Bill C-47: Mandatory tax disclosure requirements for taxpayers, promoters and advisors

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Bill C-47, *An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023* (Bill C-47), received royal assent on June 22, 2023. Bill C-47 includes a major expansion of the mandatory disclosure rules for "reportable transactions" and the introduction of disclosure requirements for "notifiable transactions".

These rules require reporting to the Canada Revenue Agency (CRA) of the reportable transaction within 90 days after the earlier of the date that the taxpayer is contractually obligated to enter the transaction and the date that the taxpayer enters into the transaction and are applicable to transactions entered into after June 22, 2023. The rules are intended to provide the CRA with information to respond to tax risks, but will impose onerous administrative, analysis and reporting requirements on taxpayers, promoters and advisors.

Reportable transactions

Reporting obligations exist in respect of "reportable transactions". There are two elements that encompass a "reportable transaction": (1) there must be an "avoidance transaction"; and (2) the transaction must include one of three particular hallmarks As described in more detail below, the three hallmarks are broadly categorized as:

1. Contingent fees
2. Confidential protection
3. Contractual protection

An "avoidance transaction" is defined as a transaction if it may reasonably be considered that one of the main purposes of the transaction, or of a series of transactions of which the transaction is a part, is to obtain a tax benefit. The definition of "tax benefit" is quite broad and includes any reduction, avoidance or deferral of tax, an increase in a tax refund and the preservation or creation of a tax account for use at a later time.

For the purposes of these rules, an “advisor” includes any person who has provided assistance or advice with respect to a transaction. A “promoter” includes a person who is promoting or selling a plan, scheme or arrangement in respect of a transaction.

Hallmarks

Contingent fees

The contingency fee hallmark is applicable where an advisor or promoter has an entitlement to a fee (i) based on the amount of a tax benefit, (ii) contingent on obtaining a tax benefit or (iii) based on the number of persons participating in the type of transaction.

The explanatory notes and CRA guidance have confirmed that the following items (among others) are **not** sufficient, in and of themselves, to give rise to a reporting obligation under this hallmark:

- “Value billing” by professionals where a fee is based on value criteria other than the value of tax benefits, as well as fees based on an annual income tax return or preparation and filing of a certain number of election forms.
- Standard fees collected by financial institutions for the provision of ordinary financial accounts (the CRA has indicated acceptance of specific items such as a normal per-transaction charge for each security trade in the context of a year-end tax-loss selling program).
- A fee for the claiming of the scientific research and experimental development (SR&ED) tax credits.

Taxpayers and their advisors should consider the reportable transaction rules any time the fees charged are based on a contingent element or appear outside of ordinary commercial practices. Critical thinking will need to be applied in this context, as many innocuous situations involving alternative fee arrangements may be caught by the rules, despite the various CRA administrative exceptions.

Confidential protection

The confidential protection hallmark is applicable where an advisor or promoter obtains "confidential protection" in respect of the tax treatment of a transaction from:

i. In the case of an advisor, a person to whom the advisor has provided assistance or advice in respect of the transaction.
ii. In the case of a promoter, from a person to whom an arrangement, plan or scheme has been sold. “Confidential protection” is defined as anything prohibiting disclosure of the details or structure of a transaction that provides confidentiality.

A typical example of confidential protection would be a non-disclosure agreement. Fortunately, the CRA has confirmed that there should be no reporting requirement for the mere protection of trade secrets that do not relate to tax. However, care should be exercised where a transaction might have tax implications for the applicable party, such as structuring in the context of a purchase and sale transaction or an internal reorganization.

Taxpayers, advisors, and promoters should revisit their non-disclosure agreements, engagement letters and other similar agreements, having regard to these rules.

Contractual protection

The contractual protection hallmark will be met where the taxpayer, a person who entered into the transaction on behalf of the taxpayer, or an advisor or promoter obtains "contractual protection" in respect of the transaction. "Contractual protection" includes any form of insurance or protection that

i. Protects a person against the failure of the transaction to obtain a tax benefit or
ii. Reimburses a person for any fees, expenses, taxes, interest, penalties or similar amounts incurred in the course of a dispute relating to a tax benefit realized from the transaction.

A typical example of contractual protection would be an indemnity, contract or guarantee that limits a person's loss. The CRA has confirmed that the following items should generally not be included in this hallmark.

- Normal professional liability insurance of a tax practitioner.
- Standard representations, warranties and guarantees between a vendor and purchaser, including insurance policies, obtained in the ordinary commercial context of M&A transactions to protect a purchaser from pre-sale liabilities (including tax liabilities).
- Contractual protection in the form of insurance that is integral to an agreement between persons acting at arm's length for the sale of a business where it is reasonable to conclude that the insurance protection is intended to ensure that the purchase price paid under the agreement takes into account any liabilities of the business immediately prior to the sale and the insurance is obtained primarily for purposes other than to obtain a tax benefit from the transaction or series.

Unfortunately, the CRA has yet to provide guidance as to the contractual protection found in many engagement letters of public accountants as well as indemnity clauses found in many trust deeds.

In any event, taxpayers and their advisors should consider the reportable transaction rules in the context of any indemnity or other contractual protections. Even for relatively innocuous transactions, taxpayers should ensure that a legislative or administrative exception applies.

Who must report?

The reporting obligations apply to:

1. All persons who receive or expect to receive a tax benefit from the transaction.
2. Persons who enter into a transaction to provide such a tax benefit to another person.
3. Advisors and promoters in respect of the transaction who either (i) receive fees that are caught by the fee hallmark or (ii) receive fees in respect of contractual

protection (e.g. receiving a fee for providing an indemnity or other downside protection).

Filings

CRA has released Form RC312, which must be filed no later than 90 days from the earlier that the taxpayer is contractually obligated to enter the transaction and the time the taxpayer enters into the transaction.

This form includes the requirement for a detailed description of all parties, the facts and the tax consequences of the transaction. Each party relevant to a transaction must complete its own reporting; however, individual employees and partners will be relieved of the filing obligation if a filing is completed by the relevant employer or partnership.

Notifiable transactions

Bill C-47 also introduced a requirement to file a return for a new category of transactions; namely, “notifiable transactions”. These are specific transactions designated by the Minister of National Revenue with the concurrence of the Minister of Finance, which the CRA has advised will be listed on a CRA web page once finally determined by the government. While some sample transactions were previously identified, none have been formally designated as of the date hereof.

In addition to any transactions identified by the CRA, a transaction which is the same as, or substantially similar to, any such transaction will also be a notifiable transaction. “Substantially similar” includes a transaction or series that leads to the same or similar “tax consequences”, and it is either factually similar or based on the same or similar tax strategy. The CRA has indicated that the definition of “substantially similar” is to be broadly construed in favour of disclosure.

Who must report?

The reporting obligations apply to:

1. All persons who receive or expect to receive a tax benefit from the transaction.
2. Persons who enter into a transaction to provide such a tax benefit to another person.
3. Advisors and promoters in respect of the transaction.

The definition of advisor is particularly broad: each person who provides, directly or indirectly in any manner whatsoever, any assistance or advice with respect to creating, developing, planning, organizing or implementing the notifiable transaction, to another person (including any person who enters into the notifiable transaction for the benefit of another person). This could include, for example, investment advisors, brokers, agents, accountants, lawyers and various other advisors on a transaction.

Unlike the reportable transaction rules, an advisor or promoter will have a reporting obligation for notifiable transactions even if they are not entitled to a contingent fee or contractual protection.

Filings

CRA has released Form RC312, which must be filed no later than 90 days from the earlier of the date that the taxpayer is contractually obligated to enter the transaction and the date that the taxpayer enters into the transaction. This form includes the requirement for a detailed description of the parties, the facts and the tax consequences of the transaction. Each party relevant to a transaction must complete their own reporting; however, only one filing is required for each relevant employer or partnership.

Penalties

Significant penalties apply for a failure to report under these rules. For most taxpayers, the penalty is the greater of up to $25,000 ($500 per week) and 25 percent of the tax benefit. For corporate taxpayers with a carrying value of at least $50M, the penalty can be the greater of up to $100,000 ($2,000 per week) and 25 per cent of the tax benefit sought. These penalties are in addition to any tax, interest and penalties that may be payable in the event of a reassessment of the transaction itself by the CRA.

For advisors or promoters, the penalties are the total of the (i) fees charged; (ii) $10,000; and (iii) $1,000 for each day that reporting has not been done to a maximum of $100,000.

The limitation period for reassessment of avoidance transactions is suspended until the report is filed, and no limitation period applies for failure to report (e.g., penalties under the reporting rules can be assessed at any time).

There is generally a due diligence defence available if the person has exercised the degree of care, diligence and skill to prevent the failure to file that a reasonably prudent person would have exercised in comparable circumstances. This defence is not available to advisors or promoters in respect of notifiable transactions and, instead, there is a “reasonable expectation to know” exception to the defence.

Solicitor-client privilege

Solicitor-client privilege is a quasi-constitutional right concerning oral or documentary communications passing between the client and the lawyer. Solicitor-client privilege is essential to the administration of justice, and the public’s confidence that matters communicated between a lawyer and client be held in confidence. The importance of solicitor-client privilege, not only to the client who claims it, but to society, has been consistently recognized by the Supreme Court of Canada (see, for example, *R. v. McClure*, [2001] 1 SCR 445, at 32-33).

Moreover, Canadian case law in tax-related matters has repeatedly recognized that solicitor-client privilege is not necessarily waived in situations where third parties who are not lawyers or legal professionals are involved in assisting a client to obtain legal advice. For example, communications between an accountant and a lawyer with respect to a common client may, in some cases, be protected by solicitor-client privilege.

Although the legislation now confirms that the reporting requirements will not apply if it is reasonable to believe that the information is covered by solicitor-client privilege, it does not exempt disclosure of non-privileged information, including, for example, the resulting legal agreements. It also requires an assessment of whether it is reasonable to believe that the information is covered by solicitor-client privilege. As a result, privilege is an important issue to consider where there are various parties to a transaction, as privilege can be lost through communications to and amongst non-lawyers. Given that some or all parties may have reporting obligations, advice should be sought in connection with how to best manage information, and to identify and preserve privilege in these situations.

Conclusions

The new reportable transaction and notifiable transaction rules are extremely broad and impose onerous requirements on taxpayers, promoters and advisors. The rules still contain several gaps, which will cause them to apply in the context of ordinary commercial transactions, even where routine tax planning is involved. Accordingly, advice should be sought on these rules where there is any form of contingent fee, confidential protection or contractual protection whatsoever, or where there is a notifiable transaction or similar transaction.

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