Tax Notes

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SIMPLIFIED GST/HST REGISTRATION FRAMEWORK FOR E-COMMERCE

- –Jacques Roberge, Wolters Kluwer Canada Limited

This article will outline the significant new rules that apply to e-commerce as of July 1, 2021, which were presented in the federal Budget of April 19, 2021, and subsequently enacted as part of Bill C-30.

NEW RULES FOR E-COMMERCE APPLICABLE AS OF JULY 1, 2021 (INITIAL DRAFT PROPOSALS)

One of the most important measures in the Budget and Bill C-30 confirmed the introduction, as of July 1, 2021, of new rules and a new registration framework relating to e-commerce. These were initially announced in 2020 as draft proposals in the November 30 *Fall Economic Statement*; notably some amendments to the draft proposals were included, which we will discuss later.

Let’s first review the basis for these changes. The ongoing digitalization of the economy is opening up new ways for businesses to sell goods and traditional services (e.g., legal and accounting services) and has seen the development of new types of digital products, such as mobile apps, online gaming, and streaming services. The evolution of the commercial and retail landscape in Canada and the ways in which Canadians shop pose challenges to the effectiveness and fairness of the GST/HST regime. In particular, certain aspects of the current GST/HST system are more reflective of the economy that was in place when the tax was introduced in 1991, when goods and services were almost exclusively purchased from stores and other vendors located in Canada.

Under previous GST/HST rules, persons who carried on business in Canada were generally required to register for the GST/HST and collect and remit tax on their taxable supplies of goods and services in Canada. Non-resident persons not carrying on business in Canada were not required to register, or collect or remit the GST/HST. For goods and services supplied by such non-residents, the GST/HST generally applied as follows:

- Where physical goods are purchased from a non-resident vendor, the applicable GST/HST was levied on the value of the goods at the time they are imported.
- Where a non-resident vendor supplies digital products or services in Canada to a Canadian consumer, <u>the consumer was required to self-assess and pay the applicable GST/HST directly to the Canada Revenue Agency</u> (“CRA”).

However, in practice, few consumers effectively complied with the requirement (underlined above) to self-assess. The previous rules often resulted in the GST/HST not being collected on online purchases from non-resident vendors or made through digital platforms (also known as online marketplaces). The non-collection of the GST/HST presents equitable, economic, and fiscal concerns. In particular, it places physical and online retailers operating in Canada (who are required to register for and collect the GST/HST) at a competitive disadvantage relative to non-resident vendors.

To improve the collection of the GST/HST and level the playing field between resident and non-resident vendors, the new e-commerce rules provide that non-resident vendors supplying digital products or services (including traditional services) to consumers in Canada must register for the GST/HST and collect and remit the tax to the CRA on their taxable supplies to Canadian consumers. In many instances, digital products or services may also be supplied to consumers in Canada through digital platforms that facilitate sales by third-party vendors (hereinafter referred to as a “distribution platform”). To ensure that the GST/HST applies equally to these supplies, it was also proposed that distribution platform operators be generally required to register for the GST/

HST and collect and remit the tax on the supplies that these platforms facilitate of digital products or services of non-resident vendors to Canadians.

To facilitate compliance with these requirements—and to be consistent with the Organisation for Economic Co-operation and Development's ("OECD") recommendations on the digital economy and the actions taken by many other jurisdictions—a simplified GST/HST registration and remittance framework is being made available to non-resident vendors and non-resident distribution platform operators that are not carrying on business in Canada (e.g., have no permanent establishment in Canada).

The new simplified system includes the following key features:

- **Simplified online registration and remittances**: An online portal is being made available for simplified GST/HST registration and remittances by non-resident vendors of digital products or services and non-resident distribution platform operators that facilitate the supply of a non-resident vendor's digital products or services to consumers in Canada.
- **Business-to-consumer supplies only**: Non-resident vendors and non-resident distribution platform operators using the simplified registration system would be required to collect and remit the GST/HST only on the supply of digital products and services made to Canadian consumers. Conversely, they would not be required to collect and remit the GST/HST on their supplies of digital products or services to businesses. The GST/HST registration number of the customer will relieve the vendor from its obligation to collect the tax, as any GST/HST registrant will be considered as a business and not a consumer.
- **No input tax credits**: Non-resident vendors and non-resident distribution platform operators using the simplified registration system would not be able to claim input tax credits to recover any GST/HST paid on their business inputs. Those non-resident vendors and non-resident distribution platform operators wishing to claim input tax credits for the GST/HST paid in Canada may register under the normal GST/HST registration process. In this case, they will operate under the normal GST/HST rules.
- **Registration threshold**: Registration will generally be required for non-residents vendors or distribution platform operators if their total taxable supplies of digital products or services made to consumers in Canada exceed, or are expected to exceed, $30,000 over a 12-month period. The rate of tax (or place of supply rule) will generally be determined by the province of residence of the consumer to whom the supply is made. There will be exceptions to this rule, such as when the supply relates to real property of the consumer located in a different province than his or her usual place of residence.

A GST/HST registered business will continue to be required to self-assess and remit the GST/HST on its purchases of digital products and services from non-resident vendors and non-resident distribution platform operators, unless the purchase is for use exclusively in the business's commercial activities.

GST/HST ON GOODS SUPPLIED THROUGH FULFILLMENT WAREHOUSES

Non-resident vendors are increasingly selling goods to Canadians through digital platforms, also known as online marketplaces or digital platforms, that facilitate sales of third-party vendors (hereinafter referred to as "distribution platforms"). These may also store the goods of third-party vendors in fulfillment warehouses in Canada and ship these goods to purchasers in Canada.

While applicable duties and taxes are levied at the border on the value of the goods at the time of importation, the GST/HST is not consistently charged on the final price paid for the goods when they are subsequently sold to Canadians through distribution platforms and fulfillment warehouses located in Canada. This means that the difference between the value at the time of importation and the final price paid escapes the GST/HST. Although these goods are situated in Canada at the time of sale, there is generally no requirement under the current rules for the non-resident vendor, or distribution platform operator facilitating the sale, to collect or remit the GST/HST when the goods are sold to a purchaser in Canada. This is because the non-resident third-party vendor is generally not considered to be carrying on business in Canada and the distribution platform operator is not considered to be the supplier of the goods.

Again, this scenario places vendors situated in Canada at a disadvantage, since the final price on which the GST/HST applies and is collected by resident suppliers is the final price paid by the consumer.

To level the playing field between resident and non-resident vendors, the following new rules apply as of July 1, 2021:

- Distribution platform operators are required to register under the normal GST/HST rules and to collect and remit the GST/HST in respect of sales of goods that are located in fulfillment warehouses in Canada (or shipped from a place in Canada to a purchaser in Canada) when those sales are made by non-registered vendors through distribution platforms;
- Non-resident vendors are also required to register under the normal GST/HST rules and to collect and remit the GST/HST in respect of sales of goods located in fulfillment warehouses in Canada (or shipped from a place in Canada to a purchaser in Canada) when those sales are made by the non-resident vendors on their own (i.e., they are not made through a distribution platform); and
- Fulfillment businesses in Canada will be required to notify the CRA that they are carrying on a fulfillment business and to maintain records regarding their non-resident clients and the goods they store on behalf of their non-resident clients.

Under the new framework, GST/HST applies as follows:

- **Duties and taxes levied at the border**: All goods that are imported into Canada will continue to be subject to applicable duties and taxes on the value of the goods at the time of importation. In particular, applicable duties and taxes will continue to be levied at the border on:
    - goods that are imported into Canada for storage in a fulfillment warehouse or any other place in Canada for subsequent sale and delivery to a purchaser in Canada; and
    - goods that are sold and shipped from outside Canada directly to a purchaser in Canada (e.g., sent by mail or courier and not stored in a fulfillment warehouse in Canada after importation and prior to sale).
- **Platform operator deemed supplier**: Distribution platform operators (whether resident or not) will be deemed to be the supplier in respect of sales they facilitate by non-registered vendors (whether resident or not) of goods that are located in fulfillment warehouses in Canada or shipped from a place in Canada to a purchaser in Canada (hereinafter referred to as a “qualifying supply”). Distribution platform operators will be required to collect and remit the GST/HST on the final sale price of the goods for which they are deemed to be the supplier.
    - For these purposes, a distribution platform operator would be a person that controls or sets the essential elements of the transaction between the third-party vendor and the purchaser (e.g., by providing listing services for the sale of goods and setting payment terms and delivery conditions). If no such person exists, the operator would be a person that is involved, directly or through arrangements with third parties, in collecting, receiving, or charging payment for the sale and transmitting payment to the third-party vendor. However, a distribution platform operator does not include a person who operates a website that simply allows vendors to list their goods for sale, such as a classified or advertising website, or is solely a payment processor.
    - Distribution platform operators are required to collect and remit the GST/HST on all of their qualifying supplies, including those made through their platforms by non-registered third-party vendors, regardless of whether the supply is made to a consumer or a purchaser that is registered for the GST/HST.
    - Distribution platform operators are not deemed to be the supplier in respect of sales they facilitate by registered third-party vendors (whether resident or not). Where a third-party vendor is registered for the GST/HST, the third-party vendor would remain liable for its GST/HST obligations in respect of its platform sales.
- **Platform operator threshold**: The $30,000 annual threshold also applies in these circumstances.

- **Recovery of tax on inputs**: Registered distribution platform operators would be eligible to claim input tax credits in respect of the tax paid at the border by non-registered third-party vendors that import their goods into Canada and sell their goods through distribution platforms (i.e., there is a flow through of the input tax credits). Registered third-party vendors would be eligible, as under the existing GST/HST rules, to claim input tax credits in respect of the tax paid on inputs used in their commercial activities, including tax paid at the border.
- **No tax on platform services**: Distribution platform operators are deemed to not have made a supply to the non-registered third-party vendor of services relating to the deemed supply of goods made through the platform. This deeming rule recognizes that non-registered third-party vendors are unable to claim input tax credits in respect of the tax paid on inputs used in their commercial activities, and helps avoid the embedding of the GST/HST in the final price of goods for which the distribution platform operator would be deemed to be the supplier.
- **Drop shipment exception**: The GST/HST drop shipment rules are a key way in which non-registered non-residents obtain GST/HST relief in commercial transactions and activities. The new rules are designed to ensure that they do not conflict with the existing drop shipment rules. Accordingly, GST/HST relief is provided under the (modified) drop shipment rules where a non-registered non-resident provides a certificate to a service provider or vendor of goods acknowledging that a registered distribution platform operator was deemed to sell the goods and required to collect tax.
- **Platform operator information reporting obligations**: To assist the CRA in the administration of the GST/HST, distribution platform operators will be required to report information to the CRA on the third-party vendors using their platforms.
- **Fulfillment business reporting and record keeping obligations**: To assist the CRA in the administration of the GST/HST in respect of sales made by non-residents through fulfillment warehouses in Canada, persons carrying on a fulfillment business in Canada are required to notify the CRA that they are carrying on such a business and maintain certain records on their non-resident clients.

MODIFICATIONS TO THE PREVIOUSLY ANNOUNCED RULES INCLUDED IN THE BUDGET AND INCORPORATED INTO BILL C-30

Safe Harbour Rules

In many cases, platform operators may rely on information provided by third parties on the transactions they make for determining whether the platform operator is required to collect and remit tax. Accordingly, additional rules are provided to:

- impose joint and several, or solidary, liability on a platform operator and a third-party supplier for the collection and remittance of tax, if the third-party supplier provides false information to the platform operator; and
- limit the liability of a platform operator for failure to collect and remit tax, if the platform operator reasonably relied on the information provided by a third-party supplier.

These rules ensure that a platform operator is not held liable for failing to collect and remit tax as a result of having relied in good faith on information provided by a third-party supplier. Under the new rules, the platform operator is relieved from liability to the extent that it did not collect and remit tax (i.e., where it partially collected tax, it would remain liable for those amounts) and the third-party supplier that provided false information would be liable for any amounts not collected.

Eligible Deductions

Budget 2021 proposed an amendment to clarify that suppliers registered for the GST/HST under the simplified framework are eligible to deduct amounts for bad debts and certain provincial HST point-of-sale rebates to purchasers (e.g., in respect of audio books) from the tax that they are required to remit, and that public libraries and similar institutions are eligible to claim a rebate for the GST paid on audio books acquired from those suppliers.

Threshold Amount Determination

Budget 2021 proposed an amendment to the proposals to clarify that supplies of digital products or services that are GST/HST-free (i.e., zero-rated) are not included in the calculation of the threshold amount for determining if a person is required to be registered for the GST/HST under the simplified framework.

Platform Operator Information Return

Under the new rules, platform operators are required to file an annual information return if they facilitate a sale by a non-registered vendor of goods that are located in a fulfillment warehouse in Canada. Budget 2021 proposed an amendment to clarify that the requirement to file an annual information return applies only to platform operators that are registered or are required to be registered for the GST/HST.

Authority for the Minister of National Revenue to Register a Person

Budget 2021 proposed an amendment to provide the Minister of National Revenue with the authority to register a person who the Minister believes should be registered under the simplified framework. This authority already exists in respect of the existing GST/HST framework and in the rules of other jurisdictions that have adopted similar e-commerce measures.

FINAL CONSIDERATIONS

While the requirements for non-residents to register are presented as mandatory, they are somewhat voluntary as it is not clear that Canada can effectively enforce the need to register. The simplified measures for registering, collecting, and remitting the GST/HST are, to a certain extent, an incentive to get the persons affected to comply. To the extent that other OECD members enact similar measures, it will also encourage general compliance. Finally, it should be noted that these measures are similar to measures already adopted by Québec with respect to the Québec Sales Tax (“QST”). Québec will revise its rules and harmonize them with the federal rules in spirit with the harmonization of the QST with the GST/HST regime. It is interesting to note that, so far, it appears that a large number of non-resident companies required to register under the QST rules have done so. Accordingly, acceptance of and compliance with the new federal rules on GST/HST may also be expected.

There is undoubtedly more information that will be provided on the operational matters and issues relating to this new framework. The CRA has already stated it will work closely with affected businesses and platform operators to assist them in meeting their obligations. Where the affected businesses and platform operators demonstrate they have taken reasonable measures, but are unable to meet their new obligations for operational reasons, the CRA will take a practical approach to compliance and exercise discretion in administering these measures during a 12-month transition period starting from the July 1, 2021, coming into force date.

COVID-19 UPDATE

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

FEDERAL

New Bill C-2 (November 24, 2021)

Bill C-2, *An Act to provide further support in response to COVID-19*, received First Reading in the House of Commons on November 24, 2021. Among other things, the Bill proposes to enact previously announced extensions and modifications to the Canada Emergency Wage Subsidy (“CEWS”), Canada Emergency Rent Subsidy (“CERS”), and Canada Recovery Hiring Program (“CRHP”). The major changes proposed by the Bill are as follows:

- Extend the CEWS, CERS, and CRHP to May 7, 2022 (they may be further extended to July 2, 2022, by regulation).
- Introduce three streams under which an organization must qualify to access the CEWS and CERS. These are the Tourism and Hospitality Recovery Program, the Hardest-Hit Business Recovery Program, and the Local Lockdown Program.
- Increase the $300,000 monthly cap for the CERS to $1 million.

The Tourism and Hospitality Recovery Program is only available to certain organizations in the tourism and hospitality industry. Since this is a fairly broad category, on its website the Department of Finance published *Types of Business Eligible for the Tourism and Hospitality Recovery Program*; these criteria are also found in the regulation proposed by Bill C-2.

Bill C-2 also proposes to extend the Canada Recovery Caregiving Benefit and the Canada Recovery Sickness Benefit until May 7, 2022, and increase the maximum duration of benefits by two weeks. This would extend the caregiving benefit from 42 to 44 weeks and the sickness benefit from four to six weeks.

The Bill also proposes to establish the Canada Worker Lockdown Benefit, which would provide $300 per week in income support to eligible workers who are directly impacted by a COVID-19-related public health lockdown in their region up until May 7, 2022. Eligible workers would be able to apply to receive this support retroactively from October 24, 2021.

PROVINCIAL

Alberta

WOMEN’S ECONOMIC RECOVERY CHALLENGE GRANT PROGRAM

Alberta’s government is committing $1 million in grant funding for projects that increase women's participation in the economy. The Women’s Economic Recovery Challenge Grant program will help address areas of concern for women entrepreneurs and women working in Alberta. Grants are open to non-profit groups, including community organizations, municipalities, First Nation and Métis communities, industry associations, and economic development organizations. Eligible non-profits can apply for up to $250,000 in funding in the following focus areas:

- increasing the representation of women and girls in STEM;
- increasing female entrepreneurship;
- decreasing the challenges women face in the workplace; and
- helping women transition to a new career, supporting inclusive employer training, and updating employment skills.

Examples of eligible projects could include the development and implementation of programs and educational materials, delivering training and networking opportunities, and executing media or educational campaigns. Applications can be downloaded from www.alberta.ca/womens-economic-recovery-challenge-grant-program.aspx and submitted via email. The deadline to apply is January 12, 2022.

SUPPORT FOR BUSINESSES IMPLEMENTING THE RESTRICTIONS EXEMPTION PROGRAM

Certain Alberta businesses can, in lieu of following public health restrictions, continue business as usual if they implement the Restrictions Exemption Program. The program basically requires proof of vaccination, negative test results, or medical exemption for patrons 12 and over, plus mandatory masking. As of November 16, the $20-million Restrictions Exemption Program Implementation Grant is open to all eligible businesses, cooperatives, and non-profit organizations. In-scope small- and medium-sized organizations may use the one-time funding as they see fit. Applications can be made online at: www.alberta.ca/restrictions-exemption-program-implementation-grant.aspx.

SECOND INTAKE OF JOBS NOW PROGRAM

The Alberta Jobs Now program allows employers to apply for funding to offset the cost of hiring and training unemployed or underemployed Albertans in new or vacant positions. Private sector businesses and non-profit organizations across all industries can apply for funding to reduce the costs of hiring and training unemployed or underemployed Albertans. Additional funding is available for hiring persons with disabilities.

The program's second application intake opened on November 10. When the second intake was announced on November 9, the following changes to the program were also announced:

- opening the program to Alberta businesses and non-profits that have been incorporated or registered for less than a year;
- reducing the minimum number of hours employees must work under the program from 30 to 15 hours per week;
- while the focus is on hiring unemployed and underemployed Albertans, employers may fill available positions with employed Albertans if there is a business need;
- reducing the number of positions that employers can apply for per intake period from 20 to 10;
- reducing the amount of time employers have to fill positions from 120 to 90 days after receiving application approval;
- employers who have hired eligible employees since May 19, but have not submitted an application, can apply during this intake period; and
- if an employer was previously declined because their employee(s) was ineligible but now qualifies under the new criteria, the employer can reapply.

British Columbia

MORE SUPPORT FOR INDIGENOUS TOURISM BUSINESSES

Indigenous tourism businesses will receive another financial boost to aid in pandemic recovery and foster growth through the continued partnership of the province and Indigenous Tourism BC.

The province initially provided $5 million to Indigenous Tourism BC ("ITBC") to create the BC Indigenous Tourism Recovery Fund. It is now providing an additional $3 million for a second intake.

The fund provides grants to Indigenous tourism businesses, including lodges and resorts, restaurants, outdoor adventure experiences, galleries, and gift shops owned by Indigenous people. The intake opening date for the second round of the recovery grant will be announced by ITBC in the coming weeks.

AGRICULTURE FUNDING

The Buy BC Partnership Program is providing $2 million in additional funding in 2021. The program provides financial support for farmers and food and beverage processors to access and develop websites that help online sales. The program also helps cover the costs of marketing and shipping products to people throughout the province. Businesses could apply for Buy BC funding from October 26 until November 18, 2021. Details can be found at: iafbc.ca/buy-bc/buy-bc-partnership-program-e-commerce-funding-stream.

Manitoba

DIGITAL MANITOBA INITIATIVE

The Manitoba government is partnering with the Manitoba Chambers of Commerce ("MCC") to fund the Digital Manitoba Initiative ("DMI"), which will help businesses and non-profit organizations with digital transformation. The DMI offers businesses and non-profit organizations across Manitoba a low-risk way to invest in and adopt digital technology. The initiative will be delivered and administered by the MCC, but the province will cover the $15-million cost of the initiative as part of Manitoba's $50-million Long-Term Recovery Fund.

The DMI fund will provide parameters for applicants but be purposefully broad to prevent bias and encourage creative solutions by businesses, for businesses. The fund consists of two streams designed to support projects that are immediately actionable:

- TechUP digital adoption investment of up to $5,000 for fundamental digital tools, which could include a range of assets and/or applications, such as supporting marketing and promotional activities, website development/enhancement, e-commerce capabilities, accounting, events, or project management software; and
- PowerUP digital strategy funding of up to $25,000 to evolve business models, processes, and operations; improve client/customer experience; and increase productivity.

Initial applications to the DMI will be reviewed and vetted for eligibility. Organizations must be a Manitoba-based business or not-for-profit, with a valid Manitoba business number, in good standing with the Companies Office. Once eligibility to apply is confirmed, DMI applicants will be invited to submit their funding request via the digital portal. Submissions will be accepted and reviewed on a rolling basis by a panel of new media and technical experts. For more information, visit digitalmanitobainitiative.com.

Ontario

EXTENDING THE TEMPORARY WAGE ENHANCEMENT FOR PERSONAL SUPPORT WORKERS

The Ontario government is investing an additional $373 million to extend the temporary wage enhancement for personal support workers and direct support workers. This increase will continue until March 31, 2022.

The government is extending the wage enhancement for over 158,000 personal support workers and direct support workers who deliver publicly funded personal support services or direct support services in home and community care, long-term care, public hospitals, and social services. This temporary wage enhancement includes:

- $3 per hour for approximately 38,000 eligible workers in home and community care;
- $3 per hour for approximately 50,000 eligible workers in long-term care;
- $2 per hour for approximately 10,000 eligible workers in public hospitals; and
- $3 per hour for approximately 60,000 eligible workers in children, community, and social services providing personal direct support services to those who need assistance with the activities of daily living.

This latest temporary wage increase builds on the government's previous wage enhancement extension on August 23, 2021, which was set to expire on October 31, 2021. The government continues to explore a permanent solution to address a range of longstanding recruitment and retention issues among personal support workers and direct support workers.

Prince Edward Island

COVID-19—VAX PASS IMPLEMENTATION FUND

The COVID-19—Vax Pass Implementation Fund supports businesses, not-for-profits, and non-governmental organizations that may need to purchase a new tablet to implement a vaccine passport system in their business or operation. The fund provides up to 75% of the eligible cost of purchasing a tablet to a maximum of $525 per tablet. If multiple tablets are required, the fund covers up to $2,100, for a maximum of four tablets. To learn more about the COVID-19—Vax Pass Implementation Fund, visit: www.princeedwardisland.ca/en/service/covid-19-vax-pass-implementation-fund.

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.

AQUILINI V. THE QUEEN, 2021 DTC 5119 (FEDERAL COURT OF APPEAL)—THE ALLOCATION OF 99% OF NET INCOME TO PARTNERS WHOSE CONTRIBUTION OF CAPITAL TO THE PARTNERSHIP WAS NOMINAL WAS UNREASONABLE

Background

In the 1950s, Luigi and Elisa Aquilini started a real-estate business acquiring undervalued real estate and either renovating or developing the property to form part of a growing portfolio of income producing properties. In 2001, the business was reorganized to consolidate the various business interests under one limited partnership ("AIG LP").

In connection with the reorganization, AIG LP issued Class G units to four Aquilini family trusts (the "Family Trusts") in consideration for an aggregate capital contribution of $1,000, representing only 0.0006% of the total capital contributed to AIG LP. The capital accounts of the partners holding all other units of AIG LP was greater than $150 million. Notwithstanding these capital contribution differences, the partnership agreement provided that partnership income in excess of $1 million was to be allocated to the holders of Class G units.

In 2005, AIG LP purchased a 50% interest in the Vancouver Canucks. In 2007, in order to finance the acquisition of the remaining 50%, AIG LP sold various real estate properties, resulting in taxable capital gains of approximately $48 million. Almost all of these gains were allocated to the Family Trusts in accordance with the agreed upon allocation in the partnership agreement.

The Minister of National Revenue (the "Minister") reassessed the partners on the basis that this allocation was unreasonable under subsection 103(1.1) of the *Income Tax Act* (the "ITA"), and assessed each partner as being deemed to have received a pro rata allocation of AIG LP's taxable income based on their relative capital accounts.

Subsection 103(1.1) provides that where two or more members of a partnership are not dealing with each other at arm's length and they agree to share the partnership's income or losses in a manner that is unreasonable "having regard to the capital invested in or the work performed for the partnership by the members thereof or *such other factors as may be relevant*" [emphasis added], the partners will be deemed to have been allocated an amount that is reasonable in the circumstances.

Tax Court Decision

The taxpayers argued that the partners had a number of reasonable objectives in agreeing to the allocation, including creditor proofing and estate planning goals, and as such the agreed upon allocation met the test of reasonableness under subsection 103(1.1).

The Tax Court of Canada disagreed. The Tax Court found that the taxpayers failed to establish that creditor proofing and estate planning objectives were the factors motivating the income allocation. The Tax Court further held that the test to be applied to determine reasonableness for the purpose of subsection 103(1.1) is "an objective test between arm's length parties", and that the taxpayer's allocation failed to meet this objective test.

The Tax Court held that, in the alternative, the Minister had established that the income could be allocated under subsection 103(1) of the ITA, which operates to redistribute amounts to reflect a reasonable allocation in situations where income or losses were allocated for the principal purpose of reducing or postponing taxes payable.

The Tax Court also considered the allocation of the losses of another partnership (the "GERI Partnership") to Francesco, Roberto, and Paolo, finding that the allocation was not reasonable pursuant to subsection 103(1.1) of the ITA. However, because the taxpayers did not submit arguments to challenge the Tax Court's finding, the Federal Court of Appeal ("FCA") dismissed the appeal with respect to the GERI Partnership.

Issues

The issues before the FCA were:

(1) Did the Tax Court err by basing its conclusion that subsection 103(1.1) of the ITA applied on its finding that partners dealing at arm's length would not allocate the income as it was allocated?
(2) Did the Tax Court err in finding that the taxpayers had not established that creditor proofing was the reason for the allocation of income?
(3) Can creditor proofing be considered a relevant factor for the purposes of subsection 103(1.1) of the ITA and, if so, is the allocation of income to the Family Trusts based on this factor reasonable?

FCA Decision

IS A CONSIDERATION OF WHAT PARTNERS DEALING AT ARM'S LENGTH WOULD DO RELEVANT?

The FCA held that the Tax Court did not err by considering whether partners dealing at arm's length would allocate income in the way AIG LP did.

The FCA found that "such other factors as may be relevant" cannot include any factors that partners who are not dealing at arm's length might consider relevant. Otherwise, any allocation of income by non-arm's length partners could be justified based on factors they subjectively found to be relevant—which would result in subsection 103(1.1) effectively becoming inoperative. Rather, the FCA agreed with the Tax Court that "such other factors as may be relevant" must include factors that partners dealing at arm's length would find relevant, and exclude factors that arm's length partners would not find relevant.

WAS CREDITOR PROTECTION THE PARTNERS' OBJECTIVE?

The FCA held that the Tax Court did not make a palpable and overriding error in finding that the taxpayers had failed to establish that the purpose of the allocation was to protect business assets from creditors to facilitate continued business growth.

IS CREDITOR PROTECTION A RELEVANT FACTOR?

The FCA decided it was unnecessary to address whether Parliament intended creditor protection to be a relevant factor under subsection 103(1.1). Nonetheless, the FCA commented on Parliament's intent, stating that capital invested and work performed both reflect contributions made by partners that directly or indirectly contribute to earning the income that is being allocated. In contrast, creditor protection is not related to anything enabling the partnership to earn income. Therefore, including creditor protection as a relevant factor would not be consistent with the *ejusdem generis* principal of statutory interpretation (i.e., where there are general words following specific words, the general words must be confined to things of the same kind as those specifically mentioned).

Conclusion

The FCA unanimously dismissed the appeal in relation to the application of subsection 103(1.1) of the ITA. It found there was therefore no need to consider whether subsection 103(1) also applied.

— Paige Donnelly and Caroline Harrell

BANK OF NOVA SCOTIA V. THE QUEEN, 2021 DTC 1055 (TAX COURT OF CANADA)—ARREARS INTEREST AND RETURN OF REFUND INTEREST IS CALCULATED BASED ON YEAR OF AUDIT NOT YEAR OF LOSS

Background

Following an audit, the Minister of National Revenue (the "Minister") and the Bank of Nova Scotia (the "Bank") negotiated a settlement agreement dated March 13, 2015 (the "Settlement"). The Settlement provided that certain amounts would be included in income as transfer pricing adjustments for the 2006 to 2014 taxation years. As a result of the Settlement, the Bank's income under Part I of the *Income Tax Act* (the "ITA") for the 2006 taxation year was increased by $54,916,616 (the "Adjustment").

On March 12, 2015, the Bank asked the Minister for $54,000,000 of non-capital losses from 2008 to be carried back to offset the Adjustment. In a notice of reassessment for the 2006 taxation year dated March 20, 2015, the Minister applied the loss carryback as requested (the "Reassessment").

For the purpose of the Reassessment, the Minister calculated interest using an effective date of March 12, 2015, pursuant to subparagraph 161(7)(b)(iv) of the ITA. Accordingly, the Minister assessed arrears interest of $7,931,087.49 and a return of refund interest of $180,323.87. The Minister erroneously failed to add 30 days to her calculation as required by paragraph 161(7)(b) and subsection 164(5) of the ITA.

Issue

The issue before Justice Wong of the Tax Court of Canada was how to determine the deemed payment date for the purposes of calculating arrears interest and refund interest when a taxpayer makes a written request to carry back non-capital losses to offset taxes payable. Because the provisions relating to arrears interest and those relating to refund interest are identical, the principles articulated in Justice Wong's decision applied to both.

Legislative Framework

Subsection 161(7) considers interest on late balances. At paragraph 9 of her decision, Justice Wong articulated the mechanics of the provision when a non-capital loss in a subsequent taxation year is carried back to offset tax payable in a particular taxation year:

> The amount of tax payable is deemed to be the amount it would be without applying the particular carryback in question. The resulting difference in tax payable (i.e., with and without applying the particular carryback) is then deemed to have been paid on the day that is 30 days after the latest of four points in time, and interest is calculated based on the deemed payment date.

These four points in time are set out in paragraph 161(7)(b) and are:

(i) the first day immediately following that subsequent taxation year,
(ii) the day on which the taxpayer's or the taxpayer's legal representative's return of income for that subsequent taxation year was filed,
(iii) if an amended return of the taxpayer's income for the particular taxation year or a prescribed form amending the taxpayer's return of income for the particular taxation year was filed under subsection 49(4) or 152(6) or (6.1) or paragraph 164(6)(e), the day on which the amended return or prescribed form was filed, and
(iv) where, as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the particular taxation year to take into account the carryback of the non-capital loss, the day on which the request was made.

For the purposes of the refund interest, pursuant to subsection 164(5), the portion of an income tax overpayment resulting from the deduction of a non-capital loss carryback is deemed to have arisen on the day that is 30 days after the latest of the same four points in time.

The Bank's Position

In the Bank's view, the correct deemed payment date was April 28, 2009 (i.e., the date on which the loss year return was filed). The bank argued that the Minister should have applied subparagraph 161(7)(b)(ii) because:

(1) The Minister reassessed the Bank to make transfer pricing audit adjustments, not as a consequence of the written carryback request.

(2) Parliament did not intend to subject taxpayers to interest for a period when the taxpayer did not know the loss was available until the conclusion of an audit.
(3) Other discretionary deductions under the ITA are not subject to such an interest calculation when they are applied to offset an audit adjustment.

The Respondent's Position

In support of its position that it correctly applied subparagraph 161(7)(b)(iv), the respondent made the following arguments:

(1) The words of the provision are clear and the Court should defer to their ordinary meaning.
(2) Loss carrybacks do not create a legal fiction in which taxes in earlier years were never owed.
(3) In response to the Bank's argument that the reassessment was made as a result of the transfer pricing adjustment and not the request for carryback, the respondent argued that had the Minister issued two consecutive notices of reassessment, one for the transfer pricing adjustment and one for the loss carryback, then subparagraph 161(7)(b)(iv) would apply and there should not be a different result based on the number of notices issued.

Decision

Justice Wong rejected the Bank's interpretation of the provision, quoting the modern statutory interpretation rule that the words of the ITA should be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the ITA, the object of the ITA, and the intention of Parliament. Justice Wong acknowledged the distinction the Bank drew between a situation where a taxpayer determines the amount of tax owing when they file their return, compared to a situation where the Minister reassesses to make adjustments that result in tax owing. However, she held that the different circumstances do not lead to a different treatment under the interest provisions. Subsection 152(3) says that liability for tax is unaffected by an incorrect/incomplete assessment or by the fact that no assessment was made, therefore, one is liable for tax owing regardless of the assessment status.

Justice Wong quoted the Minister of Finance's Technical Notes which stated:

> Where […] the taxpayer files his prescribed form claiming a carryback at a later date or the Minister of National Revenue later accedes to the taxpayer's written request to reassess the earlier year, interest will be computed for the period ending on the day on which the form was filed or the request was made. This amendment applies where an amount is carried back from a taxation year ending after 1984.

Justice Wong also rejected the Bank's argument that the French version of the provision supported its position that subparagraph 161(7)(b)(ii) should apply because the Minister reassessed the Bank on its transfer pricing adjustment and not as a consequence of the carryback request.

The Bank argued that because the words "à la suite de laquelle" are used elsewhere under the ITA as an equivalent to "as a consequence of" and "as a result of" the phrase denotes causation (i.e., that one should look to the cause of the reassessment, which, in this case, was the transfer pricing audit).

However, Justice Wong noted that the Larousse dictionary translated "à la suite de laquelle" to "following which". Upon her literal reading of the French provision, Justice Wong found the provision:

> [R]efer[red] to the day of the written request following which the Minister issued a new assessment concerning the taxpayer's tax for the year and which takes into account the deduction or the exclusion, in the case where there is such a new assessment. It contemplates a temporal element by way of a reassessment of tax owing following a written request.

Finally, Justice Wong considered *Connaught Labratories Ltd. v. Canada* (94 DTC 6697), relied on by the respondent, and *Methanex Corp. v. Alberta* (2003 PTC-AB-1 (ABQB), aff'd 2004 PTC-AB-1 (ABCA)), relied on by the Bank, finding that the case at bar was more similar to *Connaught.*

In *Connaught*, the Minister reassessed the appellant, including a capital gain for the tax year at issue. The taxpayer asked the Minister to apply a capital loss from a subsequent taxation year to be carried back to offset the capital gain. The Federal Court found that arrears interest was owed with respect to the earlier year because (1) taxes were payable as a result of the undeclared capital gain, (2) the wording of subsection 161(7) was unambiguous, and (3) the Minister's interpretation did not offend the purpose of objectives of the ITA.

In *Methanex*, the Court of Queen's Bench of Alberta was concerned with paragraph 39(3)(b) of the *Alberta Corporate Tax Act* (RSA 2000, c. A-15). The Court found that Methanex had not made a written request or that the reassessment did not take place as a consequence of their request. Accordingly, the Court held that the effective dates for the purpose of calculating interest were the dates the tax returns were filed. Justice Wong stated that *Methanex* was either wrongly decided or does not apply to the ITA.

Conclusion

Justice Wong found that the deemed payment date was April 11, 2015, which was 30 days after March 12, 2015, based on subparagraph 161(7)(b)(iv). Similarly, the refund interest deemed overpayment date was April 11, 2015, based on paragraph 164(5)(l).

Since the Minister erroneously used March 12, 2015, instead of April 11, 2015, for her calculation, resulting in 30 days less interest being assessed, and the Court cannot put the taxpayer in a worse position, the interest was calculated from March 12, 2015.

The appeal was dismissed with costs.

— *Paige Donnelly and Caroline Harrell*

GLENCORE CANADA CORPORATION V. THE QUEEN, 2021 DTC 1053 (TAX COURT OF CANADA)—TAX COURT CONFIRMS BREAK FEES RECEIVED FOR FAILED BID WERE INCOME FROM A SOURCE

Background

The appellant, Glencore Canada Corporation, was the successor corporation of Falconbridge Limited ("Falconbridge"), a nickel mining company.

By notice of reassessment dated December 16, 2013, the Minister of National Revenue (the "Minister") assessed as income a commitment fee of $28,206,106 (the "Commitment Fee") and a non-completion fee of $73,335,881 (the "Non-Completion Fee" and, collectively with the Commitment Fee, the "Break Fees") received by Falconbridge in its 1996 taxation year in the context of a failed merger with Diamond Field Resources Inc. ("DFR").

DFR is a Canadian public mining company that owned mineral claims in an ore deposit in Voisey's Bay thought to be one of the largest and most concentrated sources of nickel in the world (the "Deposit"). In early 1995, Falconbridge and DFR discussed the possibility of Falconbridge acquiring an interest in the Deposit. The discussion, however, did not result in an acquisition.

In June 1995, DFR and Falconbridge's competitor, Inco Limited ("Inco"), entered into an agreement whereby:

- Inco acquired 25% of DFR's subsidiary Voisey's Bay Nickel Company ("VBNC");
- Inco agreed to market nickel and cobalt production from the Deposit; and
- DFR agreed to provide Inco with a reasonable opportunity to discuss any takeover offers it received from third parties.

In addition to their agreement, Inco also acquired two million of DFR's outstanding common shares.

Contemplated Transactions

In early 1996, DFR contacted Falconbridge about a sale of its 75% interest in the Deposit. In February of 1996, Falconbridge made its offer to merge with DFR. Under the terms of the offer, the outstanding common shares of DFR would be exchanged for a combination of Falconbridge shares, cash, and exchangeable notes with a total value of approximately $4.1 billion (the "Merger Offer"). Pursuant to the Merger Offer, DFR paid $28 million of the Commitment Fee and the balance at a later date.

In March of 1996, Inco offered to purchase DFR's outstanding common shares. In response, Falconbridge submitted an amended bid to acquire DFR's common shares, conditional upon DFR and Inco approving the restructuring of the ownership of the Deposit whereby Falconbridge and Inco would each own 50% of VBNC's shares. DFR accepted Inco's offer, rejected Falconbridge's counter-bid, and paid the Non-Completion Fee to Falconbridge.

Tax Reporting

Falconbridge included the Break Fees in its income for the 1996 taxation year as it believed this was the best way to preserve its right to make an election under subsection 12(2.2) of the *Income Tax Act* (the "ITA"). The Minister initially accepted Falconbridge's treatment of the Break Fees by notice dated August 29, 1997 (the "Assessment").

In November of 1997, Falconbridge objected to the Assessment on the grounds that the Break Fees were non-taxable capital receipts. In June and August of 2001, the Minister reassessed Falconbridge without removing the Break Fees from income. Falconbridge objected to the reassessments. The Minister, maintaining its position, reassessed Falconbridge again on December 16, 2013.

Issues

The issue before the Court was whether the Minister properly included the Break Fees in the appellant's income. This required the Court to consider:

(1) Whether the Break Fees constituted income from a source pursuant to section 3 of the ITA;
(2) Whether the Break Fees were taxable under paragraph 12(1)(x) of the ITA; and
(3) In the alternative, whether the Break Fees gave rise to a capital gain pursuant to sections 38 and 39 of the ITA.

Decision

THE APPELLANT'S POSITION

The appellant made three arguments. First, it argued that the Break Fees were extraordinary receipts not from a source because they were not ancillary to its business of exploring, developing, mining, processing, and marketing minerals. The appellant sought to distinguish its case from *Morguard Corp. v. The Queen* (2013 DTC 5009) and *Ikea Ltd. v. The Queen* (98 DTC 6092). It argued that the Break Fees were not inextricably linked to, or incident of, its business activities because the purpose of the Merger Offer was not to receive the Break Fees and because the Break Fees did not compensate Falconbridge for its costs or expenses. In the appellant's view, the Break Fees were designed as a deterrent to keep third parties from bidding.

The appellant's second argument was that paragraph 12(1)(x) of the ITA did not apply because the respondent failed to identify which expenses were being reimbursed and there was no clear link between the amounts received and an amount included in the cost of property or an outlay or expense. The appellant argued that Falconbridge's expenses for the attempted merger had no correlation to the quantum of the Break Fees as the Break Fees far exceeded the amount of the expenses ($15.3 million).

The appellant's third argument was that, in the alternative, the Break Fees were capital gains because Falconbridge's rights pursuant to the Merger Offer were capital property.

THE RESPONDENT'S POSITION

The respondent took the position that the Break Fees were compensatory, not a deterrent, and therefore properly characterized as income. Further, the respondent argued that the sum of the Break Fees, being only 2.5% of the purchase price, was too small of an amount to act as a deterrent against third party bids.

The respondent argued, relying on *Ikea*, that the acquisition of the Deposit was part of Falconbridge's business strategy and the Break Fees were therefore on income account. The respondent relied on *The Queen v. Cranswick* (82 DTC 6073) to argue that the Break Fees did not constitute non-taxable windfalls because Falconbridge had an enforceable claim to the payments, the Break Fees were negotiated between two sophisticated parties, the Break Fees were solicited by Falconbridge, and finally, Falconbridge wanted deal protection when bidding.

The respondent argued that paragraph 12(1)(x) applied because the Break Fees were inducements for Falconbridge to bid on DFR and that the Non-Completion Fee was intended to reimburse Falconbridge for expenses it incurred.

Analysis

The Tax Court held that the Break Fees were income from a source, namely, Falconbridge's business as a nickel mining company. The Court found that Falconbridge's business was not the acquisition and sale of companies, rather, it was in the business of exploring, developing, mining, processing, and marketing minerals. However, as a public company focused on maximizing shareholder value, Falconbridge's business included maintaining and bolstering its ore reserves. It did so through exploration but also, like in this case, acquiring claims or interests in ore deposits through joint ventures and partnerships with other mining companies.

The Court found that the fact that the attempted acquisition was structured differently than Falconbridge's previous acquisitions could be attributed to DFR being a public company and held that the form of acquisition (i.e., a bid for common shares), was irrelevant. The Break Fees were received in the course of earning income from business because Falconbridge was carrying on business when it negotiated the Merger Offer. Accordingly, the Court found that the Break Fees were inextricably linked to Falconbridge's ordinary business operations as a nickel mining company and that Falconbridge pursued the Deposit to make a profit.

In his analysis, the judge relied on *Ikea*. In *Ikea*, the taxpayer did not include a tenant inducement payment in computing its income on the basis that it was a tax-free capital receipt. The Supreme Court of Canada held that the characterization of an unusual or extraordinary receipt involves the consideration of the commercial purpose of the payment and its relationship to the business operations. The tenant inducement payment was held to be received as part of the taxpayer's ordinary business. Similarly, the court found the Break Fees were necessary and integral parts of Falconbridge's bid for DFR, the main purpose of which was to acquire the Deposit.

Conclusion

The Tax Court dismissed the appeal. Finding that the Break Fees were income from a source, the Court did not consider the parties' other arguments, and dismissed the appeal.

— Jacob Yau and Caroline Harrell

CURRENT ITEMS OF INTEREST

INDEXATION ADJUSTMENT FOR 2022

The CRA updated its website on November 16 with all the indexed personal income tax and benefit amounts for 2022. The indexation increase was 2.4%. The new 2022 amounts are listed below.

Tax Bracket Thresholds

Taxable income above which the 20.5% bracket begins	$50,197

Taxable income above which the 26% bracket begins	$100,392
Taxable income above which the 29% bracket begins	$155,625
Taxable income above which the 33% bracket begins	$221,708

Non-Refundable Tax Credits and Related Amounts

Basic personal amount for individuals whose net income for the year is greater than or equal to the amount at which the 33% tax bracket begins	$12,719
Basic personal amount for individuals whose net income for the year is less than or equal to the amount at which the 29% tax bracket begins	$14,398
Spouse or common-law partner amount (maximum) for individuals whose net income for the year is greater than the amount at which the 33% tax bracket begins	$12,719
Spouse or common-law partner amount (maximum) for individuals whose net income for the year is less than or equal to the amount at which the 29% tax bracket begins	$14,398
Spouse or common-law partner amount for individuals whose net income for the year is greater than or equal to the amount at which the 33% tax bracket begins (maximum if eligible for the Canada caregiver amount for a dependent spouse or common-law partner)	$15,069
Spouse or common-law partner amount for individuals whose net income for the year is less than or equal to the amount at which the 29% tax bracket begins (maximum if eligible for the Canada caregiver amount for a dependent spouse or common-law partner)	$16,748
Amount for an eligible dependant (maximum) for individuals whose net income for the year is greater than or equal to the amount at which the 33% tax bracket begins	$12,719
Amount for an eligible dependant (maximum) for individuals whose net income for the year is less than or equal to the amount at which the 29% tax bracket begins	$14,398
Amount for an eligible dependant for individuals whose net income for the year is greater than or equal to the amount at which the 33% tax bracket begins (maximum if eligible for the Canada caregiver amount for a dependant)	$15,069
Amount for an eligible dependant for individuals whose net income for the year is less than or equal to the amount at which the 29% tax bracket begins (maximum if eligible for the Canada caregiver amount for a dependant)	$16,748
Canada caregiver amount for children under age 18	$2,350
Age amount	$7,898
Net income threshold for age amount	$39,826
Canada employment amount (maximum)	$1,287
Canada caregiver amount for other infirm dependants age 18 or older (maximum amount)	$7,525
Net income threshold for Canada caregiver amount	$17,670
Disability amount	$8,870
Supplement for children with disabilities (maximum)	$5,174
Threshold relating to allowable child care and attendant care expenses	$3,030
Adoption expenses (maximum per adoption)	$17,131
Medical expense tax credit (3% of net income ceiling)	$2,479

Refundable Medical Expense Supplement

Maximum supplement	$1,316
Minimum earnings threshold	$3,841
Family net income threshold	$29,129

Old Age Security Repayment

Old age security repayment threshold	$81,761

Certain board and lodging allowances paid to players on sports teams or members of recreation programs

Income exclusion (maximum per month)	$386

Tradesperson's tools deduction

Threshold amount relating to cost of eligible tools	$1,287

Advanced life deferred annuities ("ALDA")

Lifetime dollar limit	$160,000

Canada training credit ("CTC")

Minimum working income threshold	$10,342
Maximum net income	$151,978

Goods and services tax/harmonized sales tax ("GST/HST") credit

Adult maximum	$306
Child maximum	$161
Single supplement	$161
Phase-in threshold for the single supplement	$9,919
Family net income at which credit begins to phase out	$39,826

Tax-free savings account ("TFSA")

Annual TFSA dollar limit	$6,000

Lifetime capital gains exemption for qualified farm or fishing property and qualified small business corporation shares

Exemption limit	$913,630
Deduction limit (since $^1/_2$ of the capital gain is taxable)	$456,815
Additional exemption amount for qualified farm or fishing property	$86,370
Additional deduction amount for qualified farm or fishing property (since $^1/_2$ of the capital gain is taxable)	$43,185

Canada child benefit ("CCB")

CCB (base benefit, child under age 6)	$6,997
CCB (base benefit, child aged 6 to 17)	$5,903
Adjusted family net income at which phase out begins	$32,797
Second phase out threshold	$71,060
Base phase out amount for one eligible child	$2,678
Base phase out amount for two eligible children	$5,166
Base phase out amount for three eligible children	$7,270
Base phase out amount for four or more eligible children	$8,801

Child disability benefit ("CDB")

Maximum benefit	$2,985
Family net income threshold for phase out	$71,060

UPDATE ON QUÉBEC'S ECONOMIC AND FINANCIAL SITUATION

On November 25, 2021, the government of Québec presented the *2021 Update on Quebec's Economic and Financial Situation*. The following tax-related announcements were included in the update.

Enhancing the Refundable Tax Credit for Childcare Expenses

As of the 2021 taxation year, the government is enhancing the refundable tax credit for childcare expenses. The enhanced tax credit is intended to ensure that parents pay a net fee that is relatively equivalent to that of a subsidized daycare, regardless of their family income.

The limit for qualifying childcare expenses for children under seven years old is increased to $10,400 per year (up from $9,950), beginning in 2021, which is equivalent to a daily rate of $40 for a child attending daycare full time, or 260 days. This limit covers the average amount claimed in advance by parents in 2021, which is $39.64 per day. For parents whose children do not attend childcare all year, this new limit may cover a daily rate higher than $40.

This limit is also indexed annually and will reach $10,675 in 2022, the equivalent of a daily rate of $41.06.

To provide more support for families with a disabled child, the limit that applies to disabled children will be increased to $14,230 in 2021 (up from $13,615) and indexed to $14,605 in 2022.

A greater proportion of childcare expenses will be refunded. A new tier of tax assistance is added, at a rate of 78%, for families with a family income between $43,880 and $101,490.

The minimum rate is being increased from 26% to 67%, which is now reached at a family income of over $101,490.

The issuance of an RL-24 slip will become mandatory as of the 2022 taxation year for all childcare expenses eligible for the refundable tax credit for childcare expenses.

To benefit more quickly from the enhancement for 2022, families can apply for an advance refund using the *Tax Credit for Childcare Expenses: Application for Advance Payments* form (TPZ-1029.8.F-V) or through My Account for individuals on the Revenu Québec website.

Families that have already applied for advance payment for the 2022 taxation year will have their advance refund automatically adjusted by Revenu Québec in the first months of 2022.

Tax System Indexation

Under current legislation, indexation of the 2022 tax system is based on real data for the period from October 2020 to September 2021. Therefore, the tax system will be indexed at a rate of 2.64% in 2022. This is more than twice the 1.26% rate applicable last year.

Introduction of the Extraordinary Cost of Living Allowance

The extraordinary cost of living allowance will be a single, non-reducible lump-sum payment that comprises an amount of $200 per adult, with an additional amount of $75 per person living alone. This assistance will take the form of a refundable tax credit.

To get this benefit, a household must have received the refundable solidarity tax credit for July 2021 to June 2022. The extraordinary allowance will be disbursed automatically to eligible households starting January 24, 2022. They will not have to file an additional application to get it.

Enhancing the Senior Assistance Amount

The government is enhancing the senior assistance amount as of the 2021 taxation year. The maximum annual assistance offered will rise from $209 to $400 per senior aged 70 or older starting in 2021. Subsequent to this enhancement, seniors aged 70 or older will be able to benefit from the tax credit up to a family income of $31,575 for seniors living alone, and $54,340 for couples where both spouses are 70 years of age or older.

For 2021, a single person will receive the maximum amount offered, $400, up to a family income of $23,575, while a couple in which both spouses are 70 years of age or older will receive a maximum of $800 up to a family income of $38,340.

Expanded Eligibility for the Treatment of Infertility Tax Credit

As previously announced, as of November 15, 2021, changes were made to this credit to make it complementary to the public health coverage now offered by the medically assisted procreation ("MAP") program. There are no longer any limits on the number of cycles eligible for the tax credit. In addition, the cost of artificial insemination for individuals who do not qualify for the MAP program is now eligible for the tax credit, regardless of the woman's age.

2022 MAXIMUM PENSIONABLE EARNINGS UNDER THE CPP

The maximum pensionable earnings under the Canada Pension Plan ("CPP") for 2022 will be $64,900; this amount was $61,600 in 2021.

The basic exemption amount will remain at $3,500.

The employee and employer contribution rates for 2022 will be 5.70%, up from 5.45% in 2021, and the self-employed contribution rate will be 11.40%, up from 10.90% in 2021.

Therefore, the maximum employer and employee contribution to the plan for 2022 will be $3,499.80 each, and the maximum self-employed contribution will be $6,999.60.

2022 PENSION LIMITS

The Registered Plans Directorate has added new annual pension limits to its website. The limits for 2022 are as follows:

- the money purchase limit for 2022 (and RRSP dollar limit for 2023) will be $30,780;
- the RRSP dollar limit for 2022 will be $29,210;
- the defined benefit limit for 2022 will be $3,420;
- the deferred profit sharing plan limit for 2022 will be $15,390; and
- the year's maximum pensionable earnings ("YMPE") for 2022 will be $64,900.

The TFSA dollar limit for 2022 is still to be determined.

ONTARIO 2021 FALL ECONOMIC STATEMENT

Minister of Finance Peter Bethlenfalvy released the *2021 Ontario Economic Outlook and Fiscal Review: Build Ontario*, on November 4, 2021 (the "Statement"). The Statement announced several new tax changes that are discussed below. For a complete description of the newly proposed tax measures, see budget.ontario.ca/2021/fallstatement/annex.html.

Staycation Tax Credit

The government is proposing a new, temporary Ontario Staycation Tax Credit for 2022. This refundable credit would provide Ontario residents with support of 20% of eligible 2022 accommodation expenses of up to $1,000 for an individual and $2,000 for a family, for a maximum credit of $200 or $400, respectively.

An eligible accommodation expense would have to be:

- for a stay of less than a month at an eligible accommodation such as a hotel, motel, resort, lodge, bed-and-breakfast establishment, cottage, or campground in Ontario;
- for a stay between January 1 and December 31 of 2022;
- incurred for leisure (e.g., a non-business purpose);
- paid by the Ontario tax filer, their spouse or common-law partner, or their eligible child, as set out on a detailed receipt;
- not reimbursed to the tax filer, their spouse or common-law partner, or their eligible child by any person, including by a friend or an employer; and
- subject to Goods and Services Tax ("GST")/Harmonized Sales Tax ("HST"), as set out on a detailed receipt.

Extending the Ontario Jobs Training Tax Credit

In the 2021 Budget, the government announced the temporary Ontario Jobs Training Tax Credit for the 2021 tax year. The government is proposing to extend this credit by one year to 2022.

Extending the Ontario Seniors' Home Safety Tax Credit

In the 2020 Budget, the government announced the temporary Seniors' Home Safety Tax Credit for the 2021 tax year. The government is proposing to extend this credit by one year to 2022.

Beneficial Ownership Reporting Requirements

The government is proposing to add new beneficial ownership information requirements to the *Business Corporations Act* to prevent and better detect the use of corporations for tax evasion, money laundering, or other illicit financial activities.

The proposed information requirements would apply to an individual, referred to as an "individual with significant control", who:

- Owns, controls, or directs 25% or more of the voting shares of the corporation or shares that are worth 25% or more of the fair market value of all outstanding shares of the corporation; or
- Has direct or indirect influence over the corporation without owning at least 25% of the shares.

A person would also be an individual with significant control if they own or control a significant number of shares jointly with other people. In addition, if a group of related persons collectively controls at least 25% of the shares of a corporation, then each person would be an individual with significant control. A related person would include an individual and their spouse, son or daughter, or any other relative living in the same house.

Privately held business corporations would be required to collect and maintain beneficial ownership information and make it available upon request to law enforcement, tax authorities, and certain regulatory authorities. These amendments would be effective on January 1, 2023.

Property Tax Measures

In 2019, the government announced a plan to conduct a review of Ontario's property assessment and taxation system. The Ontario Ministry of Finance has been conducting consultation meetings and receiving input from municipalities, taxpayers, business and industry associations, and other interested stakeholders. While the government will continue to review the input that was received, it is acting now on some measures.

The Statement proposes various property tax measures that are intended to achieve the following objectives:

- enhance the accuracy and stability of property assessments;
- support a competitive business environment; and
- strengthen the governance and accountability of the Municipal Property Assessment Corporation ("MPAC").

Technical Amendments

The Statement proposes several technical amendments to the *Taxation Act, 2007* that would:

- Clarify that the Ontario Tax Reduction ("OTR") and the Low-income Individuals and Families Tax ("LIFT") credit are available on the final tax return of a deceased person.
- Ensure that the OTR, LIFT credit, and certain refundable credits are not available for a bankrupt individual.
- Update the Ontario Child Benefit definition of "shared-custody parent" to parallel the recent change to the federal definition.
- Clarify the availability of the tax credit for unused tuition education tax credits.

RECENT CASES

SUPREME COURT UPHOLDS AVOIDANCE TRANSACTION UNDER CANADA-LUXEMBOURG TAX TREATY

In 2011, two American firms, including the Blackstone private equity group, established Alta Canada, a subsidiary of an American company, to conduct shale oil operations in Alberta. In 2013, Alta Luxembourg was established under the laws of Luxembourg and purchased the shares of Alta Canada. In 2013, it sold those shares, realizing a $380 million capital gain. In its Canadian tax return Alta Luxembourg claimed that the gain was exempt from Canadian tax under the tax treaty between Canada and Luxembourg (the "Treaty"). The CRA denied the exemption; the Tax Court held that the shares were treaty-protected property and the Federal Court dismissed the CRA's appeal. This appeal followed.

The Supreme Court of Canada dismissed the appeal. Article 13(4) of the Treaty creates an exemption for residents of Luxembourg from Canadian tax arising from a capital gain on the alienation of shares, the value of which is derived principally from immovable property situated in Canada and in which the business of the company was carried on. Here, the CRA argued that the Article 13(4) exemption did not apply, or if it did the general anti-avoidance rule (“GAAR”) should apply. The exemption is based on country of residence, not sufficiency of economic contacts. Parliament could have foreseen this tax strategy and chosen to prohibit it, but did not. There was no abuse of Treaty transactions and thus no application of the GAAR was possible. In dissent, Chief Justice Wagner held that Alta Luxembourg engaged in an abusive avoidance transaction despite adhering to the letter of the treaty. The GAAR was enacted to curb such abuses, and requires courts to look beyond the words of the applicable provisions. The Treaty assigns taxing rights to the state with the closest economic connection to the taxpayer’s income. Alta Luxembourg had no genuine economic connections with Luxembourg, but was a conduit that allowed residents of third-party states to take advantage of a tax exemption offered by the Treaty. Parliament could rely on the GAAR to curb such abuses rather than negotiate specific rules. The dissenting judges would have allowed the appeal.

Canada (AG) v. Alta Energy Luxembourg S.A.R.L

2021 DTC 5125

TAX COURT HOLDS THAT PROMISSORY NOTE DOES NOT QUALIFY FOR CHARITABLE DEDUCTION

The appellant was the estate of Edmond Odette; it implemented a tax plan to distribute the deceased's assets as efficiently as possible upon his death. Odette had been the sole director, sole shareholder, and president of Edmette Corp. The plan involved (1) transferring Edmette's shares to a non-arm's length entity with registered charitable status, the E. & G. Odette Foundation; then (2) returning the shares to Edmette in exchange for a promissory note that (3) Edmette paid about eight months later. The estate then sought a charitable deduction credit for its transfer of the shares to the Foundation. On reassessment, the CRA denied this credit to the estate. This application followed.

The application was dismissed. There was no dispute that under s. 118.1(18) of the *Income Tax Act*, all relevant transactions were among non–arm's length parties—the estate, Edmette, and the Foundation. Thus, eligibility for the deduction is determined by s. 118.1(13). The only consideration for the retransfer of shares from the Foundation to Edmette was the promissory note, a non-qualifying security. The cash payments on the promissory note were not received at the time of the disposition and therefore could not count as consideration (if the transfer were an excepted gift, it would qualify for the deduction under s. 118.1(13); however, the transfer was to a private foundation and therefore not an excepted gift under s. 118.1(19)). Parliament meant to restrict the deduction "where the donor is not impoverished and the charity is not yet enriched," which is not the case with a promissory note between non-arm's length parties. Under s. 118.1(13)(c), the fair market value of the promissory note was nil.

Odette (Estate) v. The Queen

2021 DTC 1052

BANKRUPTS GIVEN CONDITIONAL DISCHARGE

Mr. and Mrs. Tran filed assignments in bankruptcy in 2015. The Trans' debts arose primarily from non-payment of taxes and failure to remit amounts owing due to their individual obligations for unremitted corporate obligations under subsection 227.1(1) of the *Income Tax Act* and subsection 323(1) of the *Excise Tax Act*. The Trans' affairs were inextricably interwoven because they were engaged in the same businesses. Mr. Tran was indebted to the Crown for $823,738.71. While Mr. Tran's bankruptcy was not subject to section 172.1 of the *Bankruptcy and Insolvency Act* ("BIA"), the CRA was the largest unsecured creditor. Mrs. Tran was indebted to the Crown for $1,098,561.87. The Trustee allowed the Minister a secured claim of $62,000, which formed a charge against the family home, of which Mrs. Tran is the sole registered owner. The remaining debt of $1,036,561.86 was unsecured. Like Mr. Tran's bankruptcy, section 172.1 of the BIA did not apply. The Trustee registered a "Bankruptcy Caution" against the home's title respecting approximately $85,493 of non-exempt equity. Accordingly, upon Mrs. Tran's voluntary sale of the property, this amount would be paid to the bankrupt estate. The Trustee and the Minister opposed the Trans' unconditional discharge.

Conditional discharges were ordered. In the absence of section 172.1 of the BIA, the Court must consider section 173, so that if any of the facts mentioned therein are proven the Court must (1) refuse the discharge; (2) suspend the discharge for such period as the Court thinks proper; or (3) require the bankrupt, as a condition of discharge, to perform certain acts or make certain payments. The Court found the Minister proved the Trans were offside the matters enumerated in section 173—namely, the assets of the bankrupts were not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities; the bankrupts omitted to keep books of account as are usual and proper in the business carried on; the bankrupts' bankruptcies were brought on, or contributed to, by culpable neglect of their business affairs; and the bankrupts failed to perform the duties imposed under the legislation or to comply with any order of the court. In the circumstances, including the COVID-19 pandemic, their family situation (both children had developmental delays), and their modest lifestyle, the Court ordered conditional discharges that required Mr. Tran to pay $2,916 and Mrs. Tran to pay $6,201. The secured interest on their home and caution remained in place.

Tran v. Canada (AG)

2021 DTC 5112

FEDERAL COURT OF APPEAL UPHOLDS DISALLOWANCE OF FILM DISTRIBUTION AND REAL PROPERTY LOSSES

The appellants appealed from a judgment of the Tax Court (2019 DTC 1143) essentially upholding reassessments by the CRA of two transactions. The first involved the deductibility of certain film expenses; the second, unrelated, involved the treatment of gains on the sale of four land parcels. In the first transaction, a producer sold two films to the appellants. They claimed distribution losses, and the producer claimed an option to re-acquire the films; the Tax Court characterized these transactions as "shams." With respect to the second transaction, the appellants argued that the Tax Court erred in holding that four parcels of land were held on capital account; it mistakenly assumed that the secondary intention doctrine, under which an intention to sell at a profit indicates treatment as income, applied.

The appeal was dismissed. On the film transaction, the appellants claimed they did not know the case they had to meet, i.e., that the transaction was a sham, and had had no opportunity to meet it. The Federal Court of Appeal ("FCA") held that the Tax Court had disallowed the losses because there was no evidence the appellants intended to hold the film properties for profit, and the appellants had in fact tried to "demolish" this and other CRA assumptions and failed to do so. As for the claimed real property losses, the appellants argued the Tax Court misapplied the secondary intention doctrine, under which a secondary intention to sell a property means that it is being held as income and not capital. The Tax Court noted the appellants' contention was belied by the fact that they had taken "no concrete steps" toward developing the property; the FCA agreed that this supported an inference concerning the appellants' secondary intention to sell.

Paletta v. The Queen

2021 DTC 5109