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What are Revenu Québec's new tools to fight against “aggressive” tax planning?

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On May 17, 2019, the Ministère des Finances du Québec announced new anti-avoidance tax measures in its Information Bulletin 2019-5 (the “Bulletin”) that are in line with today’s tightening of the tax environment and the fight against tax planning deemed to be aggressive.

The measures announced on May 17, 2019, essentially target three types of operations:

1. sham transactions;
2. nominee agreements;
3. mandatory disclosure of “prescribed transactions.”

Failure to comply with the new measures could have consequences not only for taxpayers having carried out such transactions, but also for various persons associated with or related to said taxpayers. **These consequences range from substantial penalties to a ban on doing business with the Government of Québec**.

The measures also provide for penalties, and, in the case of sham transactions, bans affecting advisers and promoters of such operations.

This initiative began on October 15, 2009[1] and the new measures set out in the Bulletin supplement those announced on November 10, 2017[2], which included, among other things, penalties imposed on taxpayers[3] and promoters of transactions[4] when an assessment is issued based on the General Anti-Avoidance Rule (“GAAR”). Most of these measures came into force on February 1, 2018[5].

The new measures

Sham transactions

The concept of “sham” has been defined as a transaction or a complex series of transactions conducted with an element of deceit so as to create an illusion calculated to lead the tax authorities away from the taxpayer or to confound the tax authorities with respect to the true nature and legal consequences of the transaction(s)[6].

As announced in the Bulletin, four new measures will apply to assessments, reassessments or additional assessments (an “Assessment”). As a result, taxpayers who are party to a transaction or series of transactions involving a sham could be subject to one or more of the following measures:

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1. **Longer limitation period to issue a reassessment**: The Agence du Revenu du Québec (“Revenu Québec”) will have an additional three years to issue a reassessment for a transaction involving a sham. The limitation period will now be six or seven years rather than three or four years. This measure applies not only to the taxpayer, but also to taxpayers related to or associated with said taxpayer. For example, this measure applies to a taxpayer who is a member of a partnership that is itself party to a sham transaction[7].
2. **More severe penalties for the taxpayer, promoter and adviser**:
    1. For a taxpayer having participated in a sham transaction, the new measures introduce a penalty equal to the greater of $25,000 or 50% of the tax benefit generated by the sham transaction;
    2. For the Promoter or the Adviser having participated in a sham transaction that will be subject to an Assessment, the penalty will be equal to 100% of the fees paid for said transaction.

    For the purposes of the new measures and in accordance with section 1079.9 of the Taxation Act, a person is referred to as a “Promoter” if (i) the person or partnership commercializes the transaction or series of transactions, promotes it or otherwise supports its development or the interest it generates; (ii) the person or partnership receives or is entitled to receive, directly or indirectly, a consideration for the commercialization, promotion or support, or another person or partnership related to, or associated with, the person or partnership receives or is entitled to so receive such a consideration; and; (iii) it is reasonable to consider that the person or partnership assumes an important role in the commercialization, promotion or support.

    In addition, in accordance with section 1079.8.1 of the *Taxation Act*, an “Adviser” in respect of a transaction means a person or partnership that provides help, assistance or advice regarding the design or implementation of the transaction, or that commercializes or promotes it.

    In-house and independent tax planners are thus covered by these definitions and are subject to the disclosure obligations and penalties listed below.
3. **Suspended limitation period**: The limitation period otherwise applicable will be suspended to allow for the issuance of a reassessment to determine the tax consequences arising from a transaction or series of transactions involving a sham when Revenu Québec makes a formal demand for information concerning unnamed persons.
These three measures came into force on May 17, 2019, except for a transaction that is part of a series of transactions that began before said date and will be completed before August 1, 2019.
4. **Registration in the Register of Enterprises Ineligible for Public Contracts (“RENA”) upon a final assessment**: A taxpayer who is the subject of a final assessment in respect of a sham transaction or a promoter or adviser on whom a penalty has been imposed on the same basis will be registered in the RENA.
The duration of this ban and the possibility of appealing this decision are not mentioned in the Bulletin and remain unclear. Normally, a five-year ban could apply.

    In order to obtain the authorization of the “Autorité des marchés publics” to bid for public contracts or subcontracts, the companies concerned will need to obtain a certificate from Revenu Québec confirming that the taxpayer in question has not been the subject of a GAAR-based final assessment nor participated in a sham transaction, in addition to the criteria that already apply, namely that appropriate tax returns and documents have been duly filed and that the taxpayer is not indebted to Revenu Québec.
    The same will apply to the Promoter or Adviser of the transaction that led to the issuance of the final assessment.
    The Bulletin announces that these taxpayers will be included on the RENA list.

    As of the date of this bulletin, this measure has not yet been adopted by the National Assembly.

Nominees

A nominee agreement is considered to be a valid agreement by which a person is mandated to act in the place of, and in the name of, another person. This type of agreement is often used in real estate transactions.

The Bulletin states that the tax legislation will be amended to take into account three new measures:

1. **Mandatory disclosure**: From now on, any nominee agreement must be disclosed to Revenu Québec within **90 days** of its conclusion, using a prescribed form[8]. No such form is currently available, this does not preclude the taxpayer from providing the information listed in the Bulletin in order to comply with this new measure and avoid any penalties.
2. **Penalty for non-disclosure**: Failure to comply with the obligation will result in a penalty of **up to $5,000**. The parties to the nominee agreement will be jointly and severally liable for said amount.
3. **Suspended prescription period**: In cases where the information return disclosing the nominee agreement is not

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filed within the prescribed time limit, the prescription period otherwise applicable will be suspended with respect to the tax consequences arising from a transaction or series of transactions that occurred that year and that are part of the nominee agreement.

It is important to note that the disclosure made by either party to the nominee agreement will be deemed to also have been made by the other party.

These new measures apply to all nominee agreements entered into **on or after May 17, 2019**. These measures also apply to any nominee agreement entered into before May 17, 2019, for which the tax consequences of transactions relating thereto persist after said date. In these cases, the deadline for disclosure to Revenu Québec is September 16, 2019.

Mandatory disclosure and “prescribed transactions”

In 2009 and 2015, Revenu Québec implemented measures to counter abusive tax planning that included a mandatory disclosure mechanism for certain transactions deemed to be “aggressive.” The Bulletin states that tax legislation will be amended to extend the scope of this mandatory disclosure mechanism to transactions or series of transactions that will be called “prescribed transactions.”

A taxpayer who carries out a prescribed transaction or who is a member of a partnership carrying out a prescribed transaction will be required to file an information return for all transactions that, for a fiscal or taxation year, **result in a tax benefit of $25,000 or more or have an impact on income of $100,000 or more.**

A prescribed transaction will be a transaction or series of transactions whose form and purpose are significantly similar, but not necessarily identical, to those described by Revenu Québec on a list yet to be published.

As of the date of this bulletin, said list has not yet been published. Revenu Québec will publish a list of these transactions at such time as it deems appropriate. This measure is not in effect at this time.

In addition, an Adviser or Promoter commercializing a prescribed transaction that requires little or no modifications to adapt it to different taxpayers is required to disclose to Revenu Québec, using the prescribed form, the facts relating to the prescribed transaction and any other information provided for in the form.

Penalties: :

1. A taxpayer who fails to file the aforementioned information return will incur a penalty of up to **$100,000**. the taxpayer who fails to comply with this obligation to disclose a prescribed transaction will incur a **penalty equal to 50% of the tax benefit obtained** as a result of the transaction in question. In addition, the prescription period applicable to a taxation year covered by this information return will be extended in accordance with the current provisions of the *Taxation Act*;
2. An Adviser or Promoter who fails to file the aforementioned information return will incur a penalty of **up to $100,000**. Moreover, the Adviser or Promoter who fails to comply with this disclosure obligation will incur **a penalty equal to 100% of his or her fees** with respect to the various taxpayers to whom he or she has commercialized or promoted the undisclosed prescribed transaction.

These measures will apply to all prescribed transactions published by Revenu Québec as of **May 17, 2019**.

For more details, we invite you to refer to the information bulletin 2019-5.

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1. Information Bulletin 2009-5.
2. Tax Fairness Action Plan and Information Bulletin 2017-10.
3. Penalty increased from 25% to 50% of the amount assessed.
4. Penalty increased from 12.5% to 100% of the fees paid to the promoter.
5. A ban on contracting with the State when the taxpayer is subject to a final GAAR-based assessment was also provided for, but this measure has not yet been adopted by the National Assembly. This measure would also affect the promoter.
6. *Cameco Corporation v. The Queen*, 2018 TCC 195.
7. According to the Bulletin, this measure applies to a taxpayer who is party to a sham transaction; a taxpayer who is a member of a partnership that is party to a sham transaction; a corporation associated with the taxpayer or the partnership that is party to a sham transaction at the time that it is carried out; a corporation associated with a taxpayer who is a member of a partnership that is party to a sham transaction at the time that it is carried out; a person related to the taxpayer or the partnership that is party to a sham transaction at the time that it is carried out; a person related to a taxpayer who is a member of a partnership that is party to a sham transaction at the time that it is carried out.
8. The taxpayer must disclose the identity of the parties to the nominee agreement; a full description of the facts relating to the transaction or series of transactions to which the nominee agreement relates; the identity of any person or entity on which such a transaction or series of transactions has tax consequences; and any other information requested in the prescribed form.

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