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MAYBE YOU'RE NOT REALLY GILTI, YOU JUST THOUGHT YOU WERE: THE FINAL REGULATIONS

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A bit of bright news for American business owners living in Canada . . .

Prior to 2018, the United States had a "deferral" system for foreign income. Roughly speaking, active business income earned by a Controlled Foreign Corporation ("CFC") outside the United States was not subject to US tax. However, when that CFC repatriated the funds, the US owner would pay US tax.

As part of tax reform[1] the United States moved from a deferral system for foreign income to a participation exemption system. As before, the CFC's income is initially exempt. However, upon being paid as a dividend to a US corporate owner, it remains exempt.[2] This system is much like Canada's[3] (and those of most OECD countries).

However, the revenue loss from this (and other) tax reform changes, combined with a desire to induce companies to move foreign income-generating activities to the United States, justified a modification of the exemption principle. Tax reform created the concept of Global Intangible Low-Taxed Income ("GILTI"). GILTI is not about intangibles. Initially it was not even about low-taxed income, but thanks to some new regulations, at least it gets to live up to that part of its name.

The Basics

Mobile Income

An exemption system works well for active business income, but if the same approach were used for mobile (say, investment) income, the immediate result would be capital flight — everyone would put their money into foreign companies or the like. Most countries with sophisticated tax systems have rules that impute this kind of income to their domestic owners. The United States has Subpart F rules;[4] Canada has the Foreign Accrual Property Income rules.[5]

[1] *Tax Cuts and Jobs Act*, PL 115-97, December 22, 2017.

[2] US *Internal Revenue Code* ("IRC") §245A(a).

[3] *Income Tax Act* (Canada) ("ITA") s. 113(1)(*a*).

[4] IRC §951(a).

[5] ITA s. 91(1), 95(1) "Foreign Accrual Property Income".

GILTI

GILTI piggybacks on the Subpart F rules to take a portion of the foreign corporate income and impute it to a US owner,[6] where it is subject to contemporaneous taxation.

But GILTI is specifically *non*-Subpart F income. GILTI is, roughly, business income in excess of a 10% return on net tangible capital invested.[7]

How Does This Affect Americans in Canada?

US citizens and residents (including green-card holders) are subject to US tax on their worldwide incomes, regardless of where they live.[8] A US Shareholder living in Canada who owns shares in a Canadian corporation that is a CFC is subject to GILTI.

Some clarification: A "US Shareholder" includes a US citizen or resident who owns at least 10% of the shares, measured by votes or value.[9] For GILTI to apply, the corporation must be a CFC — US Shareholders must, in aggregate, own shares with the ability to control the board of directors or value of over 50% of the total.

A GILTI imputation is not a dividend,[10] and as such is subject to tax at ordinary tax rates (up to 37%), and not eligible to be taxed at qualified dividend rates (limited to 20%).[11]

Why GILTI Is Potentially Bad

The short version is that an American in Canada can have Canadian corporate income attributed to him or her without the corporation necessarily paying a dividend. That can lead to double taxation:

- If the company pays no dividend in the current year, there is no Canadian personal tax with which to create a US foreign tax credit (the Canadian corporate tax is not relevant in this calculation). The US tax is not eligible for a Canadian foreign tax credit, as it does not relate to US-source income.[12] Even if the tax were eligible, it would not likely create a credit, for lack of US-source income.[13]
- When the company pays a dividend in a subsequent year out of this income, the Canadian tax created then would not be able to be carried back to create a US foreign tax credit.[14]
- Even with a dividend in the year the income was earned, the US tax rate might exceed the Canadian tax, particularly at low levels of income where the dividend tax credit eliminated the Canadian tax.

To mitigate the GILTI inclusion, it could be necessary to have a corporation pay out a large portion of its income annually. This choice might be precluded because of previous financial commitments, loan restrictions, or shareholder agreements. It may effectively require earlier payment of Canadian tax than would otherwise be desirable.

In any case, distribution of previously-taxed earnings and profits (so taxed because of GILTI) may not yield the desired results because of the (exceptionally complicated) ordering provisions.[15]

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[6] IRC §951A(a).

[7] IRC §951A(b)(1), (2).

[8] IRC §1(e), 63.

[9] IRC §951(b). There are complex rules regarding indirect and constructive ownership.

[10] IRS Notice 2004-70 §4.02.

[11] IRC §1(h)(1)(B)–(D).

[12] ITA s. 126(7) "non-business income tax" (*d*).

[13] ITA s. 126(1)(*b*)(i), 126(7) "qualifying incomes", 126(9).

[14] IRC §904(c) last sentence.

[15] IRS Notice 2019-01.

The Good News That We Already Knew

High-Tax Exclusion

There is a high-tax exclusion for GILTI. If the Canadian corporation's effective tax rate is over 18.9% (90% of the standard US corporate tax rate of 21%), then there is no GILTI.[16] This solves the problem for most Canadian corporations that are not entitled to the small business deduction.[17] Their statutory rates are typically in the 26% range, and their effective rates are almost always above 18.9%. The proposed regulations clarified that this exemption would apply to individuals (initially that was not the case).[18]

Corporate Treatment Election

It is possible for an individual to elect to be treated as a corporation for the purpose of calculating the tax on GILTI:[19]

- Foreign tax is added back in calculating the income.[20]
- Only 50% of the GILTI is included in the US Shareholders' incomes (62.5% beginning 2026).[21]
- The tax rate on the income is only 21%.[22]
- An indirect foreign tax credit is allowed in respect of 80% of the Canadian corporate tax.[23]

This election means that if the effective Canadian corporate tax rate is at least 13.125%, there will be no tax on the GILTI (16.406% beginning 2026). If there is a meaningful value of net tangible assets in the corporation, this threshold rate will be lower, because the GILTI calculation effectively counts depreciation twice.[24]

Using this election, a subsequent dividend is taxable,[25] but that should not be a problem. In this scenario the US and Canadian income recognition happens simultaneously, which is key. Generally, the dividend will be "qualified",[26] meaning the US tax rate will be low (maximum 20%).[27] It will almost always be lower than the Canadian tax rate, which ranges up to 48%. The US foreign tax credit[28] will thus eliminate the US tax.

For most shareholders of companies eligible for the Canadian small business deduction, this election should substantially obviate the tax on GILTI. For shareholders of companies in low-tax provinces, such as Manitoba (which has no provincial tax on small-business income), the impact is still greatly muted.

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16 IRC §951A(c)(2)(A)(i)(III).

17 ITA s. 125(1).

18 Prop. Reg §1.951-2(c)(6).

19 IRC §951A(f)(1)(A), 962.

20 IRC §78.

21 IRC §250(a)(1)(B).

22 IRC §962(a)(1), 11(b).

23 IRC §960(d)(1)(A).

24 IRC §951A(b)(2) Net deemed tangible income return plus regular depreciation included in IRC §951A(c)(2)(A)(ii).

25 IRC §962(d).

26 IRC §1(h)(11)(B)(i)(II), (C)(i)(II).

27 IRC §1(h)(1)(B)–(D).

28 IRC §901(a).

The Good News That Just Came Out

The final regulations confirm that the high-tax exclusion will be allowed for GILTI income beyond what is narrowly described in the legislation. The Internal Revenue Code wording allows this exclusion only to income "excluded from the foreign base company income . . . by reason of [the high-tax exception]".[29] This was not a terribly useful exclusion, and likely did not reflect the intent of the drafters. The final regulations cast the exception far more broadly, covering all income subject to high foreign tax.

While this treatment was allowed in the previous version of the proposed regulations,[30] it was not guaranteed to remain. The bigger change is that taxpayers will be allowed to make an election to apply this exception prospectively *and* retroactively to the inception of GILTI (2018).[31] The previous proposal was to have the exception apply only prospectively from finalization of the regulations.

The election is made on an annual basis — it need not be made consistently year to year. However, the controlling domestic shareholders must inform other US Shareholders of any change to the election.[32]

There is a consistency requirement. Where a CFC is one of several controlled by a group of US persons, all such CFCs must make the election (or revoke the election).[33] A CFC group is defined as an affiliated group (used for determining which companies can file a consolidated return)[34] with modifications, such as using a "more than 50%" test instead of 80% and removing the restriction against foreign corporations. Stock ownership is applied using the normal attribution rules,[35] slightly modified.

Amending Prior Years

As the original rules did not allow for a high-tax exclusion for certain kinds of income, US taxpayers may have filed without the election. It is possible to amend those prior years' returns taking the exclusion, but *all* US Shareholders must agree to file or amend on that same basis.[36] The amended returns must be filed no later than 24 months following the unextended due date of the original federal income tax return of the controlling domestic shareholder, and all amended returns must be filed within a six-month time frame.[37]

Calculation of the Foreign Tax Rate

The good news is slightly tempered by the way in which the effective foreign tax rate must be calculated. Instead of it being done on a CFC-by-CFC basis (which would be easy), or a Qualified Business Unit ("QBU")-by-QBU[38] basis, it will be determined on a "tested unit" basis.[39] The 2019 proposed regulations used QBU.

A tested unit is like a QBU, but slightly different. A tested unit applies to the extent an entity or activity is actually subject to foreign tax as a resident or branch. The impact largely relates to disregarded payments among a company

[29] IRC § 951A(c)(2)(A)(i)(III).

[30] Prop. Reg. § 1.951A-2(c)(6).

[31] Reg § 1.951A-7(b).

[32] Reg § 1.951A-2(c)(7)(viii)(A)(1)(ii)(C), (D).

[33] Prop. Reg § 1.951A-2(c)(6)(v)(e)(1).

[34] IRC § 1504(a).

[35] IRC § 318(a).

[36] Reg § 1.951A-2(c)(7)(viii)(A)(2), (C).

[37] Reg § 1.951A-2(c)(7)(viii)(A)(2)(ii).

[38] IRC § 989(a) a Qualified Business Unit is an identifiable unit of trade that maintains separate books and records.

[39] Reg § 1.951A-2(c)(7)(ii).

and a third-country branch. For most Canadian corporations, and particularly for owner-managed ones, there is unlikely to be any difference between any of the three different approaches.

It is our view that the Canadian RDTOH accounts[40] are not relevant in determining the effective tax rate.[41]

There Are Still Problems

Treasury was asked for a blanket exclusion for small companies. It rejected that approach.[42]

For US Shareholders of companies not eligible for the high-tax exception, there is a lot of work to make the corporate-treatment election. It requires professionals knowledgeable in both US personal and corporate tax. Forms 8992 and 8993 are far from intuitive. Combined with the 2017 earnings and profits inclusion, the distribution regime is tremendously complicated.[43] The process is hard to get right, and more importantly for clients, expensive.

If a corporation has losses initially, and then earns income, the losses will shelter the income for Canadian tax purposes.[44] Treasury explicitly rejected making accommodations for this problem.[45] If the corporation has Canadian tax credits, such as from Scientific Research and Experimental Development ("SRED"),[46] that will lower the effective Canadian tax rate for a given year.

The low Canadian tax rate may cause the GILTI exemption to be unavailable. The indirect foreign tax credit would be reduced. There may still be tax on the GILTI.

The high-tax exclusion must be determined for the same year as is used for US tax purposes,[47] which will usually be the calendar year.[48]

Conclusion

The final regulations offer potential relief from a US tax burden. However, for many Americans in Canada there remains a significant reporting requirement at the very least, and double tax at the worst. In addition, work is required to ensure that a taxpayer is properly structuring his or her affairs.

Canadian "general" corporate income tax rates will largely prevent the imposition of US tax. Complicating factors such as losses, refundable taxes, SRED credits, and the small business deduction may make the high tax exclusion unavailable. In this case, consideration should be given to electing corporate tax treatment, which reduces US tax, eliminating it once the Canadian effective rate reaches 13.125%.

To the extent that a taxpayer has previously been subject to the GILTI regime, a review should be undertaken to determine if the taxpayer is, in fact, not GILTI and a claim for refund may be appropriate.

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[40] ITA s. 129(4) "eligible refundable dividend tax on hand" and "non-eligible refundable dividend tax on hand".

[41] Reg. § 1.954-1(d)(3)(iii).

[42] Guidance under sections 951A and 954 regarding income subject to a high rate of foreign tax TD 9902 § III.D.

[43] IRC § 959(c).

[44] ITA s. 111.

[45] Guidance under sections 951A and 954 regarding income subject to a high rate of foreign tax TD 9902 § II.D.3.

[46] ITA s. 127.3.

[47] Reg § 1.-51A-2(c)(7)(v)(D).

[48] IRC § 898(c)(1)(A), (3)(A)(i). The exception contained in Prop. Reg. § 1.898-1(c)(1) will rarely apply to corporations extant prior to 2018 because of the Transition Tax IRC § 965.

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/.

Federal

Federal Government Extends Canada Emergency Response Benefit ("CERB") (August 20, 2020)

On August 20, the Deputy Prime Minister and Minister of Finance and the Minister of Employment, Workforce Development and Disability Inclusion announced CERB will be extended by an additional four weeks to a maximum of 28 weeks. This means that for Canadians expecting to exhaust their CERB benefits at the end of August, they will now be able to access an additional month of support, after which the Government will be transitioning them to a simplified Employment Insurance program, effective September 27, 2020.

Changes to Employment Insurance ("EI") Program (August 20, 2020)

On August 20, 2020, changes to the EI program were announced. EI will now be available to more Canadians, including those who would not have qualified for EI in the past. Those receiving EI will be eligible for a taxable benefit rate of at least $400 per week, or $240 per week for extended parental benefits, and regular benefits will be accessible for a minimum duration of 26 weeks. The government will continue to work with provinces and territories to ensure Canadians receiving EI benefits have access to skills training and employment supports to help them get back to work. The government will also freeze the EI insurance premium rates for two years, so Canadian workers and businesses will not face immediate increases to costs and payroll deductions due to the additional expenses resulting from the pandemic.

The Government is also implementing temporary measures to support self-employed fish harvesters who rely on EI fishing benefits in the off-season. These measures will allow EI fishing benefits for these workers to be calculated using either their actual fishing earnings for their current claim, or their fishing earnings from their claim for the same season from the previous year, whichever is higher.

Canadians already receiving benefits through Service Canada will be transitioned to the EI program once they have received the maximum CERB benefits for which they are entitled, if they are EI eligible and continue to need income support. Canadians who are currently receiving the CERB from the Canada Revenue Agency who believe they are entitled to EI will need to apply through Service Canada after September 26.

Government Announces New Canada Recovery Benefit, Canada Recovery Sickness Benefit, and Canada Recovery Caregiving Benefit (August 20, 2020)

The government announced plans to implement three new benefits:

- The Canada Recovery Benefit ("CRB") will provide $400 per week for up to 26 weeks to workers who are self-employed or are not eligible for EI and who still require income support and who are available and looking for work. This benefit will support Canadians whose income has dropped or who have not returned to work due to COVID-19. The benefit will allow Canadians to earn more income while on claim as well as include links to Job Bank, Canada's national employment service, with career planning tools for those seeking employment. In addition, the government will be working with provinces and territories to share information to ensure that Canadians have access to tools and training opportunities to successfully return to the workforce.
- The Canada Recovery Sickness Benefit ("CRSB") will provide $500 per week for up to two weeks, for workers who are sick or who must self-isolate for reasons related to COVID-19.

- The Canada Recovery Caregiving Benefit ("CRCB") will provide $500 per week for up to 26 weeks per household, for eligible Canadians unable to work because they must care for:
  - a child under age 12 due to the closures of schools or daycares because of COVID-19,
  - a family member with a disability or a dependent because their day program or care facility is closed due to COVID-19, and/or
  - a child, a family member with a disability, or a dependant who is not attending school, daycare, or other care facilities under the advice of a medical professional due to being at high risk if they contract COVID-19.

The Government intends to introduce new legislation to support the implementation of the new benefits. The Canada Revenue Agency ("CRA") will administer the Canada Recovery Benefits, and Canadians will be able to apply through the CRA. In the coming weeks, the CRA will provide more details on how and when Canadians can get ready to apply at www.canada.ca/coronavirus.

Applications Open for Enhanced Canada Emergency Wage Subsidy ("CEWS") (August 17, 2020)

On August 17, the Minister of National Revenue announced that the Canada Revenue Agency has opened applications for Period 5 — the first period of the enhanced CEWS program. Program changes for Periods 5–9 include:

- The extension of the CEWS, including redesigned program details, until November 21, 2020.
- Increased eligibility, meaning that all eligible employers who've experienced a revenue drop can now qualify for a base subsidy. The subsidy amount is based on the revenue drop.
- Employers who are especially hard-hit can qualify for a top-up of up to 25%.
- Providing certainty for employers that have already made business decisions for July and August by ensuring they will not receive a subsidy rate lower than they would have under the previous rules.

Tax Court of Canada ("TCC") Time Limits (August 14, 2020)

On July 27, 2020, the federal *Time Limits and Other Periods Act (COVID-19)* (the "Act") came into force. The Act contains provisions that suspend certain time limits established by or under an Act of Parliament and that relate to court proceedings. The Act suspends these time limits from March 13, 2020, to September 13, 2020. Specifically, the Act suspends time limits relating to Tax Court of Canada proceedings that are contained in the *Income Tax Act*, *Excise Tax Act*, *Tax Court of Canada Act*, *Tax Court of Canada Rules (General Procedure)*, *Tax Court of Canada Rules (Informal Procedure)*, and other statutes and regulations.

In order to align with the Act, the TCC is issuing a new Order regarding the suspension of time. The period beginning on March 13, 2020, and ending on September 13, 2020, inclusively, will be excluded from the computation of time under: the *Tax Court of Canada Rules (General Procedure)*; all other Rules made under the *Tax Court of Canada Act* governing the conduct of matters that, pursuant to section 12 of the *Tax Court of Canada Act*, are under the TCC's jurisdiction; or an Order or Direction of the TCC issued on or prior to March 13, 2020.

The Act's effects include the suspension of time limits for filing Notices of Appeal if the time limits fall between March 13, 2020, and September 13, 2020, inclusively. In the TCC's Practice Direction and Order dated July 8, 2020, the Court ordered that certain Notices of Appeal filed after the statutory deadline would be treated as including an Application for an extension of time to appeal. The Act's coming into force means that these Notices of Appeal will no longer be considered to be filed after the statutory deadline. As such, the Registry will not be treating these Notices of Appeal as including an Application for an extension of time to appeal. The Registry will serve these Notices of Appeal on the Respondent.

Correspondence issued by the Registry often requires the parties to provide responses by certain dates. These dates will be extended and updated in the same manner as the suspension of time described above, meaning that the period beginning on March 13, 2020, and ending on September 13, 2020, inclusively, will not be included in the computation of time for the response deadline. Neither the Court nor the Registry will be issuing new correspondence with adjusted dates.

CRA Updates CEWS Guidance and Calculator (August 11, 2020)

The CRA announced that it has updated and improved its online CEWS calculator. The CEWS calculator can be found at www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy/cews-calculate-subsidy-amount.html. The calculator uses a step-by-step approach to get employers to enter information about their business situation to provide an estimate of the subsidy they can expect to receive. The calculator also includes printable spreadsheet and statement features that employers can use to view their claim at a glance and enter required information into the CEWS application form quickly and easily.

The CRA has also updated its webpage titled *Frequently asked questions — Canada emergency wage subsidy (CEWS)* (www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy/cews-frequently-asked-questions.html) to reflect recent changes to the CEWS.

Canada Emergency Commercial Rent Assistance ("CECRA") Extended Into August (July 31, 2020)

Finance Minister Bill Morneau announced that the CECRA will be extended by one month to help eligible small businesses pay rent for August. All provinces and territories continue to participate in this initiative. Existing applicants must reapply for the month of August and have until September 14, 2020, to do so. New applicants can choose to apply for the three-month initial period, four months, or five months, but must do so by the original date of August 31, 2020.

Bill C-20 Receives Royal Assent (July 27, 2020)

Bill C-20, *An Act respecting further COVID-19 measures*, received Royal Assent on July 27, 2020. The bill enacted the proposed legislation that was first published on July 17, 2020. The bill made numerous amendments to the Canada Emergency Wage Subsidy, amended various acts to allow for a one-time payment to persons with disabilities, and enacted the *Time Limits and Other Periods Act (COVID-19)*.

Income Tax Payment Deadline Extended, Interest Relief To Be Provided (July 27, 2020)

The CRA is extending the payment deadline for income tax balances and instalments. The deadline with respect to current-year individual, corporate, and trust income tax returns is extended to September 30, 2020 — previously this deadline had been extended to September 1, 2020. Penalties and interest will not be charged if payments are made by September 30, 2020, which includes the late-filing penalty if the return is filed by September 30, 2020. The deadline for instalment payments is also extended to September 30, 2020. To align with the federal postponement, Revenu Québec announced that the deadline for the payment of tax balances, instalments, and other tax payments is also extended to September 30, 2020.

The CRA is also waiving interest on existing tax debts for individual, corporate, and trust income tax returns from April 1, 2020, to September 30, 2020. Similarly, interest on existing GST/HST debts is waived from April 1, 2020, to June 30, 2020. Therefore, interest does not apply during these periods with respect to existing balances owing, but this does not cancel interest and penalties that had been assessed prior to these periods.

Provincial

Alberta

Further Deferral for Corporate Income Tax Payments (August 4, 2020)

Alberta corporations with income tax balances owing on or after March 18, 2020, or installment payments due between March 18, 2020, and September 30, 2020, may defer making these payments until September 30, 2020 (formerly August 31, 2020). Penalties and interest will not be charged if the payments are made by the extended deadline of September 30, 2020. Arrears interest accruing from March 18, 2020, to September 30, 2020, on existing debts owing pursuant to the *Alberta Corporate Tax Act* will be waived.

British Columbia

Extension of Provincial Temporary Crisis Supplement (August 17, 2020)

The Province is extending the provincial temporary crisis supplement for people on income or disability assistance and low-income seniors during the COVID-19 pandemic. For those who are not receiving federal benefits like the Canada Emergency Response Benefit, the Province's temporary COVID-19 Crisis Supplement that has been provided since April will be extended for an additional four months. No action is required from people. The temporary $300 crisis supplement will continue to be automatically applied to cheques distributed September 23, October 21, November 18, and December 16. This supplement will also continue to be provided to low-income seniors receiving the B.C. Senior's Supplement and income assistance and disability recipients residing in special care facilities.

Helping Farmers Retain Property Tax Status (July 29, 2020)

In order to be classified as a farm in British Columbia, properties must meet certain criteria, including generating a minimum amount of gross income from a qualifying agriculture use based on the size of the parcel of land. This minimum income requirement must be met every two years and there must be some income generated every year. BC Assessment sends out self-reporting income questionnaires and conducts intermittent inspections to determine whether a property should maintain its farm status for the upcoming tax year.

However, the Government of British Columbia is waiving minimum income requirements for existing BC farm operations, allowing them to maintain their current property tax farm status for 2021.

Manitoba

Workers To Receive Risk-Recognition Payments (July 29, 2020)

The province is issuing payments to 78,442 Manitobans as part of the $120-million Risk Recognition Program to acknowledge front-line workers during the COVID-19 pandemic.

The province will divide $120 million equally among all eligible recipients for a payment of $1,530. As the payments are considered taxable income under federal tax rules, the province has remitted a 10% withholding tax to the CRA to help recipients when they file their 2020 income tax return. Eligible recipients will be notified via email of a $1,377 direct deposit in their bank account this week.

Eligible positions include health care, social services, justice, security, transportation, food and beverage, hotels, and essential retail. Payment recipients include 37,060 public-facing essential roles in retail services and lodging, 27,085 in health care, 9,325 in social services, and 3,440 in transportation. The province based the eligibility criteria on recommendations it received during extensive consultations with business and union representatives.

Ontario

Interest and Penalty Relief Period for Businesses Extended by One Month (August 12, 2020)

In March, the provincial government announced a five-month interest- and penalty-free period for Ontario businesses to file their returns and remit select provincial taxes. This relief period was set to expire on August 31, 2020. The government has extended the end of the relief period by one month from August 31, 2020, to October 1, 2020. Any outstanding returns and taxes that were due between April 1, 2020, and August 31, 2020 (during the relief period) are now due by October 1, 2020. Beginning October 2, 2020, regular filing and payment activities will resume, and regular penalties and interest apply.

Québec

Extension of Credit on Employer Contributions to the Health Services Fund (August 17, 2020)

The Québec government announced a 12-week extension of the credit on employer contributions to the Health Services Fund in respect of employees on paid leave implemented in the wake of the establishment of the Canada Emergency Wage Subsidy. This additional assistance, which offsets costs not covered by the federal government measure, will be in force for the entire duration of the wage subsidy, which now extends from March 15 to November 21, 2020. Moreover, certain eligibility criteria will be modified such that the credit continues to be granted to employers that satisfy all the conditions to benefit from the Canada Emergency Wage Subsidy, especially the condition pertaining to a drop in income.

Registered Pension Plans and Deferred Salary Leave Plans (August 17, 2020)

The Québec taxation system will apply the relief measures that the federal government announced on July 2, 2020. The measures seek, in particular, to respond to potential cash flow difficulties that registered pension plans are facing because of the COVID-19 pandemic, and to ensure that it will not be mandatory to terminate a deferred salary leave plan if an employee suspends his leave to return to work or if an employee decides to defer his paid leave.

Saskatchewan

Support for the Tourism Sector (August 10, 2020)

The provincial government announced $35 million in support for the province's tourism sector. Under the Saskatchewan Tourism Sector Support Program, eligible hospitality and event/attraction operators can apply for a one-time, non-repayable emergency payment.

For the accommodation sector and large event facilities, payments will range from $10,000 to $50,000, depending on sales revenue. For attraction, tour, or event operators with ongoing fixed costs, payments will range from $7,500 to $15,000.

Of the $35 million, $5 million will be used to support marketing and increasing the demand for Saskatchewan tourism experiences.

Temporary Wage Supplement Program Expanded (July 30, 2020)

Through a re-assessment of eligibility, the temporary wage supplement program has been further expanded to include all workers, regardless of income level, at integrated healthcare facilities which provide both short-term and long-term health care. A new application form is currently being developed for this expansion. Applications will be accepted until September 1, 2020.

Previously, workers at integrated facilities were eligible if they had a gross salary from all sources of less than $2,500 per month and earned less than $24.00 per hour. That income threshold has been lifted, as it was when the program was modified in June for workers at licensed personal care homes and special care homes.

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.

The Queen v. Cameco, 2020 DTC 5059 (Federal Court of Appeal)

Facts

In *The Queen v. Cameco*, 2020 DTC 5059, the Federal Court of Appeal (the "FCA") upheld the decision of the Tax Court of Canada (the "Tax Court") that the transfer pricing rules in the *Income Tax Act* (the "Act") did not apply to reallocate the profits of the taxpayer's foreign subsidiary to a Canadian corporation.

Cameco is a large Canadian corporation that produces uranium and converts uranium into other forms. In the 90s, Cameco negotiated an agreement with Tenex, a Russian state-owned company, for the purchase of uranium. Cameco designated its subsidiary in Luxembourg ("CESA") to sign the final agreement. CESA also entered into an agreement to purchase uranium from Urenco, a company that enriches uranium. Cameco also formed a subsidiary in Switzerland ("CEL") to which CESA transferred its business, including the rights to purchase uranium from Tenex and Urenco.

When the agreements with Tenex and Urenco were initially concluded, the price of uranium was low. In later years, the price of uranium increased significantly, resulting in substantial profits for CEL. The profits at issue in *Cameco* were those realized by CEL from its business of buying and selling uranium. The Minister reassessed Cameco under subsection 247(2) of the Act.

Tax Court Decision

At the Tax Court, Justice Owen considered whether paragraphs 247(2)(*a*) and 247(2)(*c*) applied to adjust the terms and conditions of the various agreements and also whether the re-characterization rules under 247(2)(*b*) and 247(2)(*d*) applied to allow the Minister to re-characterize the transactions in an arm's length manner.

In regard to paragraphs 247(2)(*a*) and (*c*), Justice Owen concluded that the transfer pricing adjustment did not apply because the prices charged by Cameco to CEL for the uranium were within an arm's length range of prices. Furthermore, Justice Owen found that when the parties signed the agreement in 1999, they did not know that the price of uranium would later increase and were entitled to assume the upside risk.

In regard to the re-characterization rules under paragraphs 247(2)(*b*) and (*d*), Justice Owen concluded that they did not apply to Cameco because the transactions between Cameco and CEL were not commercially irrational.

Federal Court of Appeal Decision

On appeal, the FCA rejected the Crown's argument that paragraphs 247(2)(*b*) and (*d*) of the Act applied to Cameco because it would not have entered into any of the transactions that it did with CESA and CEL with an arm's length person.

(i) Interpretation of subparagraph 247(2)(*b*)(i)

First, the FCA rejected the Crown's argument that the condition in subparagraph 247(2)(*b*)(i) was satisfied because Cameco would not have entered into the transactions with any arm's length person. The FCA confirmed that subparagraph 247(2)(*b*)(i) does not refer to whether a particular taxpayer would not have entered into the transaction or series of transactions in issue with an arm's length person. Rather, the proper test under subparagraph 247(2)(*b*)(i) is an objective assessment that requires the court to determine whether the transaction would have been entered into between hypothetical persons dealing with each other at arm's length. Further, the FCA added that if Parliament intended for the test to be subjective instead of objective it would have used the word "participants" instead of "persons" in paragraph 247(2)(*b*)(i). The FCA also held that the Crown's interpretation was overly broad because it would imply that whenever a Canadian corporation wants to carry on business in a foreign country through its own subsidiary, it would not do so on arm's length basis.

(ii) Interpretation of paragraph 247(2)(*d*)

The FCA also rejected the Crown's application of paragraph 247(2)(*d*). In particular, the FCA confirmed that the paragraph requires "the transaction or series entered into between the participants" to be replaced by the transaction or series of transactions "that would have been entered into between persons dealing at arm's length". Paragraph 247(2)(*d*) does not contemplate replacing the existing transactions entered into between the participants with nothing, which was the interpretation advanced by the Crown.

In addition, the FCA dismissed the Crown's argument that, under paragraph 247(2)(*d*), if Cameco were acting at arm's length it would have purchased uranium and sold it directly to other buyers without using CEL as an intermediary because CEL added nothing of value. The FCA rejected this argument for two reasons: first, paragraph 247(2)(*d*) also requires an objective test and does not ask what Cameco would have done in executing the uranium agreement. Second, the FCA found that there was no evidence to suggest that Cameco would have gained anything by removing CEL as an intermediary and selling uranium directly to other buyers.

In its analysis, the FCA considered:

(i) headings in the Act;

(ii) the Department of Finance's Technical Notes; and

(iii) the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration.

Relying on these sources, the FCA held that paragraphs 247(2)(*b*) and (*d*) would not allow a court to disregard CEL's separate existence and to treat Cameco as if it had bought and sold the uranium in CEL's place. Instead, the FCA found that "the transfer by Cameco of its sales function to CEL would still have to be respected".[1] Provided that CEL's sales function is respected, a court would then have to look at pricing the transactions between the Canadian corporation and its foreign subsidiaries. However, in this case, the Crown did not appeal the Tax Court's findings that:

(1) the agreements had no value when they were signed,

(2) the parties did not know in 1999 the price of uranium would increase, and

(3) the prices charged by Cameco to CEL fell within an arm's length range of prices.

Since the Crown did not appeal any of these factual findings, the FCA held that it was inappropriate for the Crown to indirectly attack them.

Closing Thoughts

The *Cameco* decision confirms that the transfer pricing re-characterization provisions under paragraphs 247(2)(*b*) and (*d*) are assessed against an objective standard of hypothetical persons dealing with each other at arm's length, not against the particular taxpayer in the dispute. Interestingly, the Minister in *Cameco* attempted to have it both ways on assessment: on the one hand, the Minister argued that paragraph 247(2)(*b*) applied to *Cameco* because it would not have entered into the transaction with an arm's length party, while on the other hand, the Minister applied paragraph 247(2)(*d*) in such a way as to re-allocate the *entirety* of the profits to the Canadian corporation. Such a result would have been illogical and invites an obvious question: why would arm's length parties enter into a transaction whereby one party is entitled to 100% of the profits?

— *Nour Chehab Eddine*

[1] *The Queen v. Cameco*, 2020 DTC 5059 (FCA) at para. 73.

Iberville Developments Limited v. The Queen, 2020 DTC 5060 (Federal Court of Appeal)

Background

Iberville Developments Limited ("Iberville") was a corporation within a group of entities known as the "Iberville Group", which was engaged in the real estate business. On December 15, 2003, Iberville and another corporation within the Iberville Group formed Realty Developments Limited Partnership (the "Partnership") with Iberville as the sole limited partner. On the same day and on two separate occasions thereafter, Iberville transferred shopping centres with accrued gains to the Partnership pursuant to subsection 97(2) of the *Income Tax Act* (Canada) (the "ITA") in exchange for promissory notes and units in the Partnership. Each transfer took place at an elected amount equal to the properties' adjusted cost base ("ACB"), thereby deferring the realization of a capital gain until the sale of the properties by the Partnership.

Within the same month of each transfer, the Partnership sold the shopping centres to a third party, realized a capital gain, and allocated the capital gain to Iberville. In total, the Partnership allocated $100,627,132 in capital gains to Iberville which Iberville included in its income for its 2005 taxation year.

In two separate transfers taking place in March 2005 and November 2007, Iberville disposed of its interest in the Partnership to a non-arm's length corporation within the Iberville Group in exchange for shares of the corporation, pursuant to subsection 85(1). This disposition triggered a capital loss of $122,091,744, which was computed on the basis that the ACB of its partnership interest was $272,076,726. Although not explicitly mentioned in the case, Iberville presumably determined the ACB of the partnership interest by adding the following amounts:

(i) the fair market value ("FMV") of the properties at the time of the transfer pursuant to subparagraph 53(1)(*e*)(x) and the definition of "adjusted cost base" in section 54;

(ii) the elected amounts (less any boot) after the transfers pursuant to paragraph 97(2)(*b*); and

(iii) the capital gains allocated to Iberville on the sale of the properties by the Partnership after the transfers pursuant to subparagraph 53(1)(*e*)(i).

The capital loss determined by Iberville was reported on its 2008 income tax return. Iberville sought to carry back this capital loss to its 2005 taxation year to offset the capital gain allocated to it by the Partnership on the sales of the shopping centres.

The Minister issued a nil assessment for the 2008 taxation year on the basis that the ACB of the partnership interest was actually $149,844,299. As a result, there was no capital loss to carry back to the 2005 taxation year. Upon request by Iberville, the Minister issued a Notice of Determination which confirmed the capital loss was nil.

Decision of the Tax Court of Canada

At trial, the trial judge reviewed the limited partnership agreement and the first same-dated agreement of purchase and sale and found that the Partnership was formed and Iberville acquired its partnership interest in the Partnership before the transfer of the first shopping centre. The trial judge then reviewed subsections 85(1) and 97(2), highlighting their similarities and differences. Subsection 97(2) does not require the transferor to receive "units of the partnership", which the trial judge described as an "exceptional concept". While subsection 85(1) requires an issuance of shares to the transferor, which are treated as distinct property, subsection 97(2) only requires that the transferor be a member of the partnership immediately after the transfer. Notwithstanding these differences, the trial judge pointed out that subsections 85(1) and 97(2) are both clearly intended to permit the deferral of a gain on the transfer of property to a corporation or partnership, as the case may be. In the case of a transfer under subsection 85(1), the deferred gain could be realized by a sale of the shares by the transferor. Given that subsection 97(2) is the partnership equivalent of section 85, it is "only logical to expect to find the deferred gain similarly imbedded in the transferor's partnership interest".

The trial judge provided the following reasons in determining that the amount to be added to the ACB of the partnership interest should be determined only under subsection 97(2):

- The definition of "adjusted cost base" in section 54 only applies to incorporate the cost of property into its ACB at the time it is first acquired, and thereafter only the adjustments provided for in section 53 apply to adjust that cost base.
- Since the Partnership was validly created before the transfers of the shopping centres, the ACB of the partnership interest is not increased by section 54 in addition to subsection 97(2).
- The ITA does not recognize changes in the relative interest in a partnership or the issuance of additional "units" of a partnership. Even if the Partnership was unitized (which the trial judge found that it was not), any issuance of additional units is not treated as distinct property from the partnership interest acquired on formation of the Partnership.
- Even if Iberville first acquired the partnership interest upon the first transfer of a shopping centre to the Partnership, applying the principles of statutory interpretation leads to the conclusion that the general rules in the definition of "adjusted cost base" in section 54 and the adjustment to the ACB of a partnership interest set out in subparagraph 53(1)(*e*)(x) do not apply to add to the ACB of the partnership interest the FMV of the transferred properties when subsection 97(2) applies. In fact, subsection 97(2) of the ITA begins with the words, "[n]otwithstanding any other provision of this Act".

The trial judge essentially agreed with Iberville's admission that Iberville's interpretation would lead to an absurd, unintended result and dismissed the appeal.

Decision of the Federal Court of Appeal

On appeal, Iberville maintained its position that on a textual reading, both section 54 and subsection 97(2) applied to determine the ACB of its partnership interest. Although at trial Iberville acknowledged that GAAR would have applied to the transactions had it been raised by the Minister, it argued that the absurd result obtained was explained by the fact that Parliament had not incorporated by reference the cost determination rules in paragraphs 85(1)(*g*) and (*h*) into subsection 97(2) (as it had other portions of subsection 85(1)). Despite the absurd result, Iberville argued that this interpretation should prevail because the text of the relevant provisions allows for no other reading. Iberville also challenged the conclusions of the trial judge with a hypothetical scenario: if the first transfer of property to the Partnership was done pursuant to subsection 97(2) and the second and third transfers were done pursuant to subsection 97(1), then the partnership units received on the second and third transfers would not carry a cost equal to the FMV of those properties transferred.

The Federal Court of Appeal (the "FCA") found that the words of the relevant provisions could in fact be read in a manner that avoids the absurd result. The FCA first noted that when it was initially enacted in 1972, subparagraphs 97(2)(*b*)(i) and (ii) provided for different treatment in the determination of the cost of a partnership interest, depending on whether the transferor was already a member of the partnership or became one by virtue of the transfer. While amended paragraph 97(2)(*b*) does not make a similar distinction, the Department of Finance's explanatory notes state that the rules relating to adjustments to the cost base of the partnership interest are generally unchanged. Even if Iberville is correct that subsection 97(2) should have included references to paragraphs 85(1)(*g*) and (*h*), this has no impact on the outcome since Iberville acquired its partnership interest before the transfers of property to the Partnership took place.

In response to Iberville's hypothetical scenario, the FCA agreed that the partnership units upon the second and third transfers under subsection 97(1) would not be attributed a cost reflecting the FMV of the properties transferred. This is because the ITA does not recognize the issuance of additional units of a partnership or relative changes in a partner's interest as the acquisition of distinct property, as explained by the trial judge. Rather, the second and third transfers of property would trigger the application of subparagraph 53(1)(*e*)(iv), which provides that the partner's ACB in the partnership interest would be increased by an amount "commensurate with its contribution" or, in other words, the FMV of the property contributed. Accordingly, the FCA dismissed Iberville's appeal.

While taxpayers and tax practitioners often use "units in a partnership" to distinguish between the rights associated with different partners' interests in a partnership, as a way of keeping track of each partner's capital contributions or as a way of setting the order in which partners are entitled to draws and distributions from the partnership, this case is an important reminder that such "units" are not to be treated as analogous to shares of a corporation. The ITA is only concerned with the partner's interest in the partnership. This decision also strengthens the Canada Revenue Agency's view that units held by a partner represent one property that is the partnership interest in the partnership.

— *Paige Donnelly*

Laliberté v. Canada, 2020 DTC 5052 (Federal Court of Appeal)

Background

Guy Laliberté (the "Taxpayer") is the founder and, at the time of the appeal, the controlling shareholder of the group of corporations carrying on business under the "Cirque du Soleil" trademark. In September and October 2009, the Taxpayer took a 12-day trip to the International Space Station ("ISS") where he arranged a live broadcast to promote Cirque du Soleil and a charity he founded. The total cost of the space trip amounted to $41.8 million and was paid for by the Taxpayer's family holding company ("Holdco"). Holdco invoiced all but $4 million of the trip's cost to Créations Méandres Inc. ("Créations Méandres"), another company in the Cirque du Soleil group. The invoice was paid for by way of promissory note which was contributed down the corporate chain and eventually extinguished upon contribution to Créations Méandres. In 2009, the Taxpayer included the remaining $4 million in his income as a shareholder benefit. However, Créations Méandres did not claim any tax deductions relating to the trip.

In 2014, the Minister of National Revenue reassessed the Taxpayer on the basis that the full cost of the space trip was a shareholder benefit under subsection 15(1) or an indirect benefit under subsection 246(1) of the *Income Tax Act* (Canada) (the "ITA"), adding roughly $37.8 million to the Taxpayer's 2009 income.

Under subsection 15(1) of the ITA, where a corporation confers a benefit on a shareholder otherwise than by way of a reduction of paid-up capital, redemption of shares, payment of a dividend or stock dividend, conferring a right to all common shareholders to acquire additional shares of the corporation, or some other legitimate extraction of property, the shareholder must include the amount of the benefit in its income. A shareholder benefit generally arises where there is an economic benefit to the shareholder and a corresponding "impoverishment" of the corporation. Under section 246, where a person confers a benefit, either directly or indirectly, by any means whatever, on a taxpayer resident in Canada, then to the extent it is not otherwise included in the taxpayer's income under Part I and would be included in the taxpayer's income if the amount of the benefit were a payment made directly by the person to the taxpayer, the amount shall be included in the taxpayer's income unless the benefit was conferred pursuant to *bona fide* transactions between arm's length persons.

Tax Court Decision

The Taxpayer appealed the Minister's reassessment to the Tax Court, which allowed the appeal in part. The trial judge reduced the amount of the shareholder benefit received by the Taxpayer from Holdco to 90% of the trip's cost because, while the space trip's purpose was overwhelmingly personal, there were some business and promotional aspects. The trial judge adopted the same analysis for both subsection 15(1) and section 246, which the parties agreed was the appropriate approach.

The trial judge cited 27 reasons to conclude that the trip was primarily personal, including:

(1) The Taxpayer intended to take the trip personally and there was no evidence that another Cirque du Soleil representative would travel in his place.

(2) The Taxpayer had a personal interest in space travel which was grounded in several childhood experiences.

(3) Cirque du Soleil's CFO understood that the Taxpayer would have travelled to the ISS even if no promotional or marketing activities were going to take place and even before it was confirmed that the broadcast was possible.

(4) The evidence supported the reasonable inference that Cirque du Soleil would not have approved the expense of the trip, and only did approve it after it was assured that the promissory note could be contributed back to Créations Méandres.

(5) Before and after the trip took place, Cirque du Soleil undertook very little analysis to determine how it would or how it did benefit from the marketing and promotional activities.

(6) The Taxpayer's three reasons cited in the broadcast for making the space trip did not include any mention of Cirque du Soleil. One was to promote his charity, and the other two were personal. Cirque du Soleil was only mentioned four times during the broadcast and its logos were not visible.

In the words of the trial judge, "[t]he space trip itself simply was not a business decision. The evidence confirms that the trip was a personal decision and activity of the [Taxpayer]."

While the trial judge found that the trip was primarily personal, it concluded that some of the promotional activities on the ISS were genuine, *bona fide* business activities. Therefore, it had to allocate the expenses of the trip between deductible business expenses and non-deductible personal expenses. The Taxpayer attempted to argue that no benefit was conferred because Cirque du Soleil was not impoverished after paying for the trip, as evidenced by two consecutive years of revenue growth. This was not persuasive in the absence of evidence of a causal link between the trip and the revenue growth. The trial judge also placed little weight on a report prepared by a media monitoring measurement and analysis company, which was the only evidence put forward by the Taxpayer to establish the value of the space trip to Cirque du Soleil. The report concluded that the value of the space trip to Cirque du Soleil was $600 million. Instead, the trial judge allocated 10% of the trip's cost as business-related expenses, which was roughly equal to the direct incremental costs borne by Cirque du Soleil in carrying out the promotional activities on the ISS.

Federal Court of Appeal Decision

On appeal to the FCA, the Taxpayer argued that the trial judge misconstrued the test for the conferral of a benefit under subsections 15(1) and 246(1) of the ITA. Specifically, the Taxpayer argued that the trial judge erroneously applied the test for deductible business expenses under paragraph 18(1)(*a*) as opposed to the applicable tests under subsections 15(1) and 246(1). However, when considering the trial judge's reasons in their entirety, the FCA found that the trial judge had properly focused on whether the space trip was a *bona fide* business transaction or a personal venture. Further, the FCA agreed with the trial judge that Créations Méandres' decision not to deduct the trip's expenses for tax purposes was a relevant factor in determining whether the trip had a business purpose.

The Taxpayer attempted to argue that a taxpayer must also have an intent to impoverish the corporation for there to be a shareholder benefit. The FCA rejected this, and found that the case law on this issue does not universally equate corporate impoverishment with corporate intent, and certainly not with the controlling shareholder's subjective intent. Accordingly, the FCA reaffirmed the trial judge's conclusion that the Taxpayer's subjective intent to benefit Cirque du Soleil during the space trip is not determinative as to: (i) whether Créations Méandres was impoverished; and (ii) the existence of a shareholder benefit, especially in circumstances where the Taxpayer formed this intent after he had already committed to the trip.

Finally, the FCA also disagreed with the Taxpayer's arguments that the trial judge relied solely on the Taxpayer's personal motivations in concluding that there was corporate impoverishment. Rather, it found that the trial judge relied on other facts that demonstrated that the space trip was not a *bona fide* corporate transaction.

— *Paige Donnelly and Nour Chehab Eddine*

CURRENT ITEMS OF INTEREST

New Minister of Finance (August 18, 2020)

On August 18, following the resignation of Bill Morneau, the Prime Minister announced the appointment of Chrystia Freeland as the new Minister of Finance.

Parliament Prorogued (August 18, 2020)

On August 18, the Prime Minister asked the Governor General of Canada to prorogue Parliament. This provides an opportunity to present a Speech from the Throne on September 23, 2020, the same week the House of Commons was previously scheduled to return.

CRA and GCKey Data Breach

Following inquiries from readers who reported that email addresses associated with their CRA accounts had been changed, that their direct deposit information had been altered, and/or that they had received CERB payments without applying for them, CBC News reported on August 15 that the CRA had been the subject of multiple data breaches that compromised the data of approximately 5,600 Canadians. The three separate attacks targeted both the CRA and GCKey, a secure online portal that is used by approximately 30 federal departments that allows Canadians to access services such as employment insurance, veterans' benefits, and immigration applications. Estimates are that 9,000 GCKey accounts were compromised. The CRA stated that it became aware of the first breach on August 7.

As a result, the CRA suspended its online services on Saturday August 15. The cyber attacks were described as being "credential stuffing", where criminals use previously stolen usernames and passwords to access accounts. A full-scale investigation into the breach has been launched by the RCMP and the Canadian Centre of Cyber Security.

On Wednesday August 19, the CRA announced that online services had resumed, with the addition of new security features. The CRA is in the process of notifying those affected. It was recommended that anyone affected by the breach immediately update their passwords and choose a password they will not use for any other account.

RECENT CASES

Minister's Requirement for Information unreasonable, and therefore varied in certain ways specified by the Federal Court

The corporate taxpayer, Bayer Canada, a Canadian corporation, was a wholly-owned subsidiary of Bayer AG, which was the publicly-traded parent corporation of a multinational group of companies (the "Bayer Group"). The Minister issued a Requirement (the "Requirement") that Bayer Canada produce all contracts between Bayer AG or any other member of the Bayer Group and a third party related to the purchase and/or sale of pharmaceutical products. This Requirement was significantly broader in scope than previous Requests for Information made by the Minister. Bayer Canada therefore applied to the Federal Court for a judicial review of the Requirement.

Bayer Canada's application was granted. The Requirement was not limited to specified agreements, and was not limited by time or geographic region. In addition, the CRA failed to explain its abandonment of the pragmatic limits placed by it on its previous requests for information. The Requirement was therefore unreasonable although neither party proposed a variation of the Requirement that might be mutually acceptable. As a result, the Requirement was varied by the Court to include certain criteria and its scope was limited to certain agreements between named pharmaceutical and life sciences companies operating at arm's length with the Bayer Group.

Bayer Inc. v. Canada (AG)

2020 DTC 5064

Taxpayers granted rescission of series of transactions based on mistake

The taxpayers developed plans (the "Plans") involving the incorporation of a holding company that purchased the shares of an operating company, the creation of a family trust with the holding company as a beneficiary, a loan from the holding company to the trust that was used to purchase from the holding company shares in the operating company, and, ultimately, the payment of dividends on the purchased shares from the operating company to the trusts. These plans were the same as those in *Re Pallen Trust*, 2015 DTC 5061 (BCCA). The taxpayers, however, were adversely reassessed by the CRA and then petitioned the Supreme Court of British Columbia successfully to rescind the transactions in the Plans on the basis of mistake. The Crown appealed to the Court of Appeal.

The Crown's appeal was dismissed. The chambers judge did not err in his interpretation of the *Pallen Trust* case in granting the taxpayers' petition for rescission on the basis of mistake in the cases before him. In addition, the *Pallen Trust* case remained as a binding precedent for the appeals in these proceedings on both the facts and the law.

Collins Family Trust v. Canada (AG)

2020 DTC 5062

Taxpayer paid tuition fees to U.S. universities but not entitled to deduct tuition fee tax credit with respect to those fees after again becoming resident of Canada

During 2002 to 2011, while not a resident of Canada, the taxpayer attended certain universities in the United States and received from them copies of the forms prescribed by the *Income Tax Act* (the "Act") for the purposes of the tuition fee and education tax credits in sections 118.5 and 118.6 of the Act. After he again became a resident of Canada, he filed returns for 2002 to 2011 on the basis that for those years he had no tax payable in Canada. In his return for 2012, however, he claimed unused tuition tax credits based on the tuition paid by him during 2002 to 2011 to the US universities. On reassessment for 2012, the taxpayer's unused tuition tax credit claim was disallowed and his previously allowed tuition and education carry forward tax credits were reduced to nil. The taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. The issue was whether the taxpayer was entitled to a tuition fee tax credit in each of 2002 to 2011 (resulting from tuition paid to the US universities and leading to an unused tuition fee tax credit balance) that he could deduct in computing his tax payable for 2012 after he had become a resident of Canada. In deciding this issue against the taxpayer, the Court observed that: (a) the taxpayer was neither resident in nor deemed to reside in Canada from 2002 to 2011; and (b) he had no taxable income earned in Canada and no tax payable in Canada in those years. The Minister's reassessment was affirmed accordingly.

Marino v. The Queen

2020 DTC 1039

Minister ordered to reconsider decision refusing to cancel tax on excess contributions to taxpayer's Tax-Free Savings Account

The Minister refused to cancel tax imposed on excess contributions to the taxpayer's tax-free savings account ("TFSA"). The taxpayer applied to the Federal Court for a judicial review of the Minister's decision.

The taxpayer's application was granted. The Minister's decision lacked analysis and justification. The Minister's decision-maker failed to reasonably assess the evidence in the record, and limited his analysis to a perfunctory statement that the taxpayer had made a series of over-contributions to his TFSA. The matter was therefore referred back to the Minister for reconsideration by a different decision-maker.

Sangha v. Canada (AG)

2020 DTC 5057

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