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Québec Minister of Finance introduces additional measures to further counter aggressive tax planning

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Authors: Mark Brender, Alain Fournier, Maude Lussier-Bourque

As part of its comprehensive strategy to combat aggressive tax planning, the Ministère des Finances du Québec (the Ministry) released Information Bulletin 2019-5 on May 17, 2019, announcing three additional measures that apply from May 17, 2019. Among other things, these measures introduce mandatory disclosure requirements for nominee agreements, expand the current mandatory disclosure requirements to "prescribed transactions" (see our Osler Update from October 20, 2009, "Québec releases detailed measures to combat aggressive tax planning schemes" [PDF]) and introduce specific penalties for sham transactions. Each of these measures are discussed below.

1) Mandatory disclosure of nominee agreements

The Ministry introduced new rules requiring the disclosure of nominee agreements, which are described as situations where the relationship between the parties is governed by a "secret contract" where their true intent is expressed, as opposed to an apparent contract available to third parties such as the Québec Revenue Agency (the QRA).[1] Such "secret contracts" would include arrangements commonly referred to as "prete nom" agreements and certain contracts of mandate.

The parties to a nominee agreement are required to file a prescribed form within 90 days of the conclusion of the agreement. Where the tax consequences of a transaction concluded before May 17, 2019, continue after that date, the parties to the transaction have until September 16, 2019, to disclose the information pertaining to the nominee agreement. Where disclosure is made by one of the parties to the nominee agreement, all parties to the agreement will be deemed to have made the required disclosure.

Prescribed form and per diem penalty

The following information is required to be provided in the prescribed form: (i) the date of the nominee agreement, (ii) the identities of the parties to the nominee agreement, (iii) a full description of the facts of the transaction or series of transactions to which the nominee agreement relates and the identity of any person or entity for which such transactions or series of transactions has tax consequences.

Failure to file the prescribed form or to provide the prescribed information results in a $100 daily penalty as of the second day of the omission, in addition to a $1,000 base penalty. The parties to an undisclosed nominee agreement will be jointly liable for a penalty up to a maximum of $5,000.

Prescription period indefinitely extended

Moreover, the prescription period for the year in which the transaction that is part of a nominee agreement has occurred is indefinitely suspended with respect to tax consequences resulting from the agreement. Consequently, a nominee agreement that applies over a number of years, such as an agreement respecting the ownership of real estate, if undisclosed, would result in the indefinite lifting of the normal reassessment period for both parties to the agreement for each year in which the nominee agreement applies.

Taxpayers who have otherwise previously disclosed the existence of a nominee agreement to the QRA are not exempted from the new mandatory disclosure obligation relating to the nominee agreement.

The prescribed form has not yet been made available. Nonetheless, taxpayers who are parties to a nominee agreement are required to provide the above-mentioned information within 90 days of concluding the agreement, or by September 16, 2019, in the case of nominee agreements in effect on May 17, 2019.

2) Extension of mandatory disclosure rules to prescribed transactions

The law currently provides for mandatory disclosure of a limited number of transactions, such as transactions for which the adviser requires confidentiality from the client, transactions for which the adviser's remuneration is conditional on the occurrence of certain events and transactions involving contractual coverage to protect the client from certain events. Failure to timely comply with the mandatory disclosure rules exposes taxpayers to a penalty of $10,000 plus $1,000 per day (from the second late day), up to a maximum of $100,000.

The Ministry has announced that the mandatory disclosure rules will be expanded to transactions that are prescribed transactions. A prescribed transaction will be a transaction or a series of transactions carried out by a taxpayer whose form and substance are very similar to transactions specified by the QRA on a public list.

The Information Bulletin does not specify the transactions that will be prescribed for purposes of the mandatory disclosure rules, but it provides that the QRA will make public, at the times it deems appropriate, transactions that are subject to mandatory disclosure.

The QRA has not announced the type of transactions or series of transactions that will be prescribed for the purposes of the mandatory disclosure rules nor the manner by which these transactions will be released publicly.

As of the time of writing this Update, no transactions have yet been prescribed for purposes of the mandatory disclosure rules.

Penalties and indefinite extension of prescription period

The disclosure obligation is satisfied by the filing of a prescribed form with the required information within 60 days from the commencement of the prescribed transaction or within 120 days from the day disclosure of the given prescribed transaction is made mandatory by the QRA, whichever is later. Failure to file the prescribed form leads to a penalty of up to $100,000 and a penalty of 50% of the tax benefit resulting from the undisclosed transaction.

Moreover, failure to file on a timely basis will result in a suspension of the prescription period applicable to the taxation year until the prescribed form containing the prescribed information is filed with the QRA. As such, failure to comply with the disclosure requirement results in an indefinite extension of the prescription period applicable to the particular year for which disclosure was required.

Expanded disclosure rules apply to tax advisors and promoters

Like the current mandatory disclosure rules, the expanded mandatory disclosure rules will also apply to tax advisers and promoters. The disclosure must be made within the same timeframe applicable to taxpayers participating in the transaction. Specifically, advisors and promoters must provide the information required on the prescribed form for every prescribed transaction that can be implemented without any substantial changes to their form or substance for different taxpayers.

Advisor and promoter penalties

An advisor or promoter who fails to file the prescribed information return will be subject to a $1,000 penalty per diem as of the second day of the omission in addition to a $10,000 base penalty up to a maximum of $100,000. Advisors and promoters are also liable for the entire amount received in fees from the different taxpayers to whom they promoted or commercialized the prescribed transaction they omitted to disclose.

Québec's introduction of mandatory disclosure rules for prescribed transactions is similar in some respects to the approach of the U.S. Internal Revenue Service in requiring disclosure of certain "reportable transactions" identified as "Recognized Abusive and Listed Transactions." For further information on this list or other U.S. tax matters, please contact any member of our New York Tax Group.

3) Sham transactions

In a recent decision discussing this concept,[2] the Tax Court of Canada stated that a given transaction constitutes a sham when the parties misrepresent the existence or true nature of their rights and obligations, which are designed to mislead the tax authorities. Simply put, a sham exists where the parties share a common intention to deceive the tax authority. The new special regime introduced by the Ministry to counter sham transactions provides for three principal changes to the legislation.

Penalties

Under the new measures, where the QRA issues an assessment to a taxpayer in respect of a transaction or series of transactions that involve a sham transaction, the QRA can impose penalties on the taxpayers involved in the sham transaction and on the tax advisors and promoters who advised or promoted the transaction. This new additional penalty is imposed at the time the sham transaction is assessed by the QRA. The taxpayer will therefore have to object to the notice of assessment in order for the penalty to be cancelled. This new penalty will therefore be assessed identically to the assessment of the gross negligence penalty.

A tax advisor is defined as a person or partnership that provides help, assistance or advice regarding the design or implementation of the transaction.[3] A promoter is defined as a person or partnership that assumes or can reasonably be considered to assume an

important role in the commercialization, promotion or support of a transaction for consideration.[4]

Taxpayers will be subject to penalties equal to the greater of the following amounts: $25,000 and 50% of the difference between the tax that would have been paid had the taxpayer not been involved in a sham and the tax that was actually paid prior to the assessment. As for tax advisors and promoters, their penalty will be equal to all fees received from the taxpayers with respect to the sham transaction at issue.

Prescription period

In addition to the normal prescription period that currently amounts to three or four years, the measures provide the QRA with an additional three years to issue a reassessment to parties to a sham transaction, a member of a partnership that was party to a sham or a person that was associated or related to any such person. This change means that the normal reassessment period will be extended by three or four years for every member of a corporate group in the event that one member corporation is considered to have participated in a sham transaction. The prescription period can also be suspended from the moment the QRA files an authorization request with a judge of the Court of Québec with respect to a formal demand concerning unnamed persons until the final settlement and taxpayer's compliance with the formal demand.

Access to public contracts

Once the assessed "sham penalty" becomes final, in that no objection or further appeal of the assessment may be made, the taxpayers and their tax advisers or promoters are listed in the register of enterprises ineligible for public contracts (RENA) by the Autorité des marchés publics. Furthermore, these penalties will be considered by the latter to determine whether or not to authorize a company to enter into public contracts.

While the amendments have been in effect since May 17, 2019, a transaction that is part of a series of transactions that commenced on or before May 17, 2019, and is completed before August 1, 2019, is exempt.

We will continue to closely follow developments in the months ahead.

For further information on the above changes or other tax matters, please contact one of the authors above or any member of our Montréal Tax Group.

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[1] Art. 1451 CCQ.

[2] *Cameco Corporation v. The Queen*, 2018 TCC 195, par. 592 (*Cameco*). In *Cameco*, the Tax Court of Canada found in favour of Cameco in deciding that there was no element of sham.

[3] Art. 1079.8.1 QTA.

[4] *Ibid,* art. 1079.9 QTA.