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Tax Alert – Canada

New disclosure requirements and penalties for both taxpayers and advisors and promoters in Québec

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 May 2019, the Québec Ministry of Finance released Information Bulletin 2019-5 “Measures Designed to Protect the Integrity and Fairness of Québec’s Tax System.”

This bulletin announces new measures to oppose aggressive tax planning by imposing significant new penalties and disclosure requirements on both taxpayers and professionals (i.e., advisors and promoters – see below).

The measures will be enacted by amendments to the Québec tax legislation, but will generally apply to all transactions that occur on or after the 17 May 2019 publication date of the Bulletin.

These measures include:

- New penalties and other sanctions for taxpayers and professionals who participate in sham transactions
- Mandatory disclosure of nominee agreements
- Mandatory disclosure of “prescribed transactions”

I Sham transactions

The Bulletin refers to a sham as a “complex transaction or series of transactions which has an element of deception aimed at misleading the tax authorities as to a taxpayer’s identity or the actual nature of a transaction or series of transactions”.

The new measures will impose a penalty on taxpayers of the greater of \$25,000 or 50% of the additional tax assessed as a result of Revenu Québec (RQ) assessing on the basis of the actual transaction and not the sham transaction.

Professionals, referred to in the Bulletin as “advisers” and “promoters”, who participated in the sham transaction will be liable for a penalty of 100% of their fees in respect of the sham transaction.

The Bulletin also announced that taxpayers or professionals who are issued a sham transaction penalty on a final assessment (i.e., an assessment that has not been appealed or that has been confirmed by a final judgment of a court) will be added to the register of enterprises ineligible for public contracts (RENA).

Lastly, an additional three-year prescription (statute-barring) period will be added to the existing three- or four-year prescription periods in order for RQ “to determine the tax consequences arising from a transaction or series of transactions involving a sham”.

This additional reassessment period will apply not only to taxpayers who are party to a sham, but also to taxpayers who are members of a partnership that is a party to a sham, and persons related and corporations associated with them.

II Nominee agreements

Nominee agreements, also called agency agreements or prête-nom agreements, are generally agreements by which one person (the principal) instructs another person (the nominee) to transact using the nominee’s name, with the understanding that only the principal and not the nominee is truly a party to the agreement.

The Bulletin announced a new prescribed form that must be filed whenever a nominee agreement is used as part of a transaction. The disclosure is made by either party and “will be deemed to have been made by the other party as well”.

The disclosure form must be filed within 90 days after the nominee agreement was concluded. If the nominee agreement has already been concluded, but the tax consequences of the transaction (or series of transactions) to which it relates will occur or continue after the publication of the Bulletin, it must be disclosed to RQ prior to 16 September 2019.

A failure to file the disclosure form will make the parties to the nominee agreement jointly liable for a penalty of up to \$5,000, namely an initial penalty of \$1,000 and an additional penalty of \$100 per day.

III Prescribed transactions

Quebec had previously enacted a mandatory disclosure mechanism for certain types of transactions considered to be aggressive tax planning.¹

The Bulletin indicates that RQ will publish a list of prescribed transactions, i.e., a list of types of transactions that must be disclosed by participating taxpayers, whether their participation is done personally or via a partnership.

The prescribed form will require the disclosure of the identity and relationship of the parties and a full description of the transaction and its tax consequences. It must be filed on the later of 60 days from when the prescribed transaction begins, or 120 days from when RQ announces the list of prescribed transactions.

Penalties for non-compliance are significant: up to \$100,000 for a failure to file the disclosure as well as an additional penalty of 50% of the tax benefits resulting from the undisclosed transaction.

Professionals (i.e., “advisers” and “promoters”) also have a disclosure obligation, if they “commercialize or promote a prescribed transaction whose form and substance has not required a material change when implemented for different taxpayers”. The penalty for non-filing is \$10,000, with an additional penalty of \$1,000 per day, up to \$100,000, as well as 100% of the fees charged to “the various taxpayers to whom he commercialized or promoted the undisclosed prescribed transaction”.

Learn more

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¹ Announced in Information Bulletin 2009-5 “Fighting Aggressive Tax Planning.”

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