



PERSPECTIVE

Canada Tax Law: What to Watch for in 2012

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To clients and friends of Davies Ward Phillips & Vineberg LLP:

This Perspective takes a look back at tax developments in Canada in 2011 and offers a look forward to possible Canadian tax developments in 2012.

I. CANADIAN TAX REVIEW AND OUTLOOK

Corporate taxpayers in Canada continue to operate in an environment of declining tax rates, with the federal income tax rate falling from 16.5% in 2011 to 15% in 2012 and some provincial income tax rates expected to decrease in 2012 and beyond. For example, the Ontario corporate tax rate was reduced to 11.5% effective July 1, 2011 and is scheduled to decline to 11% on July 1, 2012 and to 10% on July 1, 2013 (for a combined Canada/Ontario rate of 25%). However, recently there has been speculation that Ontario may not follow through with the balance of its planned rate cuts because its large annual deficits could put Ontario's credit rating at risk.

Corporate tax rates generally compare very favourably with those of the United States, which continues to struggle with calls for a reduction of its consistently higher corporate tax rates.

Short review of Canadian tax developments in 2011

A number of significant Canadian tax developments occurred in 2011, including: the entering into force of 12 tax information exchange agreements; release of draft legislation relating to the taxation of Canadian foreign affiliates; release of draft legislation targeting certain stapled securities and overriding two recent cases; enactment of legislation to end tax deferrals by corporate partnerships; and a decision by the Supreme Court on the application of the general anti-avoidance rule.

Tax Information Exchange Agreements (TIEAs)

Canada continued to expand its TIEA network in 2011, with 12 TIEAs coming into force and two additional TIEAs signed although not yet in force. In 2007, the Department of Finance Canada (the "Finance Department") announced that it will actively seek TIEAs with tax haven countries in order to improve domestic tax enforcement. To encourage tax havens to enter into TIEAs with Canada, dividends received by a Canadian corporation out of active business income of a foreign affiliate resident in a jurisdiction with which Canada has a TIEA have been made exempt from Canadian tax. As a stick to go along with this carrot, active business income of a controlled foreign affiliate is taxed in Canada on an accrual basis (in the same manner as foreign passive income) where the controlled foreign affiliate is resident in a jurisdiction that does not enter into a TIEA with Canada within 60 months after Canada either begins or seeks to enter into negotiations for a TIEA with that country.

With 12 TIEAs now in force (including with the Cayman Islands and Bermuda), the range of attractive jurisdictions within which to establish foreign affiliates of Canadian corporations has grown significantly. Moreover, with four signed TIEAs not yet in force and ongoing TIEA negotiations with 13 other countries, it is expected that this range will continue to expand.

Foreign Affiliate Rules

In 2004, the Finance Department released significant proposed amendments to the rules relevant to the taxation of foreign affiliates, which generally were to have retroactive effect to February 2004. Those amendments were never enacted and since that time the Finance Department has made statements (including in the form of comfort letters) suggesting that further revisions to the 2004 proposed amendments would be made before enactment. This created significant uncertainty as, in many cases, taxpayers undertaking transactions involving their foreign affiliates had to take into account the existing foreign affiliate rules, the 2004 proposed amendments and the additional amendments suggested by the Finance Department at conferences and in comfort letters.

Revised foreign affiliate proposals were finally released by the Finance Department on August 19, 2011. These proposals generally apply from August 19, 2011 or, on an elective basis, from February 27, 2004. To a large extent the 2004 proposals have been abandoned and while the 2011 package includes a number of welcome changes, it also contains some unexpected and highly restrictive proposals. Various groups have made submissions to the Minister of Finance and the hope is that the more onerous rules will be revised to more properly align with their purpose. However, comments made by the Finance Department at the Canadian Tax Foundation annual conference at the end of November 2011 were not encouraging.

A summary of the proposals is provided at

<http://www.dwpv.com/en/Resources/Publications/2011/Draft-Foreign-Affiliate-Rules-Include-Significant-Tax-Policy-Changes>.

Stapled Securities

On October 31, 2006, the Finance Department announced specified investment flow-through legislation (the "SIFT Legislation") targeting the flow-through nature of Canadian income trusts. Subject to a transition period for income trusts that existed before October 31, 2006 and an exemption for qualifying real estate investment trusts ("REITs"), the SIFT Legislation imposes

entity-level taxation on Canadian income trusts. On July 20, 2011, in response to certain transactions involving "stapled securities" used to fit within the REIT exemption and certain other stapled security structures that provide tax advantages similar to those associated with income trust structures prior to the enactment of the SIFT Legislation, the Finance Department announced legislative proposals.

One targeted arrangement involves a REIT spinning off into a separate taxable entity assets that it could not hold directly without losing its REIT status, with the securities of the REIT and the sister entity trading together as stapled units. The REIT rents its real property to the sister entity, which operates the facilities. While the new legislation does not affect the status of the REIT itself, any payments (including rent) made by the sister entity to the REIT will not be deductible by it. Thus, income represented by the non-deductible payments will be taxed once in the hands of the sister entity and again in the hands of the REIT unitholders.

Another arrangement targeted by the new legislation involves a trust or corporation reducing or eliminating its taxes through the deduction of interest payments made on subordinated debt that is stapled to its publicly traded units or shares. The new legislation denies the deductibility of such interest payments, making the stapled security structure less efficient than pure equity capitalization for Canadian investors.

The new legislation does not apply until January 1, 2016 for stapled security structures in existence on or before October 31, 2006 and until July 20, 2012 for structures that came into existence after October 31, 2006 but before July 20, 2011.

Partnerships – Deferral of Corporate Tax

In the 2011 federal budget, the Minister of Finance announced the elimination of tax deferrals for corporate partnerships. Legislation containing the relevant rules was enacted on December 15, 2011 generally effective from March 23, 2011.

Income of a partnership is allocated for tax purposes to its partners at the fiscal year-end of the partnership. Because a partnership of corporations can have a fiscal year that differs from the taxation year of its partners, before these rules were introduced, corporate tax could be deferred where the fiscal year of the partnership ended after the taxation year of its corporate partners. The new legislation eliminates this deferral for any corporate partner that, together with related and affiliated persons, has more than a 10% interest in the partnership. The corporate partner will be required to accrue income from the partnership for the portion of the partnership's fiscal year that falls within the corporate partner's taxation year. Although the rules are generally effective from March 23, 2011, transitional rules may permit the incremental amount realized in the first year the rules apply to be included over a five-year period to mitigate the cash impact of income from two or more years being included in a corporate partner's income in that first year.

The Canada Revenue Agency previously allowed a joint venture to establish a fiscal period that was different from the fiscal period of the joint venture participants where there was a valid business reason to justify a different fiscal period of the joint venture. As result of the new partnership rules, the Canada Revenue Agency has stated that its administrative policy on joint ventures will no longer be applicable. Where joint venture participants have relied upon the Canada Revenue Agency's administrative position in previous years, they will be allowed transitional relief consistent with that provided to members of a partnership.

General Anti-Avoidance Rule (GAAR)

On December 16, 2011, the Supreme Court of Canada rendered its decision in *Copthorne Holdings Ltd. v. The Queen*, a case involving GAAR. The *Copthorne* decision was highly anticipated with hope that the Supreme Court would provide further guidance on the meaning of the phrase "series of transactions", a term that is fundamental to GAAR and which has received much judicial consideration in that context, although its scope still remains unclear. The phrase is also highly relevant to rules dealing with tax "bumps" in mergers and acquisitions and to tax-effective divisive reorganizations, and some judicial comments in the context of GAAR have been unhelpful in considering the meaning of the phrase in these other contexts.

In *Copthorne*, a Canadian corporation undertook a series of transactions that had the effect of increasing its paid-up capital to an amount in excess of its shareholder's tax-paid capital investment. Paid-up capital is an important tax attribute because it allows a Canadian corporation to distribute amounts (including Canadian earnings) to non-resident shareholders without Canadian withholding tax even if it has accumulated retained earnings. The Supreme Court unanimously affirmed the Federal Court of Appeal's decision that GAAR applied to the series of transactions to deny the taxpayer the benefit of the increased paid-up capital.

In rendering its decision, the Supreme Court generally reaffirmed prior statements on the meaning of the phrase "series of transactions" (and on GAAR generally). As such, the decision does little to assist with the uncertainty that often exists in understanding the scope of the phrase "series of transactions" (and interpreting GAAR more generally).

The Assumption of Any Obligation is Additional Proceeds of Disposition?

In *Daishowa v. The Queen*, the Federal Court of Appeal held that reforestation liabilities assumed by a purchaser of timber rights constituted additional proceeds of disposition to the seller for tax purposes. This decision is of interest to any energy or forestry company that is selling assets where reclamation or reforestation obligations are being assumed and may also have implications to any seller of real property where environmental liabilities or other contingent obligations are assumed or of a business where pension, severance and other future obligations are assumed by the purchaser.

Daishowa, which held timber rights that gave rise to certain reforestation liabilities, accepted an offer for the timber rights of \$180 million, less the preliminary estimate of \$11 million for the long-term reforestation liability to be assumed by the purchaser, which amount would be adjusted based on a final estimate of the reforestation obligations. The Federal Court of Appeal held that the seller's assumption of the reforestation liabilities constituted consideration to *Daishowa* and because the parties specifically "agreed to a price of \$11,000,000 for the reforestation liability ... they should be held to that price for income tax purposes". The taxpayer has sought leave to appeal the Federal Court of Appeal's decision and it is hoped that the Supreme Court will grant such application. In the meantime, taxpayers negotiating and drafting agreements of purchase and sale should be careful where future obligations are being assumed as the Federal Court of Appeal's decision appears, to a large extent, to have been based on the wording of the agreement between the parties and certain admissions made by the taxpayer.

Other Proposed Amendments

There were a number of other income tax amendments announced by the Finance Department in 2011 including, among other things, amendments to expand the rules dealing with

shareholder benefits, extension of the prohibited investment regime from tax-free savings accounts to registered retirement savings plans and registered retirement income funds, and amendments (the subject of comfort letters from 2002) to the safe harbour rules in respect of investment services provided to persons not resident in Canada by Canadian service providers. In addition, there were two proposed amendments to address the decisions in *Lehigh* and *Collins*.

- *Withholding Tax on Interest – The Lehigh Amendment.* In the *Lehigh* case, the taxpayer had debt outstanding to a related foreign corporation, the interest on which was subject to Canadian withholding tax. The interest coupons were "stripped" and sold to an arm's length party for the purposes of avoiding withholding tax on the coupons. The Federal Court of Appeal concluded that GAAR did not apply to impose withholding tax in spite of the Minister's arguments to the contrary.

Prior to the *Lehigh* amendment, Canadian withholding tax applied to interest paid to a non-resident only where: (i) the non-resident did not deal at arm's length with the interest payer; or (ii) the interest constituted "participating debt interest". To address the coupon stripping circumstances in the *Lehigh* decision, the Finance Department announced amendments that will result in Canadian withholding tax applying to interest paid to a non-resident in respect of debt owed to a person with whom the interest payer is not dealing at arm's length.

- *Contingent Amounts – Collins Amendment.* In the *Collins* case, a taxpayer was allowed to accrue and deduct a higher amount of interest even though the commercial arrangements made it abundantly clear that a lower amount would ultimately be paid. In response to this case, the Finance Department announced amendments that will prohibit a taxpayer from deducting an amount to the extent that the taxpayer, or another taxpayer that does not deal at arm's length with the taxpayer, has a right, whether absolute or contingent, to reduce the amount at that time if it is reasonable to conclude the right will be exercisable. Moreover, the provision is not limited to interest; it applies to any expense or outlay or cost or capital cost of property.

Outlook for Canadian tax developments in 2012

As noted above, there is some question as to whether the gradual phasing in of the scheduled rate reductions in Ontario will continue in 2012.

International Tax Panel Report

In December 2008, a Government-sponsored international tax panel delivered a report making a number of recommendations for reforming Canada's international tax system. While much of the report dealt with the foreign affiliate rules, it also addressed such other topics as Canada's thin capitalization rules and debt dumping. In 2011, the Minister of Finance released its proposed foreign affiliate rules, although they did not reflect (and may be seen as contrary to) many aspects of the international tax panel's report. In 2012, it is possible we could see amendments addressing other topics considered in the panel's report.

Tax Consolidation

In the 2010 federal budget the Canadian Government announced that it would explore the possibility of adopting a formal loss transfer system or consolidated tax reporting for corporate groups, regimes that have been available in the United States and United Kingdom for many

years. A discussion paper on the topic prepared by the Finance Department was released at the end of 2010 seeking comments from taxpayers. It is possible that we may see proposals in this regard in 2012.

Outstanding 2010 Measures

A number of legislative measures announced in 2010 remain outstanding, but may finally be enacted in 2012. They include :

- *Aggressive Tax Reporting Regime.* The aggressive tax reporting regime is to have retroactive effect to the beginning of 2011. The regime requires the disclosure to the Canada Revenue Agency of tax avoidance transactions where certain "hallmarks" are present. The current version of the draft legislation is extremely broad and can, in some cases, be read to require the disclosure of common commercial transactions. Submissions have been made to the Minister of Finance in the hope that the rules will be revised to more properly align with their purpose. In response to concerns raised by various members of the legal community, the Finance Department issued a comfort letter in 2011 indicating its willingness to amend the proposed rules to explicitly provide that information protected by solicitor-client privilege will not be subject to the regime's mandatory disclosure requirements. However, the Finance Department has not indicated whether any other amendments will be made to the draft legislation. (Québec has enacted an aggressive tax planning reporting regime, which also imposes mandatory disclosure obligations targeting marketed tax transactions but, in addition, includes a voluntary "preventive" disclosure regime for transactions that may be subject to the Québec general anti-avoidance rule and imposes penalties and extends the limitation period where the preventive disclosure is not made.)
- *Foreign Tax Credit Generator Rules.* The foreign tax credit generator rules are to be effective for taxation years that end after March 4, 2010. The proposed legislation restricts deductions and credits for foreign taxes in respect of foreign-source income of Canadian taxpayers and their foreign affiliates. While the regime was intended to target very specific types of transactions, the proposed rules released in 2010 were broadly drafted and, as drafted, will adversely affect many investment structures that use hybrid instruments even where no inappropriate tax credits or deductions are generated. In addition, where the rules apply because a foreign affiliate of a taxpayer has issued a hybrid instrument, the draft rules appear to affect all foreign affiliates of all Canadian companies in the taxpayer's related group, rather than being isolated to the particular foreign affiliate or foreign affiliate group where the hybrid instrument exists. Hopefully, these rules will be revised before they are enacted to better focus on their intended target but, in the meantime, they present concerns in many surprising circumstances.
- *Foreign Investment Entities and Non-Resident Trusts.* Complex proposals with respect to non-resident trusts ("NRTs") and foreign investment entities ("FIEs") were first introduced in the 1999 budget and substantially revised on several occasions over the following decade without ever being enacted. To address concerns about the complexity of the proposals as well as numerous technical problems, in 2010 the proposed NRT rules were further amended and the FIE rules abandoned in favour of limited amendments to the existing offshore investment-fund property rules. The decision to scale back the proposed NRT rules and abandon the FIE rules greatly simplifies tax reporting for many Canadians with international holdings. However, the proposed NRT rules remain relevant to foreign trusts and Canadians with interests in them. While these rules are still very complex and not free of technical problems, a number (but not all) of the most troubling aspects of the prior

proposals were addressed resulting in rules better focused on their target, namely the use of offshore trusts by Canadians to minimize or avoid Canadian tax.

Expected Judicial Developments in 2012

Judicial developments in 2012 may include consideration of beneficial ownership in the context of tax treaties, transfer pricing and offshore trusts.

- *Beneficial Ownership.* In *Prévost Car Inc. v. The Queen*, the CRA argued that a shareholder was not entitled to benefits under the *Canada-Netherlands Income Tax Convention* in respect of dividends paid by the taxpayer to the shareholder because the shareholder was not the beneficial owner of the dividends. The Canada Revenue Agency was unsuccessful at the Tax Court and, on February 26, 2009, the Federal Court of Appeal affirmed the Tax Court's decision. Although the *Prévost* decision is very helpful for non-residents investing in Canada through a third jurisdiction that has a beneficial tax treaty with Canada, it does not deal with "back-to-back" arrangements, and its significance in such circumstances is less clear. There is at least one decision pending (*Velcro Canada Inc. v. The Queen*) that concerns beneficial ownership for the purposes of a Canadian income tax treaty in the context of a back-to-back arrangement and may clarify this issue. While the *Velcro* case was heard in 2011, the decision has not yet been rendered. It is expected that the judgment will be released in early 2012.
- *Transfer Pricing.* On March 24, 2011, the Supreme Court of Canada granted leave to appeal the 2010 decision of the Federal Court of Appeal in *GlaxoSmithKline Inc. v. The Queen*. The taxpayer in the case packaged and sold Zantac, a patented and trademarked drug, in Canada. The Canada Revenue Agency argued that the taxpayer paid an unreasonable amount to a related Swiss sister company for the active pharmaceutical ingredient in Zantac. The taxpayer licensed the Zantac trademark and patents from its parent for use in Canada under a licensing agreement that obligated the taxpayer to purchase the ingredient from the related Swiss company. The Tax Court held that the taxpayer had overpaid for the ingredient on the basis of evidence that, in the years in question, Canadian generic companies were able to purchase the ingredient for a price less than that paid by the taxpayer. In 2010, the Federal Court of Appeal reversed this decision and returned it to the Tax Court for reconsideration on the basis that the Tax Court had not considered "all relevant circumstances which an arm's length purchaser would have had to consider", particularly the license agreement with the parent. The appeal from this decision is expected to be heard by the Supreme Court on January 13, 2012. This will be the Supreme Court's first transfer pricing case.
- *Offshore Trusts.* The Supreme Court of Canada has granted the taxpayer in *St. Michael Trust Corp. v. The Queen* (more commonly known as *Garron et al. v. The Queen*) leave to appeal the decision rendered by the Federal Court of Appeal in 2010. The taxpayer in the case claimed an exemption under the *Canada-Barbados Income Tax Convention* from Canadian capital gains tax on the sales of shares of a Canadian corporation by a family trust established in Barbados. The Federal Court of Appeal upheld the Tax Court of Canada's decision that the disposition of shares was subject to Canadian tax. The trust was found to be resident in Canada and not Barbados based on the role played by the Canadian principals in the transactions. In coming to this conclusion, the Federal Court of Appeal confirmed the Tax Court of Canada's approach of effectively applying the corporate residence test of central management and control (rather than simply the residence of the

trustee) in determining the residence of the trust, arguably a new judicial development. The appeal in this case is scheduled to be heard by the Supreme Court on March 13, 2012.

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