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Tax Alert – Canada

Quebec releases list of transactions for mandatory disclosure

EY Tax Alerts cover significant tax news, developments and changes in legislation that affect Canadian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor or EY Law advisor.

On 17 March 2021, the first instalment of the long-awaited list of transactions for which mandatory disclosure is required in Quebec under Quebec Bill 42, *An Act to give effect to fiscal measures announced in the Budget Speech delivered on 21 March 2019 and to various other measures*, was released in the Quebec Gazette. Quebec Bill 42, which received Royal Assent on 24 September 2020, contains measures first announced in the 21 March 2019 Quebec Budget and further detailed by the Ministère des Finances in Information Bulletin 2019-5 released on 17 May 2019 relating to new mandatory disclosure requirements, including new requirements to disclose transactions identified by the Minister of Revenue or any significantly similar transactions.

The list, which has been released as part of a new regulation – the Mandatory Transaction Disclosure Regulation (the Regulation) – includes, for now, four types of transactions:

- ▶ Avoidance of deemed disposal of trust property
- ▶ Payment to a non-treaty country
- ▶ Multiplication of the capital gains deduction
- ▶ Tax attribute trading

Background

This new disclosure measure is part of a series of measures brought forward by the Quebec government in its current fight against aggressive tax planning.¹ Bill 42 provided for, among other things, an amendment to section 1079.8.1 of the *Taxation Act* (Quebec) (the Act) in order to include the definition of a specified transaction and further impose upon taxpayers, in accordance with section 1079.8.6.2 of the Act, a new obligation to disclose within an information return all transactions identified by the Minister that are carried out. Since Bill 42's enactment, taxpayers had been waiting on the Minister to publish the list of transactions.

As of 18 March 2021 (the day after the date of publication of the Regulation in the *Gazette officielle du Québec*), taxpayers who carry out one of the four identified specified transactions (including series of transactions), or a taxpayer who is a member of a partnership that carries out such a transaction, now have the obligation to disclose the transaction (or any other transaction whose form and substance are significantly similar to the ones determined by the Minister) by virtue of [Form TP-1079.DI-V, Mandatory or Preventive Disclosure of Tax Planning](#), within a particular time limit from the relevant day provided for in the Regulation. Revenu Québec has also published on the French version of its [website](#) examples of transactions that would be considered as "included" or "excluded" as one of the determined transactions.

What you need to know - who, what, when?

This new requirement to disclose is meant to apply prospectively. Therefore, any specified transaction (or any significantly similar transactions) that is carried out by an individual, a partnership,² a trust or a corporation as of 18 March 2021 will have to be disclosed. In the context of a series of transactions, the requirement to disclose may still apply even if the series began before 18 March 2021. This obligation also applies to any advisor or promoter³ that commercializes or promotes a specified transaction or any significantly similar transaction. It is important to note that the characterization of a promoter under the Act differs from the definition under the federal *Income Tax Act*.

To this day, Revenu Québec has not provided more guidance as to the scope of the term "promoter" and how to clearly distinguish a promoter from an advisor under the Act.⁴ However, Revenu Québec has indicated that an advisor would not be considered to have commercialized a transaction or to have promoted it by simply designing a planning at the

¹ For more background, refer to [EY Tax Alert Issue 2019 No. 12 Quebec Budget 2019-20](#) and [2019 Issue No. 23 New disclosure requirements and penalties for both taxpayers and advisors and promoters in Quebec](#). See also [EY Tax Alert Issue 2020 No. 55 Quebec Bill 42 receives Royal Assent - Mandatory disclosure requirements for nominee agreements come into effect](#).

² The disclosure requirement applies only if the member of the partnership that carries out the transaction is subject to the obligation to disclose the transaction.

³ The promoter of the specified transaction (or series of transactions) is any person, including a partnership, that meets all of the following criteria:

- ▶ It has commercialized the transaction or series, promoted it or otherwise supported its development or the interest it has generated;
- ▶ It (or a person or partnership associated or related to it) has received or is entitled to receive, directly or indirectly, a consideration for such commercialization, promotion or support; and
- ▶ It is reasonable to consider that it has assumed an important role in such commercialization, promotion or support.

⁴ Under the Act, an advisor is defined as a person or partnership that provides help, assistance or advice regarding the design or implementation of a transaction or that commercializes or promotes it.

request of a client or by implementing it, or by providing help, assistance or advice regarding the transaction; however, proposing to a new client a structure that is quasi-identical to one previously proposed to another client could equate to promoting the structure.

Note also that this new disclosure requirement is not dependent on the presence of a tax benefit. The requirement to disclose applies regardless of the consequences of the specified transaction.

As previously mentioned, the mandatory disclosure will have to be done through a prescribed form (TP-1079.DI-V) available online and will have to be filed within the latest of:

1. The day that is 60 days following the day provided by the Regulation, as further described below; or
2. The day that is 120 days following the publication of the transactions in the *Gazette officielle du Québec* – with respect to the four already-published transactions, the day that is 120 days following the 17 March 2021 publication, i.e., 15 July 2021.

A similar deadline for disclosing specified transactions applies to the advisors and promoters. However, there is an option for them to file a more generic disclosure in order to preserve their client's anonymity. The disclosure is made on [Form TP-1079.CP-V, Mandatory Disclosure of Tax Planning by and Adviser or Promoter](#).

With respect to disclosures by members of a partnership, only one disclosure is required and will be valid for all members.

While these new measures are aimed at ensuring greater transparency of the tax system and deterring the use of abusive schemes, disclosing a specified transaction will not be considered as an admission as to the applicability of the general anti-avoidance rule (GAAR) provided in the Act.

The four determined transactions⁵

Avoidance of deemed disposal of trust property

The first determined transaction identified by the Minister is a transaction that would result in the avoidance of the 21-year deemed disposition rules that prevent the postponement of tax on capital gains accrued on property held in a trust in favour of another trust. The facts that have been determined by the Minister are more precisely described in the Regulation, but Revenu Québec has provided an example of the type of transactions that are contemplated. What was said as requiring a mandatory disclosure would be a situation where a trust would distribute its property, before the 21st anniversary, to a beneficiary that is a corporation controlled by another trust.⁶ In a similar situation occurring after 17 March 2021, the trust will bear the obligation to disclose the transaction and will need to do so within the later of 60

⁵ The determined transactions are listed by Revenu Québec in Schedule A of the Regulation for the purposes of the definition of a "specified transaction". The specified transactions are the transactions carried out by the taxpayer that are subject to disclosure. As per s. 1079.8.1, the specified transaction is a transaction whose form and substance of the facts specific to the taxpayer are significantly similar to the form and the substance of the facts of the transaction determined by Revenu Québec (the determined transactions).

⁶ See for example, CRA document 2017-0693321C6.

days following the distribution of said property or 120 days following the publication of the determined transaction in the *Gazette officielle du Québec*, i.e., 15 July 2021.

Payment to a non-treaty country

The second determined transaction published and described in the Regulation is aimed at transactions carried out by Quebec resident taxpayers part of a multinational corporate group and that would result in the reduction in computing its income under the Act of a total amount of no less than \$1,000,000 following a non-arm's length payments agreement (other than an amount paid or payable as consideration for the acquisition of corporeal property) to a non-resident of Canada that is resident in a country with which the Government of Quebec or of Canada at that time has not entered into a tax agreement. Such payments would include interest, management (or other services) fees, royalties, etc., and payment for any service, but Revenu Québec has not yet given examples of what this type of transaction may include. However, Revenu Québec has specified that what is meant by a "tax agreement" with another country does not include tax information exchange agreements entered into with a country with which Canada does not have a tax treaty.

Also, Revenu Québec made it clear that a disclosure will not be considered complete if it does not fully disclose a series of transactions in its entirety.

The obligation to disclose applies as of the day that is 60 days before the taxpayer's filing due date for its taxation year in which the income deduction is made by the taxpayer. In the case of a taxpayer that is a member of a partnership, the obligation applies as of the day that is 60 days before the member's filing due date for its taxation year in which the relevant fiscal period of the partnership ends (the relevant fiscal period being the fiscal period in which the income deduction is made by the partnership).

As a result, the disclosure of the specified transaction will be required to be made on or before the later of either the taxpayer's filing due date or 15 July 2021.

Multiplication of the capital gains deduction

This third determined transaction was expected and targets transactions that result in the multiplication of the capital gains deduction between many taxpayers, notably through a trust or a transfer of shares of a corporation to or from one spouse to another. At the time of writing, Revenu Québec has identified two examples of this type of transaction: one that is similar to what was carried out in the case of *Laplante v. The Queen*, 2017 TCC 118 (which was later confirmed by the Federal Court of Appeal in 2018 FCA 193), i.e., a situation where a person uses "accommodating" parties (for example, beneficiaries of a trust) in order to benefit from the capital gains deduction numerous times (each beneficiary having returned their allocated portion of the capital gain to the person after each having claimed their capital gains exemption), as well as another one that would be similar to what was described in *Gervais v. The Queen*, 2018 FCA 3, where a taxpayer, as part of a reorganization of the share capital of their business (that included the taxpayer's spouse being added as a shareholder), uses the non-arm's length relationship with their spouse and the attribution rules in order to reduce their tax payable by multiplying the capital gains deduction.

The disclosure of the specified transaction will be required to be made on or before either 60 days following the day specified in the Regulation (which varies depending on the type of planning used – e.g., the day the qualified small business corporation shares are disposed of) or 15 July 2021, whichever is the later.

Tax attribute trading

Finally, the last determined transaction identified in the Regulation is one that results in tax attribute trading. Although the Regulation was drafted to include a wide range of transactions, Revenu Québec has mentioned that a transaction similar to the one described in the *Deans Knight Income Corporation v. The Queen*, 2019 TCC 76 (which dealt with trading of accumulated and unclaimed non-capital losses, scientific research and experimental development expenditures, and investment tax credits), as well as what was planned in *Birchcliff Energy Ltd. v. The Queen*, 2019 FCA 151 (which dealt with trading of non-capital losses).

Similar to the second determined transaction, the disclosure of this last transaction will be required to be made on or before either the filing due date for the first taxation year in respect of which the tax attribute is used or 15 July 2021, whichever is the later.

Consequences of non-disclosure

In the case of non-disclosure, the Act provides for two penalties for the taxpayer or the partnership that carried out the specified transaction:

- ▶ A penalty up to \$100,000, that is a penalty of \$10,000 and an additional \$1,000 per day starting after the second day of non-disclosure; and
- ▶ A penalty of 50% the tax benefit.

Additionally, the normal reassessment period will be prolonged to allow the Minister to reassess on the basis of GAAR. More importantly, failure to disclose a specified transaction will result in the suspension of the normal reassessment period in respect of that transaction or series of transactions until the filing of the disclosure. Late disclosure will, however, restart the statute-barred period.

For the advisors and promoters, penalties will also be imposed in cases of failure to disclose specified transactions:

- ▶ A penalty up to \$100,000, that is a penalty of \$10,000 and an additional \$1,000 per day starting after the second day of non-disclosure; and
- ▶ A penalty equal to 100% of the professional fees received in the course of implementing the commercialized or promoted specified transaction.

Revenu Québec has made it clear that more determined transactions will be identified in the near future. Therefore, taxpayers should make sure to contact their advisors for any updates on the new Quebec disclosure requirements.

Learn more

For more information, please contact your EY or EY Law advisor or one of the following professionals who can assist you in filing late-filed preventive disclosures or provide you with other advice in relation to these new measures:

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