Budget 2021: New draft proposals on notifiable transactions

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In order to enhance Canada’s mandatory disclosure rules, Budget 2021 announced a public consultation process on proposals, including a new requirement to report notifiable transactions. With the concurrence of the Minister of Finance, the Minister of National Revenue now has the authority to designate a transactions and series of transactions as requiring disclosure by taxpayers, advisers, promoters, and certain other persons. The proposals generally apply to taxation years, and transactions occurring in taxation years, that begin after 2021. These proposed amendments are intended to provide information to the Canada Revenue Agency (CRA) and would not change the tax treatment of a transaction.

Notifiable transactions

A taxpayer who enters into a notifiable transaction, or a transaction that is *substantially similar* to a notifiable transaction would be required to report the transaction in prescribed form to the CRA within 45 days of the earlier of:

- The day the taxpayer (or a person who entered into the transaction for the benefit of the taxpayer) becomes contractually obligated to enter into the transaction; and
- The day the taxpayer (or a person who entered into the transaction for the benefit of the taxpayer) enters into the transaction.

For these purposes, any transaction or series of transactions that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or a similar tax strategy is considered substantially similar. This is to be interpreted broadly in favor of disclosure.

The taxpayer, another person who enters into such a transaction in order to procure a tax benefit for the taxpayer, a promoter or advisor who offers a scheme that would be a notifiable transaction (if implemented), as well as a person who does not deal at arm's length with the promoter or advisor and who is entitled to receive a fee in respect of the transaction would all be required to report the transaction.

Six categories of notifiable transaction

Notifiable transaction would mainly fall into six categories:

- Manipulation of Canadian-controlled private corporation (CCPC) status to avoid anti-deferral rules applicable to investment income;
- Straddle loss creation transactions using a partnership;
- Avoidance of deemed disposition of trust property;
- Manipulation of bankrupt status to reduce a forgiven amount in respect of a commercial ;
- Obligation reliance on purpose tests in the loss restriction rules (section 256.1 of the ITA) to avoid a deemed acquisition of control; or
- Back-to-back arrangements intended to circumvent the thin capitalization rules and Part XIII withholding tax.

These notifiable transactions disclosure rules are in addition to the existing transactions rules determined by Revenu Québec (RQ) in 2021. Two of its operations overlap, namely, the avoidance of deemed disposal of trust property and tax attribute trading, meaning that it will be necessary to make two disclosures for these same transactions (*i.e.* one to RQ and one to CRA).

Takeaway

It will be important to remain aware of these new rules, as failure to report a notifiable transaction could result in a penalty of $500 per week for each failure to report a notifiable transaction, up to the greater of $25,000 and 25 per cent of the tax benefit; or for corporations that have assets that have a total carrying value of $50 million or more, $2,000 per week, up to the greater of $100,000 and 25 per cent of the tax benefit. Furthermore, the proposals provide that the normal reassessment period would not commence in respect of the transaction until the taxpayer has complied with the reporting requirement. As a result, if a taxpayer does not comply with a mandatory disclosure reporting requirement for a taxation year in respect of a transaction, a reassessment of the year in respect of the transaction would not become statute-barred.

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