MARCH 24, 2021

The First Specified Transactions to Be Disclosed to Revenu Québec Announced

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The Québec government announced in its March 21, 2019 budget a series of measures aimed at protecting the integrity and equity of Québec's tax system. These measures include the mandatory disclosure of certain transactions[1] – those that are significantly similar to so-called determined transactions (specified transactions).[2]

The first four "determined transactions" that were announced on March 17, 2021, when the *Mandatory Transaction Disclosure Regulation* (Regulation) came into force and that must henceforth be disclosed involve the following:

1. avoidance of deemed disposal of trust property
2. payment to a non-treaty country
3. multiplication of the capital gains deduction (CGD), and
4. tax attribute trading

Other determined transactions are to be published later.

Revenu Québec has published examples of "included" and "excluded" transactions on its website.

How and When to Disclose a "Specified" Transaction?

The disclosure requirement covers "specified" transactions – those that are carried out by a person (individual, trust, or corporation) or commercialized by an adviser or promoter and are significantly similar to the determined transactions set forth in the Regulation.

The disclosure requirement applies to specified transactions that began *after* publication in the *Québec Official Gazette* of the determined transaction to which the specified transaction relates.

For the four transactions mentioned above, that date is *March 17, 2021*. However, in certain circumstances, the "series of transactions" concept could broaden the scope of the disclosure requirement.

What you need to know about the disclosure requirement:

- There is no minimum threshold or amount that the tax benefit resulting from the specified transaction must exceed.
- The requirement applies to taxpayers and partnerships that carry out a determined transaction and to advisers and promoters who commercialize or promote transactions.
- Disclosure must be made using the disclosure form prescribed by Revenu Québec.

A person who has carried out a specified transaction must file the disclosure form by the later of the following dates:

1. the 60th day following the date determined by the Regulation (as more fully described below); and

2. the 120th day following the day the determined transaction is published in the *Québec Official Gazette*.

Advisers and promoters must file the form by the later of the following dates:

1. the 60th day following the day the adviser or promoter commercializes or promotes the specified transaction for the first time; and
2. the 120th day following the day the determined transaction is published in the *Québec Official Gazette*.

For the four transactions mentioned above, *the 120th day following publication is July 15, 2021*.

Note that in the case of advisers or promoters, the disclosure should be generic so that their clients remain anonymous.

Disclosure by a member of a partnership will be deemed to have been made by each other member of the partnership.

Under the *Taxation Act* (Act), disclosure of a transaction cannot constitute an admission that the general anti-avoidance rule (GAAR) applies to the transaction that is disclosed.

The Determined Transactions Covered by the Regulation

Transaction 1: Avoidance of deemed disposal of trust property

What is the determined transaction?

The first transaction is one that circumvents the deemed disposal of trust property on the 21st anniversary of the creation of the trust in order to defer tax on the gain accrued on the property.

The Act prescribes certain circumstances in which a trust will be deemed to dispose of all its property at fair market value, including on the 21st anniversary of the creation of the trust. The Act also contains a specific anti-avoidance provision that provides that if the trust property is transferred to another trust, that trust will be deemed to have disposed of the property on the 21st anniversary of the creation of the first trust. These provisions are designed to prevent a trust from indefinitely deferring tax on the gain accrued on its property.

According to an example provided by Revenu Québec, an *included transaction* would be a planning whereby a trust distributes its property before its 21st anniversary to a beneficiary that is a corporation wholly owned by another trust.[3]

Who is required to disclose?

A trust that is a party to such a transaction is required to disclose it to Revenu Québec.

When must the transaction be disclosed?

It must be disclosed within 60 days of distribution of the property by the trust or 120 days following publication of the determined transaction in the *Québec Official Gazette* – that is, March 17, 2021.

Transaction 2: Payment to a non-treaty country

What is the determined transaction?

The second determined transaction covers transactions that allow a Québec entity of a multinational corporate group to reduce its taxable income by paying "intra-group" amounts to other entitles of the group located outside Canada.

More specifically, this transaction covers all payments (royalties, interest, management fees, etc.) totalling at least $1 million made during the year by a person or partnership in Québec in favour of an entity with which the person or partnership does not deal at arm's length, when that entity is in a jurisdiction with which Québec or Canada has not entered into a tax agreement. The payment must have been

made by an individual or a trust that is resident in Québec, a corporation that has an establishment in Québec or a partnership of which each member is required to file an information return in Québec for the fiscal period in which the transaction in question occurred.

Revenu Québec has said that "tax agreement" refers to an agreement for the purpose of preventing double income tax and *does not include* tax information exchange agreements entered into by certain jurisdictions that are not party to a tax treaty with Canada.

No included transaction has been announced yet. However, Revenu Québec has announced that a disclosure will only be considered "*complete*" *if it indicates the entire series of transactions*, if applicable, not just the transaction that constitutes the payment.

Who is required to disclose?

The obligation to disclose such a transaction to Revenu Québec falls on the person (individual, trust or corporation) or the members of the partnership that has made the payment or payments in question.

When must the transaction be disclosed?

Disclosure must be made by the later of the following dates: (i) the taxpayer's general filing due date and (ii) 120 days after March 17, 2021.

Transaction 3: Multiplication of the capital gains deduction

What is the determined transaction?

The third determined transaction covers transactions that result in the multiplication of the CGD between several persons, particularly through a trust or transfers of shares of a corporation to the spouse of the person who operates the business. The CGD exempts from tax a capital gain resulting from the sale of qualified small business corporation shares by an individual.

Revenu Québec has announced two *included transactions* that are to be monitored – transactions similar to those considered in *Laplante v The Queen*, 2017 TCC 118 (upheld, *Laplante v Canada*, 2018 FCA 193) and *Gervais v Canada*, 2018 FCA 3:

a. transactions in which a person uses "accommodators" to take advantage of the CGD several times.

   For example, the shares of CanCo held by a trust are sold to a third party. The shares sold are eligible for the CGD. The trust realizes a capital gain upon the disposal of the shares of CanCo, which it attributes to its beneficiaries: the founder of CanCo and his or her children. These beneficiaries all claim the CGD against the attributed capital gains. The children of the founder of CanCo later directly or indirectly return all or part of the gain to him or her (e.g., through a loan or gift); and

b. transactions in which the shareholder's spouse becomes a shareholder of the corporation in question in order to multiply the CGD claimed by manipulating the spousal attribution rules.

Who is required to disclose?

An individual who took part in such a transaction is required to disclose it to Revenu Québec.

When must the transaction be disclosed?

a. In the case of a transaction referred to in example (a) above, disclosure must be made by the later of the following dates: (i) within 60 days of the later of the day the qualified shares are sold to a third party or the proceeds of the sale are transferred or lent to another shareholder of the corporation, and (ii) 120 days after March 17, 2021.

b. In the case of a transaction referred to in example (b) above, disclosure must be made by the later of the following dates: (i) within 60 days of the transfer of the qualified shares to the spouse, and (ii) 120 days after March 17, 2021.

Transaction 4: Tax attribute trading

What is the determined transaction?

The fourth determined transaction under the Regulation covers transactions that circumvent the rules limiting the use of tax attributes amongst unaffiliated persons or following the acquisition of control of a corporation or trust and, more specifically,

a. the use of a taxpayer's tax attributes (operating losses, tax credits that can be carried forward or remaining SR&ED expenditures) *by another taxpayer* (Profitco) that is not affiliated with the first taxpayer immediately before the series of transactions begins; and

b. the use of tax attributes *by a corporation or a trust with accumulated losses* (Lossco) after third-party capitalization of the corporation or trust, particularly in order to carry on a new business, where there is a relationship between the capitalization and the use of the tax attributes.

Revenu Québec has said that the included transactions that are to be monitored are similar to those considered in *Deans Knight Income Corporation v The Queen*,[4] 2019 TCC 76 and *Birchcliff Energy Ltd. v The Queen*, 2019 FCA 151.

Who is required to disclose?

The taxpayer that uses the tax attributes (Profitco) further to the series of transactions in question is required to disclose the transaction referred to in paragraph (a) above.

The corporation or trust with accumulated losses (Lossco) whose tax attributes are used is required to disclose the transaction referred to in paragraph (b) above.

When must the transaction be disclosed?

The transaction referred to in paragraph (a) above must be disclosed by the later of the following dates: (1) the general filing due date for the taxpayer that used the tax attributes (Profitco), and (2) 120 days after March 17, 2021.

The transaction referred to in paragraph (b) above must be disclosed by the later of the following dates: (1) the general filing due date for the taxpayer that used the tax attributes, and (2) 120 days after March 17, 2021.

The Consequences of Failing to Disclose

Taxpayers and partnerships that fail to disclose specified transactions will be liable for the following:

i. a penalty of $10,000 and an additional penalty equal to $1,000 per day as of the second day of the offence, up to $100,000;

ii. a penalty equal to 50% of the amount of the tax benefit directly or indirectly derived from the transaction for any tax year;

iii. suspension of the limitation period within which Revenu Québec may issue a reassessment relating to the transaction (until the prescribed form is duly completed and filed); and

iv. extension of the period during which Revenu Québec can issue a reassessment based on the GAAR.

Advisers or promoters who fail to fulfill their disclosure obligation could be liable for the following consequences:

i. a penalty of $10,000 and an additional penalty equal to $1,000 per day as of the second day of the offence, up to $100,000; and

ii. a penalty equal to 100% of the fees received or receivable by the adviser or promoter (or by a person or partnership with which the adviser or promoter is related or associated) for the implementation of the transaction.

Conclusion

The Regulation constitutes the most recent tool the Québec government has given itself to monitor tax planning that is considered aggressive or high risk. Given the significant consequences of failing to disclose specified transactions, taxpayers considering transactions similar to the determined transactions set forth in the Regulation and advisers and promoters who are considering commercializing or promoting them should consult a tax specialist to ensure they fulfill the disclosure requirement on time and in the form prescribed by Revenu Québec.

[1] *An Act to give effect to fiscal measures announced in the Budget Speech delivered on 21 March 2019 and to various other measures*, which gives force of law to these measures, was enacted on September 24, 2020, by the Québec National Assembly.

[2] We summarize these measures in our May 21, 2019, bulletin, Québec Announces New and Expanded Measures to Combat Aggressive Tax Planning ».

[3] A case similar to CANADA REVENUE AGENCY, Technical Interpretation, 2017-0693321C6, 2017 "2017-STEPQ2-GAAR and 21-year planning," June 13, 2017.

[4] It is important to note that the Tax Court of Canada rejected the Minister of National Revenue's position in this case and vacated the notice of reassessment disallowing the use of the tax attributes. This decision is currently under appeal to the Federal Court of Appeal.

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