

Summer 2023 Tax Updates

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Key Updates

- ▶ **Legislation**
 - Draft legislative proposals released (Aug 4, 2023)
- ▶ **Joint Committee Submission - CAE**
- ▶ **Cases & CRA Rulings**
- ▶ **CRA Guidance & Announcements**
 - Updated guidance on CRS & FATCA
 - Updated guidance on reportable & notifiable transactions

Definitions

- ▶ **Alternative minimum tax (“AMT”)**
- ▶ **Canadian-controlled private corporation (“CCPC”)**
- ▶ **Common Reporting Standard (“CRS”)**
- ▶ **Critical mineral exploration tax credit (“CMETC”)**
- ▶ **Digital services tax (“DST”)**
- ▶ **Excessive interest and financing expenses limitation (“EIFEL”)**
- ▶ ***Excise Tax Act (Canada)* (“ETA”)**
- ▶ **First Home Savings Account (“FHSA”)**
- ▶ **Foreign Account Tax Compliance Act (“FATCA”)**
- ▶ **General anti-avoidance rule (“GAAR”)**
- ▶ ***Income Tax Act (Canada)* (“ITA”)**
- ▶ **Investment tax credit (“ITC”)**
- ▶ **Retirement compensation arrangement (“RCA”)**

Draft Legislation Release

Department of Finance

August 4, 2023

Draft Legislative Proposals (August 4, 2023)

▶ Budget 2023 & Other Proposals

> Carbon capture, utilization and storage ITC (section 127.44 of the ITA)

- Refundable ITC starting at 60% credit for investments in qualified carbon capture equipment using direct ambient air; 50% credit for other capture equipment; 37.5% for qualified carbon transportation, storage or use; British Columbia added to designated jurisdictions; validation of concrete storage requirements by accredited third party; rules for qualified dual-use equipment and refurbishment costs; credit rate reduced by 10% where labour requirements are not met; reduced by 50% after 2030 and before 2041 and fully phased out by 2040

> Clean technology ITC (section 127.45 of the ITA)

- Refundable ITC starting at 30% credit for investments in qualified clean technology equipment; credit rate reduced by 10% where labour requirements are not met; reduced by 50% in 2034 and fully phased out by 2035

> Labour requirements for clean energy ITCs (section 127.46 of the ITA)

- Prevailing wage requirements and apprenticeship requirements; ITC rate reduced by 10% where labour requirements not met

Draft Legislative Proposals (August 4, 2023)

▶ Budget 2023 & Other Proposals

> Lithium from brines eligible for CMETC and flow-through share treatment (subsection 248(1) of the ITA)

- New qualification as a “mineral resource” as defined in subsection 248(1) of the ITA for purposes of the CMETC and eligibility for flow-through share deductions

> Alternative minimum tax (sections 127.51 and 127.52 of the ITA)

- Rate increase from 15% to 20.5%; increase to capital gains inclusion rate from 80% to 100% and decrease from 80% to 50% for allowable business investment losses; increase to basic exemption amount; removal of exception for capital gains on donated property to qualified donees (100% of gains rather than nil are included in AMT base, except for 30% inclusion rate on donations of publicly listed securities); disallowance for certain deductions, non-capital loss and capital loss carryforwards and tax credits

> General anti-avoidance rule (section 245 of the ITA)

- Introduction of a preamble; change to the avoidance transaction standard; introduction of an economic substance rule; introduction of a penalty; applicable to transactions that occur on or after January 1, 2024

Draft Legislative Proposals (August 4, 2023)

▶ Budget 2023 & Other Proposals

- **Excessive interest and financing expenses limitation (sections 18.2 and 18.21 of the ITA)**
 - Modifications to previous EIFEL proposals (including new filing requirements, changes affecting definitions of adjusted taxable income and interest and financing revenues, election for use of simplified calculation for pre-regime non-capital loss carryforwards, add-backs for certain ITCs and government assistance, broadening exemptions, group ratio election, section 216 filers, FAPI / FAPL, etc.)
- **RCA trust rules (various amendments)**
 - Various amendments to the ITA regarding applicability of refundable tax and eligible employer election
- **Tax on share buybacks by Canadian public corporations (sections 183.3 and 183.4 of Part II.2 of the ITA)**
 - 2% tax on net value of share repurchases by “covered entities”, which includes an entity that, at any time in the taxation year, has issued and outstanding equity listed on a designated stock exchange; conditional exceptions for substantive debt (i.e., debt-like preferred shares and units), reorganization or acquisition transactions (i.e., redemption, acquisition or cancelation of equity), and equity repurchases of less than \$1,000,000 in a taxation year

Draft Legislative Proposals (August 4, 2023)

▶ **Budget 2023 & Other Proposals**

> **Intergenerational share transfers**

- Restrictive measures to ensure exception to anti-surplus stripping rules in section 84.1 of the ITA applies only to genuine intergenerational business transfers

> **Employee ownership trusts**

- New rules to facilitate use of employee ownership trusts to hold shares of CCPCs for the benefit of employees

> **Treatment of credit unions**

- Changes to revenue test for purposes of the ITA and ETA to align with commercial realities

> **Registered plans**

- Various amendments to ITA in relation to RRIFs, RRSPs, RPPs and FHSAs

> **Stock Option Amendments**

- Corporation with control of over 50% of Mutual Fund Trust Units is non-arm's length (effective for rights after 2004 under agreements after 2002; shares acquired on surrender of stock options subject to 7(1.31) ordering rule (January 1, 2023 effective date)

Draft Legislative Proposals (August 4, 2023)

▶ International Tax Measures

> **New *Global Minimum Tax Act* to implement OECD Pillar Two**

- To implement a global minimum tax in Canada under Pillar Two, a new *Global Minimum Tax Act* will contain an income inclusion rule, a domestic minimum top-up tax and a placeholder for undertaxed profits rule

> **Domestic digital services tax as backstop to OECD Pillar One**

- Implementation of a DST in Canada in the absence of a multilateral convention to allocate taxing rights between countries under Pillar One; effective January 1, 2024 (with retroactive effect to January 1, 2022) if OECD's Pillar One is not in force

Draft Legislative Proposals (August 4, 2023)

- ▶ **Previous tax proposals not included in August 4, 2023 release**
 - **Clean hydrogen ITC & clean electricity ITC**
 - Proposed in 2023 Budget
 - **Substantive CCPC measures**
 - Proposed in 2022 Budget; draft legislation proposals released August 9, 2022
 - **Hybrid mismatch proposals**
 - Proposed in 2021 Budget; draft legislation proposals released April 29, 2022

Bill C-56 (September 21, 2023)

▶ Presently at Second Reading in the House

- ▶ Enhanced 100% GST rental rebate for qualifying purpose-built rental projects (four private apartments or 10 private suites, 90% designated long-term rental)
- ▶ Increase of present 36% GST rental rebate charged on first sale of rental unit. \$350,000 - \$450,000 reduction limitation removed for qualifying properties
- ▶ Changes only apply to federal portion of GST (HST portion above 5% not affected by the rebate changes)

Joint Committee Submission Regarding *CAE*



“ordinary commercial arrangements”

- ▶ On August 11, 2023, the Joint Committee on Taxation published its submission requesting the ITA either be amended to exclude unconditionally repayable loans issued by governments or quasi-governmental entities from constituting “government assistance” for the purposes of paragraph 12(1)(x) and section 127(9), or that the Department of Finance issue a comfort letter confirming the same
- ▶ The concerns raised were that the Tax Court of Canada’s emphasis on an “ordinary commercial arrangement” being an arrangement which maintained a market interest rate, maintaining customary commercial covenants and furthering the commercial interests of the lender
- ▶ Of particular concern was the deviation of this decision from the CRA’s historical position in IT-273R2 para. 16, and the public interest policy purposes driving various governmental and crown corporation investment decisions and policies, which necessarily would not further their commercial interest

Cases & CRA Rulings

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Cases

▶ ***Federation of Law Societies Section 7 and 8 Charter Challenge***

- ▶ On September 11, 2023 the Federation of Law Societies filed a charter challenge in the BCSC
- ▶ Challenge under Charter Sections 7 and 8 that the mandatory reporting obligations in respect of reportable and notifiable transactions infringed Canadians' rights in respect of solicitor-client privilege and the protection of clients' clause realized in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada) (Attorney General) v Federation of Law Societies of Canada*, 2015
- ▶ The Attorney General has agreed to delay solicitors' reporting requirement until the later of October 20, 2023 (hearing date) and the date a decision on the interim injunction in respect of the effect of the provisions is granted
- ▶ Clients and non-lawyer advisors remain subject to the new mandatory reporting rules and should be prepared to file

Cases

- ▶ ***Canada (AG) v 18335898 (Whitecap Energy Inc)*, 2023 ABKB 357**
 - Held: AG can revive a dissolved corporation for purpose of making a section 160 assessment of the shareholder

- ▶ ***Caudreau v The King*, 2023 CCI 115**
 - Held: Vendor required to produce the tax-planning memo of purchaser's accountant (shared with vendor and his advisors) in relation to an assessment under subsection 84(2) regarding a hybrid sale transaction due to lack of accountant-client privilege

- ▶ ***Greer v The King*, 2023 TCC 100**
 - Held: Corporate law principles applied in the face of testimony of taxpayer that single share noted in shareholder registry remained outstanding, generating approx. \$2.4 M shareholder benefit in respect of property transfers from company without consideration

CRA Rulings & Interpretations

- ▶ **Ruling 2022-0954271E5 (July 5, 2023)**
 - Details around CRA considerations on record retention of corporations under paragraph 230(4)(a) and paragraph 230(4)(b) in respect of permanent and non-permanent books & records

- ▶ **Ruling 2021-0886441E5 (June 7, 2023)**
 - Shares obtained on exercise of section 7 compliant RSUs and subsequently disposed of may be subject to subsection 7(1.31) ordering rules

- ▶ **Ruling 2019-0813761E5 (June 7, 2023)**
 - Specified renewable energy technologies affixed to land are considered to be taxable Canadian property pursuant to paragraphs (a) and/or (b) of the definition of “taxable Canadian property” pursuant to case law interpretation (*Stack v T.Eaton Co*; *Royal Bank of Canada v Maple Ridge Farmers Market Ltd.*; *859587 Ontario Ltd. v Starmark Property Management Ltd.*)

CRA Rulings & Interpretations

▶ Ruling 2019-0800191R3 (August 10, 2023)

- Canadian subsidiary providing computer and admin/marketing support services to its non-resident parent would not cause the parent to carry on business in Canada

▶ GST/HST Ruling 244917 (August 8, 2023)

- Joint tenants of a newly constructed residence are each responsible for GST/HST on 100% of the property's FMV, based on common law principles that each joint tenant is considered to own the entire property

▶ New GST/HST Memorandum 14-8 Closely Related Canadian Partnerships and Corporations for Purposes of Section 156 (July 23, 2023)

- Memorandum published regarding when Canadian partnerships and corporations will be considered to be closely related to each other for purposes of ETA section 156 (nil consideration) election. Limited Partners will not, without sufficient ownership of general partners, qualify for purposes of section 156 election due to lack of control of partnership affairs

CRA Guidance & Announcements



CRA Guidance & Announcements

▶ Updated guidance on CRS & FATCA

- Interim treatment of FHSAs while under consideration (reporting not required under CRS or FATCA at this time); updated reporting obligations for financial institutions

▶ Mandatory electronic filing thresholds

- Businesses filing 6 or more information returns must file electronically

▶ Updated guidance on mandatory disclosure rules

- Three hallmarks for determining whether a transaction is reportable
- Limitation of liability clause in professional engagement letter would normally not trigger a reportable transaction hallmark, provided the purpose is to generally limit the liability for negligence (i.e., it is related to professional indemnity insurance)
- Prescribed form for reportable & notifiable transactions (Form RC312)
- Prescribed form for reportable uncertain tax treatments (Form RC3133)

Questions & Considerations

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**For more
information**

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