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A Penalty Under GAAR Will Cause Ineligibility for Public Contracts in Québec

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The *Act mainly to establish the Centre d'acquisitions gouvernementales and Infrastructures technologiques Québec* (Act) was assented to on February 21, 2020, by the National Assembly of Québec. The Act incorporates new provisions in the government procurement rules to combat abusive tax avoidance transactions. These provisions create an additional incentive for taxpayers to be vigilant in disclosing their transactions to the Agence du revenu du Québec (ARQ). They are also expected to have broad implications and therefore require particular attention by all businesses that deal with the Québec government.

The provisions, which were announced in the budget presented on March 21, 2019, provide that when a penalty has been imposed on an enterprise or one of its "associates" as a result of the application of the general anti-avoidance rule (GAAR), the enterprise will be registered for five years in the register of enterprises ineligible for public contracts (RENA). Enterprises can, however, avoid the imposition of a GAAR-based penalty – thereby avoiding being registered in the RENA – by disclosing certain transactions to the ARQ.

The Act provides that taxpayers have until April 21, 2020, to make a late disclosure, under certain conditions. As further discussed below, it is in the interest of any concerned taxpayer to assess whether it qualifies for such late disclosure and whether it would be appropriate to make one.

GAAR-Based Penalty

Taxpayers who participate in a tax-avoidance transaction that is considered abusive may be subject to be assessed under the GAAR. Since 2009, the Québec *Taxation Act* provides that taxpayers who are assessed under the GAAR in respect of a transaction may incur a penalty that, as of 2017, is equal to 50% of the tax benefit denied. A penalty is also applicable to the promoters of the transaction. In both cases, the penalty has no equivalent at the federal level.

A taxpayer may avoid the GAAR-based penalty for any specific transaction by disclosing the transaction to the ARQ in the form and within the prescribed time limits. The disclosure is mandatory for certain types of transactions. It may also be made on a preventive basis by the taxpayer who has carried out a transaction or by a member of a partnership that is a party to the transaction.

The New Provisions

The Act provides for a series of amendments to the *Act Respecting Contracting by Public Bodies* (ACPB) and to Québec tax laws that affect the eligibility to contract or subcontract with public bodies, more specifically:

- Where a GAAR-based penalty has been imposed on an "enterprise" (legal person, natural person who operates a sole proprietorship or partnership) or a person who is an "associate" of the enterprise, that business or the associated person will be deemed to have been "convicted" of a GAAR-based penalty.
- A person will be deemed to have been "convicted" when the time limits for objecting to or appealing the assessment have expired or when a permanent settlement of the assessment in objection or before a court of competent jurisdiction confirms the penalty.
- When a company or a person related to it is deemed to have been "convicted" of a GAAR-based penalty, the company will be registered for five years in the RENA and will automatically become ineligible for government contracts for that period.

- The meaning of “associate” for these provisions is to be interpreted in accordance with the definition in the ACPB, which provides as follows:
 - in the case of a legal person, its associates are its directors and officers, and any person holding shares carrying 50% or more of the voting rights; and
 - in the case of a partnership, its partners and officers.
- In the case of a GAAR-based penalty imposed on a shareholder who is an “associate” of the enterprise, the enterprise will automatically be registered in the RENA. In the case of a GAAR-based penalty imposed on any other “associate” of the enterprise, the enterprise will only be registered in the RENA if the penalty arises from a transaction that was entered into in exercising the associate’s functions for the enterprise.
- Information contained in a tax record may now be communicated by the ARQ to the Autorité des Marchés Publics (AMP) without the taxpayer’s consent.
- The AMP, which administers the RENA, may record in it any information relating to the GAAR-based penalties received from the ARQ in this matter and take it into consideration in the context of the granting, renewal or revocation of an authorization to contract or subcontract with a public body.

Late Disclosures

Ineligibility following the imposition of a GAAR-based penalty will only apply in respect of an audit or investigation by the ARQ or the Canada Revenue Agency (CRA) that commenced after April 20, 2020.

The new provisions also provide for a transitional period until April 21, 2020, for a taxpayer to make a late disclosure in respect of a transaction or transactions not previously disclosed, provided that the taxpayer could not reasonably be considered to have known or ought to have known that the ARQ or the CRA was about to undertake or had begun an audit or investigation regarding the transaction at the time of the disclosure, if any.

Impact of the New Provisions

A company’s potential ineligibility for public contracts can have serious economic consequences when it has significant contracts with public bodies. It is therefore in the interest of any concerned company to review transactions it has entered into that have tax consequences, in order to assess whether it would be appropriate to make, by April 21, 2020, a late disclosure of any transaction likely to be subject to a GAAR-based assessment. In the future, taxpayers contracting with the Québec government will have to be particularly vigilant in setting up operations that have tax consequences, since any transaction likely to trigger the GAAR could potentially affect their ability to continue their activities in the event of a failure to disclose in the prescribed form and within the prescribed time limits.

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