established practice of the CRA permitting it to forego the 15% withholding tax on its payments to non-residents. It admitted, however, that it never applied to the CRA for a waiver of its withholding obligations under section 105 of the *Income Tax Regulations* (the "Regulations"). Valero subsequently applied to the Federal Court for judicial review of the Minister's decision to demand that it answer certain questions in the context of its compliance with section105 of the Regulations. In the alternative, Valero sought a declaration that the CRA had made representations to it that it had legitimate expectations that no withholding or deduction was required under section 105 of the Regulations. In the further alternative, Valero invoked the exercise of the Minister's discretion under subsection 153(1.1) of the *Income Tax Act* (the "Act") which allows the Minister to determine a lesser amount of withholding tax under subsection 153(1) of the Act. The Federal Court struck only a portion of Valero's application, which left for determination the following issues: (a) whether the Minister's requirement for information relating to Valero's international shipping services rendered in Canada should be set aside; (b) whether, in the alternative, a declaration should issue to the effect that the Minister could not, in the circumstances of this case, require it to comply with the above-mentioned requirement for information; and (c) whether, in the further alternative, a declaration should issue to the effect that Valero had legitimate expectations that no withholding or deduction was required of it under section 105 of the Regulations for international shipping services. The Crown

appealed to the Federal Court of Appeal, alleging that Valero's entire application for judicial review should be struck. Valero cross-appealed.

The Crown's appeal was allowed and Valero's cross-appeal was dismissed. Although the parties in this case raised a number of issues and sub-issues, a single question was dispositive of the appeal and cross-appeal. That question turned on whether the Minister could be blocked from exercising her statutory authority under subsection 231.2(1) of the Act to issue a requirement for information for use in an audit of Valero's withholding obligations. If an order setting aside the Minister's requirement for information were granted in this case, the Minister would be prevented from properly exercising her powers under the Act, and would be impeded from completing a review of Valero's 2011 to 2015 taxation years, as well as from calculating accurately any tax that should have been withheld by Valero. This outcome would be unacceptable. As a result, Valero's entire application for judicial review was struck as having no chance of success. Valero was therefore required to comply with the Minister's requirement for information.

Canada (AG) v. Valero Energy Inc.

2020 DTC 5032

Taxpayer convicted of tax evasion and not entitled to stay of proceedings based on doctrine of delay

The accused taxpayer, B, was a practising dentist who was of the view that a "natural person" is exempt from the payment of tax. He was convicted by the British Columbia Provincial Court on six counts of tax evasion. His trial had been adjourned three times. The trial judge, however, on August 9, 2016, granted B a stay of proceedings, taking into account the July 8, 2016 decisions of the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, and in *R. v. Williamson*, 2016 SCC 28, which established a new delay framework to be applied to cases currently in the system. Under that new framework, delay for trials in the Provincial Court is presumptively unreasonable beyond 18 months unless the Crown can establish exceptional circumstances. In B's case the Provincial Court judge determined that a delay of four and a half years amounted to unreasonable delay under the new framework. In allowing the Crown's appeal (2018 DTC 5022 (BCSC)), a summary conviction appeal judge ("SCAJ") found, in part, that the Crown had demonstrated reasonable reliance on the law as it stood prior to the *Jordan* decision, and that the trial judge had erred in finding otherwise. B appealed to the Court of Appeal for British Columbia, arguing that the SCAJ erred (a) by mischaracterizing delay because she did not follow *R. v. Godin*, 2009 SCC 26; and (b) by not allowing him to rely on the law as it stood prior to the *Jordan* case to establish unreasonable delay in a transitional case such as this one.

B's appeal was dismissed. The SCAJ correctly characterized the seven-month period between October 2015 and April 2016 as defence delay. In addition, she did not err in finding that the Crown's reliance on the law as it stood prior to the appearance of the *Jordan* case justified the 3.9 months beyond the presumption ceiling of 18 months that it took to get this case to trial.

R. v. Balogh

2020 DTC 5031

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