

Tax Memo

Revised Quebec Aggressive Tax Planning Proposals

On October 15, 2009, the ministère des Finances (Finances Québec) released Information Bulletin 2009-5, "Fighting Aggressive Tax Planning." According to Finances Québec, an aggressive tax plan (ATP) is a transaction that complies with the letter of the law, but abuses its spirit. The Quebec *Taxation Act* will be amended to reflect the measures outlined in the Information Bulletin.

The Information Bulletin essentially reiterates the major proposals that Finances Québec set out in its January 30, 2009, consultative document (see our *Tax Memo*, Quebec Proposal on Aggressive Tax Planning, available on www.pwc.com/CA/en/tax-memo/quebec-proposals-aggressive-planning.jhtml). A number of interested parties made representations to Finances Québec; however, few of the recommendations the tax community made have been reflected in the revised proposals.

The principal features of the ATP proposals are:

- **Mandatory disclosure** – The taxpayer will be required to disclose arrangements resulting in a tax benefit (subject to a minimum – but very low – threshold) if:
 - the arrangements between the taxpayer and the taxpayer's adviser include an undertaking of confidentiality by the taxpayer towards other persons or the tax administration; or
 - the adviser's remuneration is conditional on, or proportional to, the success of the arrangement.
- **Ambit of the general anti-avoidance rule (GAAR)** – The meaning of bona fide purpose for purposes of the definition of an avoidance transaction under the Quebec GAAR is modified so that the scope of Quebec's GAAR is more consistent with that of other provincial GAARs.
- **GAAR period of assessment** – The limitation period is extended by three years when GAAR applies, unless there has been disclosure (mandatory or preventive).
- **Penalties** – A penalty regime will apply to taxpayers and promoters when GAAR applies, unless there has been disclosure (mandatory or preventive).

Most of the announced measures are effective as of October 15, 2009 (the release date of the Information Bulletin). Others are retroactive. Some may not apply to a series of transactions that commenced before October 15, 2009, but is completed before January 1, 2010.

Mandatory Disclosure

The taxpayer will be required to disclose in prescribed form any transaction (which includes an arrangement or event and a series of transactions) carried out by it:

- that, directly or indirectly, for a taxation year:
 - results in a tax benefit of \$25,000 or more for the taxpayer; or
 - affects the taxpayer's income by \$100,000 or more; and
- for which it retained an adviser's services and
 - the contract for these services includes an undertaking of confidentiality by the taxpayer in regard to other persons or the tax administration in relation to the transaction; or
 - the adviser's remuneration is wholly or partly:
 - i) conditional on obtaining (or is established on the basis of) a tax benefit from the transaction;
 - ii) refundable to the taxpayer if the expected tax benefit does not occur; or
 - iii) received by the adviser only after the expiry of the assessment period relating to the transaction.

Application date: Mandatory disclosure

Mandatory disclosure will apply to transactions carried out after October 14, 2009, except for those carried out as part of a series of transactions that:

- began before October 15, 2009; and
- is completed before January 1, 2010.

Tax benefit

A tax benefit will be defined as:

- a reduction, an avoidance or a deferral of the tax or other amount payable under the *Taxation Act*; and
- an increase in a tax refund or other amount under the *Taxation Act*.

Adviser

An adviser will include any person or partnership that:

- provides help, assistance or advice regarding the design or implementation of the transaction; or
- commercializes or promotes it.

Modified definitions

Following the representations that were made to Finances Québec, modifications were made to the concepts of conditional remuneration and an undertaking of confidentiality. The modified definitions follow.

Conditional remuneration

A conditional remuneration transaction will exclude:

- claims for tax credits (e.g., for research and development);
- the analysis and review of interest pursuant to tax assessments;
- reviews of tax returns after they are filed; and
- a transaction for which an agreement was entered into with a professional under which the result obtained by the professional is one of many factors taken into account in setting the professional's remuneration, in accordance with the professional's code of ethics.

Furthermore, the Information Bulletin notes that sales tax reviews are not within the ambit of these disclosure rules on account of the definition of "tax benefit."

Undertaking of confidentiality

An undertaking of confidentiality will not include a clause in an engagement letter that is designed to ensure that:

- the adviser's professional liability exists only with respect to his or her client; and
- a third party cannot, for its own purposes, rely on the opinion given by the adviser to that client.

Deadline

The deadline for making the mandatory disclosure for a taxation year will be the due date for filing the taxpayer's tax return for that year. This differs from the January 30, 2009 consultative document, which had a proposed deadline of 30 days after the transaction began to be carried out.

Failure to make mandatory disclosure within the deadline will result in penalties (discussed below) for the person required to make the disclosure. It will also result in the suspension of the limitation period for that person and for any person associated with, or related to, that person on the date the transaction is carried out.

Prescribed form

The prescribed form for mandatory disclosures will require a complete and detailed description of the facts relating to the transaction and a statement of the tax consequences resulting from the transactions. The Information Bulletin does not include the prescribed form, but does indicate that the disclosure must be sufficient to enable the tax administration to analyze the transaction and understand its tax consequences.

The prescribed form must be sent under separate cover by registered mail or electronically to a division created by Revenu Québec to review this information (the Direction principale de la lutte contre les planifications fiscales abusives of Revenu Québec). If the Direction does not request additional information within 120 days from the date the prescribed form was filed, the form will be considered to have satisfied the disclosure requirements and be timely filed. As well, the disclosure is not to be considered an admission on the part of the taxpayer that GAAR applies.

Penalties

A taxpayer that fails to file the prescribed form by the deadline will be subject to a penalty of \$10,000 that will increase by \$1,000 per day to a maximum of \$100,000. Furthermore, the transaction will not benefit from any limitation period until the form is filed. The penalty can be mitigated by using Revenu Québec's voluntary disclosure procedure or by successfully arguing due diligence as a defence.

Transactions carried out by partnerships

Disclosure is also mandatory when a transaction such as is described above is carried out by a partnership of which the taxpayer is a member. In the case of a limited partnership, the disclosure will have to be made by the general partner. For other partnerships, each partner will be responsible for disclosure. However, this requirement will be met if disclosure is made by one of the members on behalf of all the members.

For a transaction carried out by a partnership, the mandatory disclosure deadline is the date the partnership's members:

- are required to file an information return for the fiscal year in which the transaction occurred; or

- would be required to file that information return if the ministère du Revenu had not waived this requirement.

Ambit of GAAR

The definition of an "avoidance transaction" generally excludes a transaction that is undertaken primarily for bona fide purposes other than to obtain a tax benefit. As indicated in the January 30, 2009 consultative document, the Information Bulletin states that, for the purposes of the definition of an avoidance transaction, the following will be excluded as a bona fide purpose:

- obtaining a tax benefit under the *Taxation Act*,
- the reduction, avoidance or deferral of tax or other amount payable on account of or regarding tax under a Quebec law other than the *Taxation Act*, a law of another province or a federal law;
- the increase in a refund of tax or of another amount on account of or regarding tax under a Quebec law other than the *Taxation Act*, a law of another province or a federal law; or
- any combination of the purposes mentioned above.

Application date: Ambit of GAAR

This change will apply commencing with the 2009 taxation year. It will also apply to:

- taxation years for which the ministère du Revenu may validly re-determine tax and reassess or make an additional assessment; and
- subject to the exception described below, taxation years covered by an objection or an appeal on October 15, 2009, in relation to an assessment, a reassessment or an additional assessment based on the application of GAAR.

The modified definition will not apply to cases pending on January 30, 2009, and notices of objection served on the ministre du Revenu before February 1, 2009, if in the motion of appeal or notice of objection previously served, one of the reasons specified for the objection or appeal is that the transaction was undertaken or planned mainly to obtain, pursuant to a federal law or a provincial law (other than the *Taxation Act*) a:

- reduction, avoidance or deferral of tax or other amount payable on account of or regarding tax; or
- a refund of tax or other amount on account of or regarding tax.

GAAR—Period of Assessment

Mirroring the January 30, 2009 consultative document, the Information Bulletin increases by three years the limitation period that applies to any taxation year (even if there was no mandatory disclosure requirement) to permit a GAAR-based reassessment. The Information Bulletin explains that the extended limitation period is intended “to allow the tax administration more time to identify ATP schemes and to change the risk/reward ratio that currently favours the taxpayer.”

The normal limitation period is as follows:

Limitation periods

	Period	Start of period
Individuals and Canadian-controlled private corporations (CCPCs)	3 years	Date the notice of original assessment is sent
Mutual fund trusts and corporations other than CCPCs	4 years	

A reassessment made within the extended limitation period would relate only to items covered by GAAR.

However, the three-year extension will not apply if:

- a period of three years has already been added to the normal limitation period; or
- the transaction was disclosed under either the mandatory or preventive disclosure rules.

Application date: GAAR—Period of assessment

The extended limitation period will apply to taxation years ended after October 15, 2009, if the reassessment or additional assessment relates to a transaction carried out after October 14, 2009. However, it will not apply to a transaction carried out as part of a series of transactions that began before October 15, 2009, and is completed before January 1, 2010.

Preventive disclosure

Preventive disclosure will enable a taxpayer to avoid the extended limitation period and the imposition of penalties when GAAR is assessed with respect to a transaction.

Preventive disclosure must be made in prescribed form. The procedure will be essentially the same as for mandatory disclosures. In addition, making a preventive disclosure is not to be considered an admission or confession with respect to the application of GAAR.

Application date: Preventive disclosure

The preventive disclosure measures will apply to transactions carried out after October 14, 2009. However, for transactions carried out as part of a series of transactions that began in a taxation year or in a fiscal year ended before October 15, 2009, a preventive disclosure can be made by April 15, 2010 (i.e., six months after October 15, 2009).

Penalties When GAAR Applies

Apart from the penalty for late or non-disclosure with respect to mandatory disclosure situations, the measures outlined in the Information Bulletin will subject a taxpayer and a promoter of a transaction to which GAAR was found to apply to additional penalties. These additional penalties will not apply if the transaction was disclosed under either the mandatory or preventive disclosure rules, or if the taxpayer successfully establishes a due diligence defence. A promoter can also avail himself of the due diligence defence.

Taxpayers

The penalty for the taxpayer will be 25% of any additional tax (or any reduction of a tax refund) and of any other additional amount payable, under the *Taxation Act* that result from the application of GAAR.

Promoters

The promoter's penalty will be 12.5% of any fees received or receivable related to an avoidance transaction in respect of which a penalty applies to the taxpayer.

A promoter is defined as a person or partnership who:

- marketed or promoted the avoidance transaction, or otherwise encouraged its growth or the interest in it;
- received or will be entitled to receive consideration in respect of that marketing, promotion or encouragement (or is associated with or related to that person or partnership); and
- it is reasonable to conclude, had a substantial role in the marketing, promotion or encouragement.

Application date: Penalties when GAAR applies

The taxpayer and promoter penalties apply to transactions carried out after October 14, 2009, except for transactions carried out as part of a series of transactions that began

before October 15, 2009, and is completed before January 1, 2010.

Conclusion

The new measures will have an important effect on entities that are taxable in Quebec and their advisers. Among other things, taxpayers with Quebec operations may face increased compliance burdens in order to mitigate exposure to extended limitation periods and possible penalties. In addition, assessing exposure for additional Quebec tax and/or penalties will become a significant aspect of due diligence and establishment of appropriate tax provisions for financial statement purposes.

Further Information

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