

Fighting Aggressive Tax Planning

This information bulletin provides a detailed description of the application details of the measures announced to more effectively fight against aggressive tax planning schemes. These four measures consist, briefly, of:

- compulsory disclosure of arrangements resulting in a tax benefit, that are covered by a confidentiality agreement between the taxpayer and his advisor or for which the remuneration of the advisor is conditional on or proportional to their success;
- a clarification to the notion of bona fide purpose for the purposes of the general anti-avoidance rule (GAAR), as a harmonization measure with the GAARs of other provinces;
- a three-year extension of the period of limitation where the GAAR applies, and the possibility of avoiding such extension through disclosure;
- a regime of penalties applicable to taxpayers and promoters where the GAAR applies, which can be avoided through disclosure.

For information concerning these measures, anyone interested can contact the Secteur du droit fiscal et de la fiscalité at 418 691-2236.

The French and English versions of this bulletin are available on the ministère des Finances website at: www.finances.gouv.qc.ca

Paper copies are also available, on request, from the Direction des communications, at 418 528-9323.

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1. BACKGROUND

The phenomenon of aggressive tax planning (ATP) is of major concern to Québec tax authorities. ATP threatens Québec's tax base and attacks the integrity and fairness of the tax system. The revenue lost to the government because of ATP must sooner or later be collected from other Québec taxpayers, which violates the long-established principle that each must pay their fair share of taxes.

□ 2008-2009 budget: a Québec strategy to fight ATP

Starting from that observation, a two-level Québec strategy to fight ATP was announced in the 2008-2009 Budget Speech:¹ at the tax administrative level and at the fiscal policy level.

■ At the tax administrative level

At the level of the tax administration, additional financial resources of \$5.3 million per year, over three years, were granted to ministère du Revenu (Revenu Québec) to set up a specialized team to act against ATP schemes.

In this regard, the Direction principale de la lutte contre les planifications fiscales abusives is now an operational unit of Revenu Québec. Reporting directly to the Deputy Minister of Revenue, it is mandated to, in particular:

- coordinate activities concerning efforts to combat ATP schemes for the entire department;
- carry out risk analyses;
- develop new methods to detect ATP schemes and identify groups at risk;
- come up with strategies to curb ATP schemes that are identified;
- propose amendments that could be made to the legislation to effectively combat ATP.

■ At the fiscal policy level

At the fiscal policy level, it was announced that a green paper (working paper) would be released in the fall of 2008 to assess the legislative tools available to Québec's tax authorities to combat ATP schemes and propose legislative actions to better support the tax administration in this effort.

1 MINISTÈRE DES FINANCES DU QUÉBEC, 2009-2010 Budget — *Additional Information on the Budgetary Measures*, March 13, 2008, Section A, p. 149.

❑ Working paper on Aggressive Tax Planning

On January 30, 2009, the Minister of Finance released the working paper entitled “Aggressive Tax Planning”.²

Briefly, it describes the problem of ATP, the legislative tools available in Québec and those used by certain foreign jurisdictions to combat ATP. It also describes a variety of actions under consideration by Québec’s tax authorities to improve the tax administration’s tools for fighting ATP.

Interested persons had until April 1, 2009 to file a brief with the ministère des Finances.

❑ Results of the consultation

The briefs received were examined carefully. While many raised objections in principle regarding some of the measures under consideration – the introduction of penalties further to the application of the general anti-avoidance rule (GAAR) for example –, most acknowledged that the state must have the tools to ensure that everyone pays their fair share of taxes, so that public confidence in the tax system is maintained.

Moreover, all offered proposals to improve or adjust the actions under consideration. A considerable number of proposals were adopted.

Thus improved, the actions under consideration are indicative of an approach that takes into consideration the competitive North American environment, the Canadian tax context and the characteristics of Québec’s tax system. Drawing on practices implemented by other member countries of the Organization for Economic Cooperation and Development (OECD), these actions will bring Québec’s tax system in line with the growing trend among the most proactive tax administrations throughout the world in terms of integrity and efforts to curb tax avoidance.

2 MINISTÈRE DES FINANCES DU QUÉBEC, *Aggressive Tax Planning*, January 30, 2009.

2. MANDATORY DISCLOSURE MECHANISM

Some taxpayers develop aggressive tax planning schemes that correspond neither to the object nor to the spirit of the tax legislation, but nonetheless comply with the wording. It is then important that the tax administration quickly detect this type of planning to ensure compliance with both the object and the spirit of the tax legislation. However, it is difficult to achieve this alacrity in a self-assessment system.

Accordingly, to make ATP schemes less attractive, the tax legislation will be amended to reduce the interval between the time a taxpayer implements an ATP scheme and the time the scheme is identified by the tax administration.

To achieve this result, other tax jurisdictions have developed early disclosure rules to detect tax avoidance transactions at an early stage. For instance, in the United Kingdom, these rules seek in particular to detect the presence of a tax benefit in a hallmarked scheme and to determine whether such tax benefit is the main or one of the main benefits of the scheme, while in the United States, an approach targeting risks of tax avoidance based on circumstantial factors and listed transactions is emphasized.

2.1 Mandatory disclosure transactions

As mentioned in the working paper, the American approach, which identifies a risk of tax avoidance on the basis of circumstantial factors, appears to be particularly well adapted to Québec government policy which seeks to limit the complexity of the tax system and streamline its administrative rules.

As well, the circumstantial factors relating to a contractual relation between a taxpayer and his advisor help identify two categories of transactions that are likely to lead to tax avoidance, namely a confidential transaction and a transaction with conditional remuneration.

It will therefore be mandatory to disclose transactions belonging to either of these two categories.

Confidential transaction

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 83

“Would be subject to a disclosure requirement a confidential transaction, i.e. a transaction providing a tax benefit regarding which a taxpayer retained the services of an advisor, where the contract between the taxpayer and the advisor includes an undertaking of confidentiality by the taxpayer towards other persons or the tax administration in relation to the transaction.”

■ Consultation

Some participants argued that, to avoid over-disclosure of simple situations not justified by the tax impact, it would be appropriate to introduce a minimum monetary threshold for the targeted transactions. That way, only transactions that deserved to be examined by the tax administration would be disclosed.

In addition, it was pointed out that a clause limiting the liability of the consultant as to the use of his opinion by a third party should not be considered an undertaking of confidentiality.

■ Announced measure

The tax legislation will be amended so that, where a taxpayer, or partnership of which he is a member, carries out a transaction³ resulting, directly or indirectly, for a taxation year or for a fiscal year, as the case may be, either in a tax benefit of \$25 000 or more for the taxpayer, or in an impact on the income of the taxpayer or the partnership, as the case may be, of \$100 000 or more, where the taxpayer or the partnership of which he is a member retained the services of an advisor concerning such transaction and where the contract between the taxpayer and the advisor, or between the partnership and the advisor, as the case may be, includes, on the part of the taxpayer or of the partnership, an undertaking of confidentiality towards other persons or the tax administration in relation to the transaction, such transaction must be disclosed to Revenu Québec for the taxation year or for the fiscal year.

To that end, 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 or an increase in a tax refund or other amount under the Taxation Act, including the reduction, avoidance or deferral of the tax or other amount that would be payable under the Taxation Act were it not for a tax agreement, as well as the increase in a tax refund or other amount under the Taxation Act arising from a tax agreement.

For the purposes of this measure, where the contract with the advisor is entered into by a person associated with or related to the taxpayer or the partnership of which he is a member,⁴ on the date when the contract is concluded, the contract will be deemed to have been concluded by the taxpayer or the partnership of which he is a member. This will also hold for the undertaking of confidentiality, with the necessary adaptations.

3 In all measures announced, the expression “transaction” includes an arrangement or event. Furthermore, in the measures announced in section 2, the expression “transaction” includes a series of transactions.

4 To determine whether a person is associated with or related to a partnership, the partnership shall be considered a corporation all of whose shares with voting rights belong to the members of the partnership in proportion to what would be the allocation among them of the income or losses of the partnership had the fiscal year of the partnership ended on the date the contract is concluded.

In addition, for the purposes of this measure, the undertaking of confidentiality towards other persons will not include a clause designed to ensure that the advisor's professional liability exists only towards his client and according to which a third party may not, for its own purposes, rely on the opinion given by the advisor to his client.

❑ Transaction with conditional remuneration

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“[I]n addition, a transaction would be subject to a disclosure requirement if it is a transaction regarding which the remuneration of the advisor takes any of the following forms:

- it is conditional, in whole or in part, on obtaining a tax benefit resulting from the transaction or it is established, in whole or in part, on the basis of such tax benefit;
- it is refundable, in whole or in part, to the taxpayer if the expected tax benefit from the transaction does not materialize;
- it is acquired, in whole or in part, to the advisor only after the expiry of the period of limitation applicable to the taxation year or the taxation years during which the transaction takes place.”

■ Consultation

As in the case of confidential transactions, some contributors argued that, to avoid over-disclosure of simple situations not justified by the tax impact, it would be appropriate to introduce a minimum monetary threshold for conditional remuneration transactions.

Some also mentioned the importance of properly defining conditional remuneration transactions, so that consumption tax recovery reviews, claims for tax credits for scientific research and experimental development (R&D), the analysis and review of interest pursuant to tax assessments and reviews of tax returns after they are filed are not included.

Lastly, others mentioned the need to comply with the codes of ethics of professionals that, like the code of ethics of lawyers,⁵ stipulate that the professional must take many factors into account in setting his fees, including the result obtained.

5 R.S.Q., 1981, c. B-1, r.1, sec. 3.08.02.

■ Announced measure

The tax legislation will be amended so that a transaction carried out by a taxpayer or partnership of which he is a member and resulting, directly or indirectly, for a taxation year or for a fiscal year, as the case may be, either in a tax benefit of \$25 000 or more for the taxpayer, or in an impact on the income of the taxpayer or the partnership, as the case may be, of \$100 000 or more, must be disclosed to Revenu Québec, for the taxation year or for the fiscal year, where the remuneration of the advisor, regarding the transaction, is of any of the following forms:

- it is conditional, in whole or in part, on obtaining a tax benefit resulting from the transaction or it is established, in whole or in part, on the basis of such tax benefit;
- it is refundable, in any way whatsoever, in whole or in part, to the taxpayer if the expected tax benefit from the transaction does not materialize;
- it is acquired, in whole or in part, to the advisor only after the expiry of the period of limitation applicable to the taxation year or the taxation years during which the transaction takes place.

To that end, a tax benefit will be defined in the same way as for a confidential transaction. Consumption tax recovery reviews that do not result in a tax benefit, within the meaning of that definition, will therefore not be covered by the measure.

For the purposes of this measure, a conditional remuneration transaction will not include the following transactions: claims for tax credits, notably for R&D, the analysis and review of interest pursuant to tax assessments and reviews of tax returns after they are filed are not included. Neither will it include a transaction in regard of which an agreement was entered into with a professional and according to which the result obtained by the professional is one of many factors taken into consideration in setting the professional's remuneration, in accordance with a provision of his code of ethics.

□ Advisor regarding a transaction that must be disclosed

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“[Th]e expression “advisor”, regarding a transaction, would mean a person, including a partnership, who provides help, assistance or advice regarding the design or implementation of the transaction or who commercializes or promotes it.”

■ Consultation

Some are of the view that the wording of the expression “advisor”, regarding a transaction, is too broad in regards to the targeted objectives, and that only avoidance transactions, within the meaning of section 1079.11 of the Taxation Act, that result in an abuse should be targeted.

However, acting on such a suggestion would be equivalent to determining the application of the GAAR a priori, which is not desirable. Since disclosure is mandatory, its application conditions must remain as simple as possible, so that taxpayers have no difficulty deciding whether or not they are required to make disclosure.

Accordingly, no change will be made to the initially proposed definition of advisor for the purposes of the mandatory disclosure mechanism.

■ Announced measure

The tax legislation will be amended so that the expression “advisor”, regarding a mandatory disclosure transaction, means a person, including a partnership, who provides help, assistance or advice regarding the design or implementation of the transaction or who commercializes or promotes it.

2.2 Person required to make mandatory disclosure

It is important to determine the person who will be required to make mandatory disclosure.

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“The taxpayer would be the person required to make early disclosure.”

■ Consultation

To streamline the mandatory disclosure process in the case of a partnership, i.e. in the case of an entity that is not a taxpayer, some contributors suggested identifying a responsible partner who would be charged with filing the disclosure on behalf of all the partners.

■ Announced measure

The tax legislation will be amended so that the taxpayer who carried out a mandatory disclosure transaction, is the person required to disclose it to Revenu Québec.

In the case where a mandatory disclosure transaction is carried out by a limited partnership, the responsibility for disclosing it will lie with the general partner. Where a mandatory disclosure transaction is carried out by a partnership other than a limited partnership, the responsibility for disclosing it will lie with each member of the partnership. However, the disclosure made by one of the members, on behalf of all the members, will be deemed made by each of the members.

2.3 Transmission of information relating to the mandatory disclosure transaction

Disclosure of a transaction must be made to Revenu Québec using a prescribed form, under separate cover, by registered mail or electronically. The information provided must be sufficiently detailed to enable Revenu Québec to analyze the transaction and understand its tax consequences.

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“[Th]e taxpayer would have to send information, using a prescribed form, that is sufficiently detailed for the tax administration to be able to identify and analyze the transaction relating to the risky behaviour pattern.”

■ Consultation

Many contributors pointed out the importance of limiting the information required to the factual elements of a transaction and of not targeting the advice or other opinions given by tax advisors.

Others mentioned that the disclosure must not be likened to an admission or confession.

Lastly, some suggested implementing an acknowledgement of receipt mechanism to guarantee the compliance and acceptability of the disclosure.

■ Announced measure

Disclosure of a transaction will have to be made using a prescribed form sent within the deadline stipulated for that purpose, under separate cover, by registered mail or electronically, to the Direction principale de la lutte contre les planifications fiscales abusives of Revenu Québec, i.e. a division different than the one where taxpayers usually send their tax returns and forms.

The information that must be provided on the prescribed form, in relation to such transaction, must consist of a complete and detailed description of the facts – not advice or other opinions – relating to the transaction as well as a statement of the tax consequences resulting from the transaction. In addition, the description of the facts and tax consequences resulting from the transaction must be sufficiently detailed to enable analysis of the transaction and understanding of its resulting tax consequences.

For the purposes of the GAAR, the mandatory disclosure made by a person may at no time be linked to an admission or confession on his part as to the application of this rule to the disclosed transaction.

Moreover, the simple transmission of the prescribed form, under separate cover, by registered mail or electronically, will serve as acknowledgement of receipt.

Lastly, if, in the 120 days following transmission of the prescribed form, Revenu Québec does not communicate with the person who made the disclosure to obtain additional information in relation to the transaction and its tax consequences, the prescribed form will then be considered as having been sent within the required deadline and completed in the required form, i.e. containing sufficiently detailed information for Revenu Québec to be able to analyze the transaction and understand its tax consequences.

2.4 Consequences of failure to make mandatory disclosure within the required deadline

Failure to make mandatory disclosure within the required deadline will result in two consequences for the person of whom disclosure is required: imposition of a penalty and suspension of the period of limitation regarding the undisclosed transaction.

□ Required disclosure deadline

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“Early disclosure would have to be made within a deadline of 30 days after the transaction begins to be carried out.”

■ Consultation

Many participants mentioned that the deadline of 30 days after the transaction begins to be carried out was too short. Others noted that, at times, it could be difficult to say precisely when the transaction to be disclosed began to be carried out.

In this regard, a deadline falling on the tax return filing deadline or, in the case of a transaction carried out by a partnership, on the date when its members are required to file an information return or the date when they would be required to file had the Minister of Revenue not waived the requirement,⁶ would have the advantage of harmonizing the obligation to make disclosure with the due date of most of the obligations of the person required to make disclosure and, if applicable, of enabling the usual tax advisors of such person to be informed of the transaction and thus be in a position to advise him as to his disclosure obligation.

■ Announced measure

The tax legislation will be amended so that the deadline for making mandatory disclosure, regarding a transaction that must be disclosed, for a taxation year or a fiscal year, as the case may be, ends on the due date for filing the taxpayer's tax return for such year or, in the case of a transaction carried out by a partnership, on the date when its members are required to file an information return for such fiscal year or the date they would be required to file it had the Minister of Revenue not waived the requirement.

□ Penalties

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“A penalty, that would rise to a maximum amount established on the basis of the number of days late in filing the prescribed form for the disclosure, would be imposed. The minimum penalty would be \$10 000. It would rise by \$1 000 per day late, as of the second day late, to a maximum of \$100 000.”

■ Consultation

Some participants pointed out that the penalty under consideration was excessive, while others proposed implementing a graduated penalty, in particular for individuals.

6 For example, where a partnership has, throughout its fiscal year, no more than five members none of which was itself a partnership and its activities did not consist in investing in flow-through shares.

However, the amount of the penalty must act as a deterrent and show the importance the tax authorities place on satisfying the requirements. Moreover, since the penalty is for the non-filing of a document and not for an amount of tax evaded, there could be no graduation depending on the significance of the fault.

It is also appropriate to note that under the Act respecting the ministère du Revenu, the Minister of Revenue can waive, in whole or in part, a penalty stipulated by a tax law. He may also cancel, in whole or in part, a penalty payable under a tax law.

■ **Announced measure**

The tax legislation will be amended to stipulate that a person who omits to disclose, within the stipulated deadline, a mandatory disclosure transaction, will incur a penalty of \$10 000 that will rise by \$1 000 per day late, as of the second day late, to a maximum of \$100 000.

□ **Limitation**

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.1.4 - Actions under consideration, p. 84

“For a taxpayer who omits to file the prescribed form for early disclosure and any person associated with or related to the taxpayer, the period of limitation applicable to the tax consequences arising from the undisclosed transaction would be suspended until the time the prescribed form is filed.”

■ **Consultation**

Some participants objected to the idea of suspending the period of limitation until the mandatory disclosure transaction is disclosed to Revenu Québec.

The mandatory disclosure mechanism applies to transactions regarding which the advisor requires confidentiality of his client as well as to those whose success or failure is crucial to the advisor’s remuneration. These categories of transactions can include very aggressive transactions and, in this context, suspending the period of limitation seems essential to ensure disclosure.

Consequently, a person’s failure to disclose a mandatory disclosure transaction according to the stipulated terms and conditions will also have an impact on the period of limitation otherwise applicable to the tax consequences arising from the undisclosed transaction.

■ Announced measure

For a person who omits to disclose, within the stipulated deadline, a mandatory disclosure transaction as well as any person associated with or related to, on the date the transaction is carried out, such person or the partnership who carried out the transaction,⁷ (including the members of a limited partnership whose general partner failed to make mandatory disclosure), the period of limitation applicable to the tax consequences arising from the undisclosed transaction will be suspended until the time the prescribed form relating to the undisclosed transaction is filed.

More specifically, the tax legislation will be amended so that the limitation in relation to a taxation year during which the tax consequences arising from a mandatory disclosure transaction occur corresponds, in relation to such tax consequences, for the person who omits to disclose it, within the stipulated deadline, and for any person associated with or related to, on the date the transaction is carried out, such person (including the members of a limited partnership whose general partner omitted to make mandatory disclosure), to the period of limitation otherwise applicable in relation to such tax consequences, that begins, however, on whichever of the following two days occurs later:

- the day of mailing of the first notice of assessment for the year;
- the day the prescribed form, duly completed, relating to the disclosure of the transaction, is sent to Revenu Québec.

Consequently, no period of limitation will henceforth start running regarding the tax consequences arising from such an undisclosed transaction.

□ Due diligence defence

■ Consultation

Some participants asked that a person who omits to make mandatory disclosure within the stipulated deadline be allowed to use due diligence as a defence to avoid the penalty.

■ Announced measure

The penalty relating to the failure to make mandatory disclosure within the stipulated deadline will not apply to the person who, according to the jurisprudence, successfully argues due diligence as a defence regarding such failure.

⁷ *Supra*, note 4.

❑ Voluntary disclosure

■ Consultation

Many contributors asked that a person who fails to make mandatory disclosure regarding a transaction be allowed to voluntarily disclose such transaction.

■ Announced measure

A person who omits to make mandatory disclosure within the stipulated deadline may avail himself of Revenu Québec's voluntary disclosure policy⁸ and thus avoid imposition of a penalty for his omission, provided he satisfies the conditions of such policy.⁹

2.5 Application date

The measures relating to the mechanism for mandatory disclosure of a transaction for which confidentiality is required by an advisor or a transaction with conditional remuneration of the advisor will apply to transactions carried out on or after the day of publication of this information bulletin. However, they will not apply regarding a transaction carried out as part of a series of transactions, leaving aside section 1.5 of the Taxation Act, that began before the day of publication of this information bulletin and that is completed before January 1, 2010.

8 REVENU QUÉBEC, *Interpretation Bulletin* ADM. 4/R2, "Voluntary Disclosures", March 31, 2004.

9 *Id.*, par. 11.

3. GENERAL ANTI-AVOIDANCE RULE

It was established, in the working paper, that in the context of Canadian fiscal federalism, unilateral changes to the substance of Québec's GAAR were not desirable. However, it was established that a change designed to clarify the notion of *bona fide* purposes, to harmonize this notion with that used for the purposes of the legislation of other provinces, was necessary.

Moreover, it was shown that the introduction of new consequences where the GAAR applies, such as penalties and the increase in the period of limitation, together with a preventive disclosure mechanism that would help avoid these new consequences, had the two-fold advantage of not changing the existing application rules of the GAAR while making a notable change to the risk/reward ratio that currently favours a taxpayer who participates in an ATP scheme.

3.1 Notion of *bona fide* purposes as applied in the GAAR

According to the existing tax legislation, an avoidance transaction is a transaction that results directly or indirectly in a tax benefit, or that is part of a series of transactions that result directly or indirectly in a tax benefit unless, in either of these cases, it is reasonable to consider that the transaction was undertaken or organized chiefly for *bona fide* purposes other than obtaining the tax benefit.

The tax legislation of many provinces excludes from the notion of *bona fide* purposes not only the obtaining of a tax benefit under the law that encompasses their GAAR, but also the obtaining of a tax benefit resulting from another law of a province or a federal law. Thus broadened, the exclusion to the notion of *bona fide* purposes ensures that a transaction undertaken chiefly to obtain a tax benefit under a law of a province or a federal law may not be considered to have been undertaken for a *bona fide* purpose to avoid application of the GAAR.

To harmonize Québec's rules with those of the other provinces and, accordingly, ensure the same field of application of the various provincial GAARs, the tax legislation will be amended to clarify the notion of *bona fide* purposes.

❑ Clarification to the notion of *bona fide* purposes

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.2.3 - Actions under consideration, p. 90

“The ministère des Finances does not intend to propose changes to the GAAR other than to the definition of avoidance transaction where it would be specified that the following are not *bona fide* purposes:

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

■ Consultation

Most participants agreed with the soundness of the change being considered to the notion of *bona fide* purposes and acknowledged that the objective is consistent with the spirit of the GAAR. However, some indicated that the expression “other amount payable under a [...] law” was too broad because it could cover amounts that have nothing to do with taxation, for instance the payment of government services. Others said they hoped the clarification would not apply retroactively.

A change will therefore be made to the notion of *bona fide* purposes so that it does not apply to payments that have nothing to do with taxation.

As to the retroactive application of the measure, the working paper mentions an argument that could be made whereby a transaction undertaken mainly to obtain a reduction of tax payable under a law other than the *Taxation Act* is a transaction undertaken mainly for a *bona fide* purpose. Since the proposed change to the notion of *bona fide* purposes is designed to counter this argument, public disclosure of the argument is a reason for a degree of retroactive application. It would indeed be peculiar that a taxpayer who read the working paper, when it was tabled on January 30, 2009, should use this argument against an assessment.

■ Announced measure

The definition of avoidance transaction will be clarified so that the following are not considered *bona fide* purposes:

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

□ Application date

This change will apply to taxation year 2009 and subsequent taxation years. It will also apply to taxation years for which the Minister of Revenue may validly re-determine tax and reassess or make an additional assessment, as the case may be. It will also apply to taxation years covered by an objection or an appeal on the date of this bulletin in relation to an assessment, a reassessment or an additional assessment based on the application of the GAAR.

However, it will not apply regarding cases pending on January 30, 2009 and notices of objection served on the Minister of Revenue no later than such date, and for which the reason of one of the items of the objection, in the motion of appeal or notice of objection previously served on the Minister of Revenue, is that the transaction was undertaken or planned mainly to obtain a reduction, avoidance or deferral of tax or other amount payable on account of or regarding tax, or of a refund of tax or other amount on account of or regarding tax, pursuant to a federal law or a provincial law other than the *Taxation Act*.

3.2 Increase in the period of limitation

According to the existing tax legislation, the Minister of Revenue may at any time determine the tax, interest and penalties for a taxation year regarding a taxpayer.

When the taxpayer files a tax return for a taxation year, the Minister notes the tax that the taxpayer was required to estimate, determines the tax, then advises the taxpayer of the assessment that has been established.

The Minister may also re-determine the tax for which an earlier assessment was produced. In this case, however, the Minister must exercise his power of assessment within a period of limitation of three years beginning the day the notice of first assessment is sent, or of four years beginning that day where the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation.

Moreover in certain situations, the period of limitation of three years or four years, as the case may be, is considered insufficient to allow the Minister to act. In these cases, the Minister is allowed an additional period of limitation of three years to issue a new assessment. Such is the case, in particular, for a new assessment that stems from a transaction involving a taxpayer and a person who is not a resident of Canada with whom such taxpayer is not at arm's length. In this case, however, the new assessment can relate only to the items concerned by the situation in question.

Lastly, even if a period of limitation has expired, the Minister may issue a new assessment at any time where the taxpayer waives the period of limitation or where he misrepresents the facts through neglect or wilful omission or commits fraud in filing his return or in supplying information stipulated by the tax legislation. In these circumstances, the new assessment can, however, only bear on the items relating to the waiver of limitation or the misrepresentations, as the case may be.

As mentioned in the working paper, ATP schemes are often characterized by the complexity of the legal structures on which they are based and, in a self-assessment system, it may be arduous to detect such schemes. Accordingly, the tax administration can only learn of such schemes through an in-depth examination of the tax returns filed by taxpayers.

The current period of limitation of three years or four years, as the case may be, is often not enough, particularly because of the sophistication of these transactions.

Consequently, the addition of a further three years to the normal period of limitation where a taxpayer carries out, in a taxation year, a transaction or series of transactions leading to the application of the GAAR, seems necessary to provide the tax administration with the time needed to identify problematic transactions. This approach was recently adopted by Alberta.

❑ Addition of three years to the normal period of limitation

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.3.4 - Actions under consideration, p. 95

“The ministère des Finances is considering the following actions, concerning the period of limitation, where the GAAR applies:

- the normal periods of limitation for application of the GAAR by the Minister of Revenue would be extended by three years, and the reassessment could relate only to the items covered by the application of the GAAR;
- this additional three-year period would not apply to a transaction or series of transactions where the taxpayer discloses such transaction or series of transactions to Revenu Québec, in accordance with the preventive disclosure rules, no later than the statutory filing date of the tax return for the taxation year in which the transaction or series of transactions occurs;
- neither would the additional three-year period apply to a transaction where the taxpayer discloses such transaction to Revenu Québec in the course of mandatory early disclosure and the form prescribed for that purpose is filed no later than the statutory filing date of the tax return for the taxation year in which the transaction occurs.”

■ Consultation

Most participants indicated that they opposed extending the period of limitation. Some of the objections raised were that large corporations are already subject to systematic audits by Revenu Québec, that extending the period of limitation will create uncertainty for companies, that preventive disclosure will increase the administrative burden on taxpayers and that the result could be double taxation with the other provinces.

To begin with, it must be understood that it can be very difficult to detect an ATP scheme with a simple compliance audit, because such an audit, though regular, does not necessarily draw the attention of auditors to ATP schemes.

Second, it is indeed undeniable that extending the period of limitation may increase uncertainty among taxpayers as to the potential application of the GAAR. That is indeed the reason why consideration is being given to implementing a preventive disclosure mechanism¹⁰ that would maintain the existing period of limitation for a given transaction.

¹⁰ These rules regarding to preventive disclosure mechanism are discussed in sub-section 3.4.

In addition, it is worth noting that in November 2008, Alberta adopted a measure similar to the one under consideration, with no possibility of avoiding it. As to the preventive disclosure under consideration, it will be limited to the facts and resulting tax consequences and will require neither the taxpayer nor his advisor to make a choice or take a position, other than the decision to proceed with such disclosure.

Lastly, fears of double taxation, in a situation where a taxpayer is assessed on the basis of the GAAR after the period of limitation has expired in the other provinces, are groundless. The new paragraph 152(4d) of the Income Tax Act (Canada) expressly allows the issuing of a new provincial assessment within the 12 months following a change made to the income allocation by another province, where the period of limitation has expired. The tax legislation in Québec and Alberta have similar provisions.¹¹

Moreover, some have suggested that the extension of the period of limitation be restricted to ATP schemes involving a tax benefit in excess of a certain threshold.

In this regard, in accordance with the jurisprudence applicable in the matter, the GAAR is applied only where the abusive nature of the transaction is clear. Accordingly, it would be inappropriate not to apply the GAAR in the same way to all situations considered clearly abusive and to distinguish between these situations not on the basis of the existence of the abuse, but rather depending on the relative size of the amounts at issue.

■ **Announced measure**

Concerning the period of limitation, the tax legislation will be amended so that, where the GAAR applies to a transaction or a series of transactions:

- a period of three years is added to the normal periods of limitation of three or four years for the application of the GAAR by the Minister of Revenue and the reassessment or additional assessment may relate only to the items covered by the application of the GAAR; however, where a period of three years has already been added to the normal periods of limitation of three or four years, the additional period of three years in relation to the GAAR will not apply;

11 Section 1010.0.3 of the Taxation Act and section 43 of the Alberta Corporate Tax Act, R.S.A. 2000, c. A-15.

- this additional period of three years does not apply to a transaction or series of transactions where the taxpayer, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the preventive disclosure rules, no later than the filing deadline of the tax return for the taxation year during which the transaction or series of transactions began to be carried out or the date when the members of the partnership are required to file an information return for the fiscal year during which the transaction or series of transactions began to be carried out or the date when they would be required to file it had the Minister of Revenue not waived such requirement.
- this additional period of three years does not apply also to a transaction or series of transactions where the taxpayer, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the mandatory disclosure rules,¹² no later than the filing deadline of the tax return for the taxation year concerned or the date when the members of the partnership are required to file an information return for the fiscal year concerned or the date when they would be required to file it had the Minister of Revenue not waived such requirement.

❑ Application date

This measure will apply to taxation years ended after the day of publication of this information bulletin, provided the reassessment or additional assessment relates to a transaction carried out on or after the day of publication of this information bulletin. However, it will not apply regarding a transaction carried out as part of a series of transactions, leaving aside section 1.5 of the Taxation Act, that began before the day of publication of this information bulletin and that is completed before January 1, 2010.

3.3 Introduction of a penalty regime

According to the existing tax legislation, a transaction must, to be subject to the application of the GAAR, have resulted in a taxable benefit to the taxpayer and constitute an avoidance transaction in the sense that it was not carried out mainly for *bona fide* purposes, other than obtaining a tax benefit. In addition, the tax administration must show that the transaction is clearly abusive.

¹² These rules are discussed in section 2.

Furthermore, where the GAAR applies, other than regarding the payment of interest on unpaid taxes because of the avoidance transaction, the only negative financial consequence for the taxpayer is that his tax attributes are determined by the tax administration resulting in the withdrawal of the tax benefit arising from the avoidance transaction. Accordingly, the risk/return ratio favours the taxpayer.

Since the objective of a penalty regime in the taxation field is to curb or deter certain behaviour patterns by increasing the monetary risk to which a taxpayer exposes himself, there is reason to conclude that the introduction of penalties is an appropriate means of fighting ATP.

Moreover, in the context of fighting ATP, a penalty regime must target the taxpayer who participates in an ATP scheme as much as the person who promotes it. As mentioned in the working paper, the propagation and distribution of ATP schemes is in part attributable to the emergence of a new business model for tax intermediaries, in which they act as genuine promoters of ATP schemes.

❑ Penalty on the taxpayer where the GAAR applies

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.4.6 - Actions under consideration, p. 102

The ministère des Finances is considering the implementation of a penalty regime, with the following parameters, where the GAAR applies to an avoidance transaction, regarding a taxpayer:

- the taxpayer would incur a penalty equal to 25% of the additional tax resulting from the application of the GAAR to the avoidance transaction;

[...]

- the taxpayer would have the possibility of avoiding the penalty in the following cases:
 - where he had disclosed such transaction (or the series of transactions that includes such transaction) to Revenu Québec, in accordance with the preventive disclosure rules mentioned in sub-section 4.3.3, no later than the statutory filing date of the tax return for the taxation year in which the transaction (or the series of transactions that includes such transaction) occurred;
 - where he had disclosed such transaction to Revenu Québec in the course of mandatory early disclosure as mentioned in sub-section 4.1.1, and the form prescribed for that purpose was filed no later than the statutory filing date of the tax return for the taxation year in which the transaction occurred;
 - where he had submitted a successful defence of due diligence.”

■ Consultation

Most participants indicated that they opposed imposing a penalty on the taxpayer. Some of the objections raised were that such a penalty will make Québec companies less competitive, will generate uncertainty among taxpayers and increase their administrative burden. In addition, contrary to what is shown in the working paper, some participants are of the view that the risk/return ratio does not, in fact, favour the taxpayer who participates in an ATP scheme.

First of all, regarding Québec companies being less competitive, it must be pointed out that implementing rules designed to ensure that each bears his fair share of the common burden is precisely one of the most effective ways to ensure healthy competition in an economy. Tax competition must be dictated by fiscal policy and not by aggressive tax planning.

As for increased uncertainty among taxpayers, it must be pointed out that apart from the clarification concerning the notion of *bona fide* purposes, no change will be made to the existing GAAR. Accordingly, any increased uncertainty among taxpayers could only arise from the extension of the period of limitation or, as some participants have indicated, the imposition of penalties. However, both the extension of the period of limitation and the imposition of penalties can be avoided by making preventive disclosure.¹³

Concerning the increase in the administrative burden, it is worth pointing out that the only requirement a taxpayer wishing to avoid the possible imposition of a penalty must satisfy is to make preventive disclosure. The administrative burden stemming from such disclosure is limited to a factual description of the planning carried out and the resulting tax consequences. Consequently, the increase in the administrative burden on taxpayers is very limited.

Lastly, regarding the risk/return ratio, if it did not currently favour the taxpayer, the Canada Revenue Agency would not consider tax avoidance as one of the major risks of tax non-compliance in Canada, and there would not be, among the tax administrations of OECD member countries, a sense of urgency to develop tools to stem the problem.

Moreover, in the event that a regime of penalties on the taxpayer is implemented, most participants propose a variety of adjustments to the measures under consideration. Thus, they propose scaling the penalty, granting discretionary power to the Minister of Revenue allowing him not to apply the penalty, clarifying the scope of the due diligence defence, applying the penalty only in cases of serious offence and, lastly, allowing the deduction of interest paid regarding the unpaid tax.

As far as the principle of a scaled penalty is concerned, the penalty considered in the working paper is expressed as a percentage of the tax avoided. Accordingly, it already contains a scaling component. As for granting a discretionary power to the Minister of Revenue allowing him not to apply the penalty to the taxpayer, the Act respecting the ministère du Revenu already stipulates that the Minister can waive, in whole or in part, a penalty stipulated by a tax law or cancel it, in whole or in part.

13 These rules regarding to preventive disclosure mechanism are discussed in sub-section 3.4

Turning to the scope of the due diligence defence, it is enough to quote the words of Mr. Justice Décary and Mr. Justice Létourneau, of the Federal Court of Appeal, in the *Polytechnique* decision:

The due diligence defence allows a person to avoid the imposition of a penalty if he or she presents evidence that he or she was not negligent. It involves considering whether the person believed on reasonable grounds in a non-existent state of facts which, if it had existed, would have made his or her act or omission innocent, or whether he or she took all reasonable precautions to avoid the event leading to imposition of the penalty. [...] In other words, due diligence excuses either a reasonable error of fact, or the taking of reasonable precautions to comply with the Act.¹⁴

Regarding the application of penalties only in cases of serious offence, it must be pointed out that the proposal in the working paper limits the application of the penalty to those situations where the GAAR applies, i.e. cases where the abusive nature of the transaction is clear.

Lastly, as to the deduction of interest paid in relation to unpaid tax because of participation in an ATP scheme, allowing such a deduction would result in inconsistency in terms of the integrity of the tax system. Indeed, in the United States, where such interest charges are currently deductible, a proposal was made, in the 2009 Budget,¹⁵ to amend the tax legislation to prohibit the deduction.

■ Announced measure

The tax legislation will be amended to stipulate that, where the GAAR applies to an avoidance transaction, in relation to a taxpayer, he will incur a penalty equal to 25% of the amount of the tax benefit withdrawn pursuant to the application of the GAAR. Accordingly, if application of the GAAR has the effect of increasing tax or any other amount payable under the Taxation Act, the penalty will be 25% of the additional tax and of any other additional amount payable.

Similarly, if application of the GAAR has the effect of reducing the tax refund or any other amount to which the taxpayer were entitled under the Taxation Act, the penalty will be 25% of the reduction of the tax refund and any other such amount. However, the taxpayer will not incur a penalty in the following cases:

- where he, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the preventive disclosure rules, no later than the filing deadline of the tax return for the taxation year during which the transaction or series of transactions began to be carried out or the date when the members of the partnership are required to file an information return for the fiscal year during which the transaction or series of transactions began to be carried out or the date when they would be required to file it had the Minister of Revenue not waived such requirement;

14 *Corporation de l'École Polytechnique v. Canada*, 2004 FCA 127, par. 28.

15 UNITED STATES, Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals*, May 2009, p. 26.

- where he, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the mandatory disclosure rules,¹⁶ no later than the filing deadline of the tax return for the taxation year concerned or the date when the members of the partnership are required to file an information return for the fiscal year concerned or the date when they would be required to file it had the Minister of Revenue not waived such requirement.

However, according to the jurisprudence, a taxpayer can also avoid a penalty by submitting a successful defence of due diligence.

❑ Penalty on the promoter where the GAAR applies

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.4.6 - Actions under consideration, p. 102

“The ministère des Finances is considering the implementation of a penalty regime, with the following parameters, where the GAAR applies to an avoidance transaction, regarding a taxpayer:

[...]

- the promoter would incur a penalty equal to 12.5% of the amounts received or receivable by him regarding the avoidance transaction in respect of which a penalty would be imposed on the taxpayer;
- the promoter would be a person, including a partnership, who satisfies the following conditions:
 - he markets or promotes an abusive avoidance transaction or otherwise encourages its growth or the interest it arouses;
 - he, or an entity with which he is related, receives, directly or indirectly, consideration in respect of that marketing, promotion or encouragement;
 - it is reasonable to conclude that he has had a substantial role in respect of that marketing, promotion or encouragement.

[...]

- since the penalty on the promoter is tied to the penalty on the taxpayer, the promoter could avoid it where the taxpayer made either preventive or early disclosure or mounted a successful defence of due diligence.”

¹⁶ These rules are discussed in section 2.

■ Consultation

Most participants indicated that they opposed imposing a penalty on the promoter. Some of the objections raised are that such a penalty would depend on the actions of another person, that it could apply to accountants who prepare tax returns and, lastly, that it will encourage a shift of tax planning activities outside Québec.

Concerning the actions of another person, the statement is inaccurate. By definition, the promoter is the person who markets the abusive avoidance transaction regarding which the GAAR applies or otherwise promotes it or encourages its growth or the interest it arouses. He is remunerated for such marketing, promotion or encouragement and plays an important role in this regard. In addition, since the relation between the promoter and the client is contractual, the promoter can obtain a written commitment from his client to make preventive disclosure in respect of the planning carried out.

The contention that the penalty on the promoter could apply to the accountant who prepares a tax return is also inaccurate since, depending on who is considered, only those persons who played a significant role in marketing, promoting or encouraging the growth of an avoidance transaction to which the GAAR applies will be targeted by the penalty on the promoter.

Lastly, as far as the shift of tax planning activities outside Québec is concerned, because of the relation of trust that usually characterizes relations between a client and a tax professional, a significant shift of such activities outside Québec seems very unlikely.

Moreover, in the event that a regime of penalties on the promoter is implemented, most participants propose a variety of adjustments to the measures under consideration. The proposals include clearly distinguishing between “promoter” and “tax advisor”, allowing the promoter to plead due diligence as a defence and, lastly, not applying penalties where there are substantial grounds in support of a tax planning arrangement.

As pointed out in the working paper, to be considered a promoter, a person must be remunerated for having played a major role in marketing, promoting or encouraging the growth of an abusive avoidance scheme. Since this criterion deals specifically with the role of the professional, it allows for an adequate distinction between the promoter and the advisor.

As for the possibility of allowing the promoter to plead due diligence as a defence, it does indeed seem that the introduction of such a defence would be desirable. The proposal that a criterion relating to substantial grounds be added must be rejected since the GAAR applies only to a clearly abusive avoidance transaction.

■ Announced measure

The tax legislation will be amended to stipulate that, where the GAAR applies to an avoidance transaction and a penalty is imposed on a taxpayer pursuant to the application of the GAAR to such transaction, the promoter of such avoidance transaction will incur a penalty equal to 12.5% of all the amounts each of which represents the consideration received or receivable, directly or indirectly, from a person (including a partnership) by the promoter, or by a person or a partnership to which the promoter is associated with or related to,¹⁷ in relation to such transaction.

For the purposes of this measure, a promoter of an avoidance transaction is any person, including a partnership, who satisfies the following conditions:

- the person marketed or promoted the avoidance transaction or otherwise encouraged its growth or the interest it arouses;
- he or a person or a partnership to which he is associated with or related to,¹⁸ received or will be entitled to receive, directly or indirectly, consideration in respect of such marketing, promotion or encouragement;
- it is reasonable to conclude that he has played a substantial role in such marketing, promotion or encouragement.

In this regard, an employee, other than a specified employee,¹⁹ of the promoter will not be considered to have played a substantial role in the marketing, promotion or encouragement, by such promoter, of an avoidance transaction. However, the conduct of an employee (including a specified employee) of a promoter will be deemed to be that of his employer for the purposes of this measure.

Since the penalty on the promoter will be tied to the penalty on the taxpayer, the promoter may avoid it in respect of each taxpayer who makes either preventive or early disclosure of the avoidance transaction (or the series of transactions that includes such transaction) in accordance with the rules and within the stipulated deadlines. The promoter may also avoid the penalty in respect of each taxpayer who successfully pleads due diligence as a defence against his own penalty.

In the case of a transaction carried out by a partnership, the promoter may avoid the penalty if the general partner makes either preventive or early disclosure of the avoidance transaction (or the series of transactions that includes such transaction) in accordance with the rules and within the stipulated deadlines. He may also avoid the penalty if the general partner successfully pleads due diligence as a defence against his own penalty.

17 *Supra*, note 4.

18 *Id.*

19 The expression “specified employee” of a person means an employee of the person who is a specified shareholder of the person or who does not deal at arm’s length with the person (section 1 of the Taxation Act).

In the case of a transaction carried out by a partnership other than a limited partnership, the promoter may avoid the penalty if one of the members of the partnership, acting on behalf of all the members, makes either preventive or early disclosure of the avoidance transaction (or the series of transactions that includes such transaction) in accordance with the rules and within the stipulated deadlines. He may also avoid the penalty in respect of each member who successfully pleads due diligence as a defence against his own penalty.

However, according to the jurisprudence, the promoter himself may plead due diligence as a defence against his penalty.

❑ **Application date**

The announced measures concerning the penalty on the taxpayer and the penalty on the promoter will apply regarding a transaction carried out on or after the day of publication of this information bulletin. However, they will not apply regarding a transaction carried out as part of a series of transactions, leaving aside section 1.5 of the Taxation Act, that began before the day of publication of this information bulletin and that is completed before January 1, 2010.

3.4 Preventive disclosure mechanism

As explained earlier, the objectives of the extension of the period of limitation and the introduction of a penalty regime where the GAAR applies are respectively to allow the tax administration more time to identify ATP schemes and to change the risk/reward ratio that currently favours the taxpayer.

Moreover, where a taxpayer informs the tax administration of a tax planning transaction, the tax administration is able to carry out its auditing work in a timely manner, i.e. with no need for additional time. In addition, in such a case, the need to change the risk/reward ratio of the taxpayer also becomes redundant.

In this context, and as mentioned in the working paper, a preventive disclosure mechanism would enable a taxpayer, in the event of the GAAR otherwise applying to a transaction, to avoid extension of the period of limitation and the imposition of penalties regarding such transaction.

❑ Introduction of a preventive disclosure mechanism

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.3.4 - Actions under consideration, p. 95

“The ministère des Finances is considering the following actions, concerning the period of limitation, where the GAAR applies:

[...]

- this additional three-year period would not apply to a transaction or series of transactions where the taxpayer discloses such transaction or series of transactions to Revenu Québec, in accordance with the preventive disclosure rules, no later than the statutory filing date of the tax return for the taxation year in which the transaction or series of transactions occurs; [...]

From the working paper on aggressive tax planning: January 30, 2009 – Sub-section 4.4.6 - Actions under consideration, p. 102

- “[...] the taxpayer would have the possibility of avoiding the penalty in the following cases:
 - where he had disclosed such transaction (or the series of transactions that includes such transaction) to Revenu Québec, in accordance with the preventive disclosure rules mentioned in sub-section 4.3.3, no later than the statutory filing date of the tax return for the taxation year in which the transaction (or the series of transactions that includes such transaction) occurred; [...]

■ Consultation

Many participants support the principle of a preventive disclosure mechanism. Moreover, with the perspective of the adoption of such a mechanism, some ask that the information to be disclosed be limited to the factual items of a transaction and not encompass the advice of other opinions given by tax advisors. Participants also request that a clarification be made to ensure that such preventive disclosure not be otherwise considered an admission or confession by the taxpayer.

In addition, some participants asked for the establishment of a minimum disclosure threshold, i.e. an amount below which no disclosure would be necessary, and that a list of transactions to be disclosed be drawn up.

Given that the GAAR applies only where the abusive nature of the transaction is clear, with respect to integrity, undertaking a clearly abusive transaction is sufficient to generate consequences, thus setting a disclosure threshold in this field is not desirable. As for drawing up a list of transactions to be disclosed, apart from the fact that that seems difficult to reconcile with the principle of disclosure that is not mandatory, this is a cumbersome approach that would require setting up an administrative structure. As explained in the working paper, this approach was not adopted for considerations of simplicity.

Moreover, since the information the tax administration needs concerns essentially the factual items of a transaction and the resulting tax consequences, thus limiting the information to be disclosed seems reasonable. In the same way, specifying that preventive disclosure may not otherwise be considered an admission or confession by the taxpayer seems reasonable.

■ **Announced measure**

The tax legislation will be amended to introduce a preventive disclosure mechanism that will enable a taxpayer, in the event of the GAAR otherwise applying to a transaction, to avoid the extension of the period of limitation and the imposition of a penalty regarding such transaction where it (or the series of transactions including such transaction) is the object of preventive disclosure in accordance with the rules and within the deadlines stipulated below.

A taxpayer may make a preventive disclosure to Revenu Québec in relation to a transaction or a series of transactions he carries out.

In the case of a transaction or a series of transactions carried out by a limited partnership, the general partner may make a preventive disclosure to Revenu Québec.

In the case of a transaction or a series of transactions carried out by partnership other than a limited partnership, any member of the partnership may make a preventive disclosure to Revenu Québec. The preventive disclosure made by one member, on behalf of all the members, will be deemed made by each of the members.

The preventive disclosure of a transaction or series of transactions must be made no later than the filing deadline of the taxpayer's tax return for the taxation year during which the transaction or series of transactions began to be carried out or, in the case of a transaction or series of transactions carried out by a partnership, the date when its members are required to file an information return for the fiscal year during which the transaction or series of transactions began to be carried out or the date when they would be required to file it had the Minister of Revenue not waived the requirement.

Preventive disclosure of a transaction or a series of transactions will have to be made using a prescribed form sent within the deadline stipulated for that purpose, under separate cover, by registered mail or electronically, to the Direction principale de la lutte contre les planifications fiscales abusives of Revenu Québec, i.e. a division different than the one where taxpayers usually send their tax returns and forms.

The information that must be provided on the prescribed form, in relation to such transaction or series of transactions, must consist of a complete and detailed description of the facts – not advice or other opinions – relating to the transaction or series of transactions as well as a statement of the tax consequences resulting from the transaction or series of transactions. In addition, the description of the facts and tax consequences resulting from the transaction or series of transactions must be sufficiently detailed to enable analysis of the transaction or series of transactions and an understanding of the resulting tax consequences.

For the purposes of the GAAR, preventive disclosure may at no time be likened to an admission or confession as to the application of this rule to the disclosed transaction.

Moreover, the simple transmission of the prescribed form, under separate cover, by registered mail or electronically, will serve as acknowledgement of receipt.

Lastly, if, in the 120 days following transmission of the prescribed form, Revenu Québec does not communicate with the person who made the disclosure to obtain additional information in relation to the transaction or series of transactions or the resulting tax consequences, the prescribed form will then be considered as having been sent within the required deadline, and completed in the required form, i.e. containing sufficiently detailed information for Revenu Québec to be able to analyze the transaction or series of transactions and understand the resulting tax consequences.

□ Application date

The measures relating to the mechanism for preventive disclosure will apply to transactions carried out on or after the day of publication of this information bulletin.

However, in the case of a transaction carried out as part of a series of transactions that began on a taxation year or on a fiscal year, as the case may be, ended before the day of publication of this information bulletin, the preventive disclosure could be done no later than six months after that day.

Appendix – Summary of Announced Measures

1. Mandatory Disclosure Mechanism

Some taxpayers develop aggressive tax planning schemes that correspond neither to the object nor to the spirit of the tax legislation, but nonetheless comply with the wording. It is then important that the tax administration quickly detect this type of planning to ensure compliance with both the object and the spirit of the tax legislation. However, it is difficult to achieve this alacrity in a self-assessment system.

Accordingly, to make ATP schemes less attractive, the tax legislation will be amended to reduce the interval between the time a taxpayer implements an ATP scheme and the time the scheme is identified by the tax administration.

To achieve this result, other tax jurisdictions have developed early disclosure rules to detect tax avoidance transactions at an early stage. For instance, in the United Kingdom, these rules seek in particular to detect the presence of a tax benefit in a hallmarked scheme and to determine whether such tax benefit is the main or one of the main benefits of the scheme, while in the United States, an approach targeting risks of tax avoidance based on circumstantial factors and listed transactions is emphasized.

1.1 Mandatory disclosure transactions

The circumstantial factors relating to a contractual relation between a taxpayer and his advisor help identify two categories of transactions that are likely to lead to tax avoidance, namely a confidential transaction and a transaction with conditional remuneration.

It will therefore be mandatory to disclose transactions belonging to either of these two categories.

❑ Confidential transaction

The tax legislation will be amended so that, where a taxpayer, or partnership of which he is a member, carries out a transaction²⁰ resulting, directly or indirectly, for a taxation year or for a fiscal year, as the case may be, either in a tax benefit of \$25 000 or more for the taxpayer, or in an impact on the income of the taxpayer or the partnership, as the case may be, of \$100 000 or more, where the taxpayer or the partnership of which he is a member retained the services of an advisor concerning such transaction and where the contract between the taxpayer and the advisor, or between the partnership and the advisor, as the case may be, includes, on the part of the taxpayer or of the partnership, an undertaking of confidentiality towards other persons or the tax administration in relation to the transaction, such transaction must be disclosed to Revenu Québec for the taxation year or for the fiscal year.

To that end, 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 or an increase in a tax refund or other amount under the Taxation Act, including the reduction, avoidance or deferral of the tax or other amount that would be payable under the Taxation Act were it not for a tax agreement, as well as the increase in a tax refund or other amount under the Taxation Act arising from a tax agreement.

For the purposes of this measure, where the contract with the advisor is entered into by a person associated with or related to the taxpayer or the partnership of which he is a member,²¹ on the date when the contract is concluded, the contract will be deemed to have been concluded by the taxpayer or the partnership of which he is a member. This will also hold for the undertaking of confidentiality, with the necessary adaptations.

In addition, for the purposes of this measure, the undertaking of confidentiality towards other persons will not include a clause designed to ensure that the advisor's professional liability exists only towards his client and according to which a third party may not, for its own purposes, rely on the opinion given by the advisor to his client.

20 In all measures announced, the expression "transaction" includes an arrangement or event. Furthermore, in the measures announced in section 1 of the appendix, the expression "transaction" includes a series of transactions.

21 To determine whether a person is associated with or related to a partnership, the partnership shall be considered a corporation all of whose shares with voting rights belong to the members of the partnership in proportion to what would be the allocation among them of the income or losses of the partnership had the fiscal year of the partnership ended on the date the contract is concluded.

❑ Transaction with conditional remuneration

The tax legislation will be amended so that a transaction carried out by a taxpayer or partnership of which he is a member and resulting, directly or indirectly, for a taxation year or for a fiscal year, as the case may be, either in a tax benefit of \$25 000 or more for the taxpayer, or in an impact on the income of the taxpayer or the partnership, as the case may be, of \$100 000 or more, must be disclosed to Revenu Québec, for the taxation year or for the fiscal year, where the remuneration of the advisor, regarding the transaction, is of any of the following forms:

- it is conditional, in whole or in part, on obtaining a tax benefit resulting from the transaction or it is established, in whole or in part, on the basis of such tax benefit;
- it is refundable, in any way whatsoever, in whole or in part, to the taxpayer if the expected tax benefit from the transaction does not materialize;
- it is acquired, in whole or in part, to the advisor only after the expiry of the period of limitation applicable to the taxation year or the taxation years during which the transaction takes place.

To that end, a tax benefit will be defined in the same way as for a confidential transaction. Consumption tax recovery reviews that do not result in a tax benefit, within the meaning of that definition, will therefore not be covered by the measure.

For the purposes of this measure, a conditional remuneration transaction will not include the following transactions: claims for tax credits, notably for R&D, the analysis and review of interest pursuant to tax assessments and reviews of tax returns after they are filed are not included. Neither will it include a transaction in regard of which an agreement was entered into with a professional and according to which the result obtained by the professional is one of many factors taken into consideration in setting the professional's remuneration, in accordance with a provision of his code of ethics.

❑ Advisor regarding a transaction that must be disclosed

The expression “advisor”, regarding a mandatory disclosure transaction, means a person, including a partnership, who provides help, assistance or advice regarding the design or implementation of the transaction or who commercializes or promotes it.

1.2 Person required to make mandatory disclosure

The tax legislation will be amended so that the taxpayer who carried out a mandatory disclosure transaction is the person required to disclose it to Revenu Québec.

In the case where a mandatory disclosure transaction is carried out by a limited partnership, the responsibility for disclosing it will lie with the general partner. Where a mandatory disclosure transaction is carried out by a partnership other than a limited partnership, the responsibility for disclosing it will lie with each member of the partnership. However, the disclosure made by one of the members, on behalf of all the members, will be deemed made by each of the members.

1.3 Transmission of information relating to the mandatory disclosure transaction

Disclosure of a transaction will have to be made using a prescribed form sent within the deadline stipulated for that purpose, under separate cover, by registered mail or electronically, to the Direction principale de la lutte contre les planifications fiscales abusives of Revenu Québec, i.e. a division different than the one where taxpayers usually send their tax returns and forms.

The information that must be provided on the prescribed form, in relation to such transaction, must consist of a complete and detailed description of the facts – not advice or other opinions – relating to the transaction as well as a statement of the tax consequences resulting from the transaction. In addition, the description of the facts and tax consequences resulting from the transaction must be sufficiently detailed to enable analysis of the transaction and understanding of its resulting tax consequences.

For the purposes of the GAAR, the mandatory disclosure made by a person may at no time be likened to an admission or confession on his part as to the application of this rule to the disclosed transaction.

Moreover, the simple transmission of the prescribed form, under separate cover, by registered mail or electronically, will serve as acknowledgement of receipt.

Lastly, if, in the 120 days following transmission of the prescribed form, Revenu Québec does not communicate with the person who made the disclosure to obtain additional information in relation to the transaction and its tax consequences, the prescribed form will then be considered as having been sent within the required deadline and completed in the required form, i.e. containing sufficiently detailed information for Revenu Québec to be able to analyze the transaction and understand its tax consequences.

1.4 Consequences of failure to make mandatory disclosure within the required deadline

Failure to make mandatory disclosure within the required deadline will result in two consequences for the person of whom disclosure is required: imposition of a penalty and suspension of the period of limitation regarding the undisclosed transaction.

❑ Required disclosure deadline

The tax legislation will be amended so that the deadline for making mandatory disclosure, regarding a transaction that must be disclosed, for a taxation year or a fiscal year, as the case may be, ends on the due date for filing the taxpayer's tax return for such year or, in the case of a transaction carried out by a partnership, on the date when its members are required to file an information return for such fiscal year or the date they would be required to file it had the Minister of Revenue not waived the requirement.

❑ Penalties

The tax legislation will be amended to stipulate that a person who omits to disclose, within the stipulated deadline, a mandatory disclosure transaction, will incur a penalty of \$10 000 that will rise by \$1 000 per day late, as of the second day late, to a maximum of \$100 000.

❑ Limitation

For a person who omits to disclose, within the stipulated deadline, a mandatory disclosure transaction as well as any person associated with or related to,²² on the date the transaction is carried out, such person or the partnership who carried out the transaction (including the members of a limited partnership whose general partner failed to make mandatory disclosure), the period of limitation applicable to the tax consequences arising from the undisclosed transaction will be suspended until the time the prescribed form relating to the undisclosed transaction is filed.

More specifically, the tax legislation will be amended so that the limitation in relation to a taxation year during which the tax consequences arising from a mandatory disclosure transaction occur corresponds, in relation to such tax consequences, for the person who omits to disclose it, within the stipulated deadline, and for any person associated with or related to, on the date the transaction is carried out, such person (including the members of a limited partnership whose general partner omitted to make mandatory disclosure), to the period of limitation otherwise applicable in relation to such tax consequences, that begins, however, on whichever of the following two days occurs later:

- the day of mailing of the first notice of assessment for the year;
- the day the prescribed form, duly completed, relating to the disclosure of the transaction, is sent to Revenu Québec.

Consequently, no period of limitation will henceforth start running regarding the tax consequences arising from such an undisclosed transaction.

22 *Supra*, note 21.

❑ Due diligence defence

The penalty relating to the failure to make mandatory disclosure within the stipulated deadline will not apply to the person who, according to the jurisprudence, successfully argues due diligence as a defence regarding such failure.

❑ Voluntary disclosure

A person who omits to make mandatory disclosure within the stipulated deadline may avail himself of Revenu Québec's voluntary disclosure policy²³ and thus avoid imposition of a penalty for his omission, provided he satisfies the conditions of such policy.²⁴

1.5 Application date

The measures relating to the mechanism for mandatory disclosure of a transaction for which confidentiality is required by an advisor or a transaction with conditional remuneration of the advisor will apply to transactions carried out on or after the day of publication of this information bulletin. However, they will not apply regarding a transaction carried out as part of a series of transactions, leaving aside section 1.5 of the Taxation Act, that began before the day of publication of this information bulletin and that is completed before January 1, 2010.

2. General Anti-Avoidance Rule

It was established, in the working paper, that in the context of Canadian fiscal federalism, unilateral changes to the substance of Québec's GAAR were not desirable. However, it was established that a change designed to clarify the notion of *bona fide* purposes, to harmonize this notion with that used for the purposes of the legislation of other provinces, was necessary.

Moreover, it was shown that the introduction of new consequences where the GAAR applies, such as penalties and the increase in the period of limitation, together with a preventive disclosure mechanism that would help avoid these new consequences, had the two-fold advantage of not changing the existing application rules of the GAAR while making a notable change to the risk/reward ratio that currently favours a taxpayer who participates in an ATP scheme.

23 *Supra*, note 8

24 *Id.*, par. 11.

2.1 Notion of *bona fide* purposes as applied in the GAAR

According to the existing tax legislation, an avoidance transaction is a transaction that results directly or indirectly in a tax benefit, or that is part of a series of transactions that result directly or indirectly in a tax benefit unless, in either of these cases, it is reasonable to consider that the transaction was undertaken or organized chiefly for *bona fide* purposes other than obtaining the tax benefit.

The tax legislation of many provinces excludes from the notion of *bona fide* purposes not only the obtaining of a tax benefit under the law that encompasses their GAAR, but also the obtaining of a tax benefit resulting from another law of a province or a federal law. Thus broadened, the exclusion to the notion of *bona fide* purposes ensures that a transaction undertaken chiefly to obtain a tax benefit under a law of a province or a federal law may not be considered to have been undertaken for a *bona fide* purpose to avoid application of the GAAR.

To harmonize Québec's rules with those of the other provinces and, accordingly, ensure the same field of application of the various provincial GAARs, the tax legislation will be amended to clarify the notion of *bona fide* purposes.

□ Clarification to the notion of *bona fide* purposes

The definition of avoidance transaction will be clarified so that the following are not considered *bona fide* purposes:

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

□ Application date

This change will apply to taxation year 2009 and subsequent taxation years. It will also apply to taxation years for which the Minister of Revenue may validly re-determine tax and reassess or make an additional assessment, as the case may be. It will also apply to taxation years covered by an objection or an appeal on the date of this bulletin in relation to an assessment, a reassessment or an additional assessment based on the application of the GAAR.

However, it will not apply regarding cases pending on January 30, 2009 and notices of objection served on the Minister of Revenue no later than such date, and for which the reason of one of the items of the objection, in the motion of appeal or notice of objection previously served on the Minister of Revenue, is that the transaction was undertaken or planned mainly to obtain a reduction, avoidance or deferral of tax or other amount payable on account of or regarding tax, or of a refund of tax or other amount on account of or regarding tax, pursuant to a federal law or a provincial law other than the *Taxation Act*.

2.2 Increase in the period of limitation

According to the existing tax legislation, the Minister of Revenue may at any time determine the tax, interest and penalties for a taxation year regarding a taxpayer.

When the taxpayer files a tax return for a taxation year, the Minister notes the tax that the taxpayer was required to estimate, determines the tax, then advises the taxpayer of the assessment that has been established.

The Minister may also re-determine the tax for which an earlier assessment was produced. In this case, however, the Minister must exercise his power of assessment within a period of limitation of three years beginning the day the notice of first assessment is sent, or of four years beginning that day where the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation.

Moreover in certain situations, the period of limitation of three years or four years, as the case may be, is considered insufficient to allow the Minister to act. In these cases, the Minister is allowed an additional period of limitation of three years to issue a new assessment. Such is the case, in particular, for a new assessment that stems from a transaction involving a taxpayer and a person who is not a resident of Canada with whom such taxpayer is not at arm's length. In this case, however, the new assessment can relate only to the items concerned by the situation in question.

Lastly, even if a period of limitation has expired, the Minister may issue a new assessment at any time where the taxpayer waives the period of limitation or where he misrepresents the facts through neglect or wilful omission or commits fraud in filing his return or in supplying information stipulated by the tax legislation. In these circumstances, the new assessment can, however, only bear on the items relating to the waiver of limitation or the misrepresentations, as the case may be.

As mentioned in the working paper, ATP schemes are often characterized by the complexity of the legal structures on which they are based and, in a self-assessment system, it may be arduous to detect such schemes. Accordingly, the tax administration can only learn of such schemes through an in-depth examination of the tax returns filed by the taxpayers.

The current period of limitation of three years or four years, as the case may be, is often not enough, particularly because of the sophistication of these transactions.

Consequently, the addition of a further three years to the normal period of limitation where a taxpayer carries out, in a taxation year, a transaction or series of transactions leading to the application of the GAAR, seems necessary to provide the tax administration with the time needed to identify problematic transactions. This approach was recently adopted by Alberta.

❑ Addition of three years to the normal period of limitation

Concerning the period of limitation, the tax legislation will be amended so that, where the GAAR applies to a transaction or a series of transactions:

- a period of three years is added to the normal periods of limitation of three or four years for the application of the GAAR by the Minister of Revenue and the reassessment or additional assessment may relate only to the items covered by the application of the GAAR; however, where a period of three years has already been added to the normal periods of limitation of three or four years, the additional period of three years in relation to the GAAR will not apply;
- this additional period of three years does apply to a transaction or series of transactions where the taxpayer, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the preventive disclosure rules, no later than the filing deadline of the tax return for the taxation year during which the transaction or series of transactions began to be carried out or the date when the members of the partnership are required to file an information return for the fiscal year during which the transaction or series of transactions began to be carried out or the date when they would be required to file it had the Minister of Revenue not waived such requirement;
- this additional period of three years does not apply also to a transaction or series of transactions where the taxpayer, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the mandatory disclosure rules,²⁵ no later than the filing deadline of the tax return for the taxation year concerned or the date when the members of the partnership are required to file an information return for the fiscal year concerned or the date when they would be required to file it had the Minister of Revenue not waived such requirement.

25 These rules are discussed in section 1 of the appendix.

❑ Application date

This measure will apply to taxation years ended after the day of publication of this information bulletin, provided the reassessment or additional assessment relates to a transaction carried out on or after the day of publication of this information bulletin. However, it will not apply regarding a transaction carried out as part of a series of transactions, leaving aside section 1.5 of the Taxation Act, that began before the day of publication of this information bulletin and that is completed before January 1, 2010.

2.3 Introduction of a penalty regime

According to the existing tax legislation, a transaction must, to be subject to the application of the GAAR, have resulted in a taxable benefit to the taxpayer and constitute an avoidance transaction in the sense that it was not carried out mainly for *bona fide* purposes, other than obtaining a tax benefit. In addition, the tax administration must show that the transaction is clearly abusive.

Furthermore, where the GAAR applies, other than regarding the payment of interest on unpaid taxes because of the avoidance transaction, the only negative financial consequence for the taxpayer is that his tax attributes are determined by the tax administration resulting in the withdrawal of the tax benefit arising from the avoidance transaction. Accordingly, the risk/return ratio favours the taxpayer.

Since the objective of a penalty regime in the taxation field is to curb or deter certain behaviour patterns by increasing the monetary risk to which a taxpayer exposes himself, there is reason to conclude that the introduction of penalties is an appropriate means of fighting ATP.

Moreover, in the context of fighting ATP, a penalty regime must target the taxpayer who participates in an ATP scheme as much as the person who promotes it. As mentioned in the working paper, the propagation and distribution of ATP schemes is in part attributable to the emergence of a new business model for tax intermediaries, in which they act as genuine promoters of ATP schemes.

❑ Penalty on the taxpayer where the GAAR applies

The tax legislation will be amended to stipulate that, where the GAAR applies to an avoidance transaction, in relation to a taxpayer, he will incur a penalty equal to 25% of the amount of the tax benefit withdrawn pursuant to the application of the GAAR. Accordingly, if application of the GAAR has the effect of increasing tax or any other amount payable under the Taxation Act, the penalty will be 25% of the additional tax and of any other additional amount payable.

Similarly, if application of the GAAR has the effect of reducing the tax refund or any other amount to which the taxpayer were entitled under the Taxation Act, the penalty will be 25% of the reduction of the tax refund and any other such amount. However, the taxpayer will not incur a penalty in the following cases:

- where he, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the preventive disclosure rules, no later than the filing deadline of the tax return for the taxation year during which the transaction or series of transactions began to be carried out or the date when the members of the partnership are required to file an information return for the fiscal year during which the transaction or series of transactions began to be carried out or the date when they would be required to file it had the Minister of Revenue not waived such requirement;
- where he, the general partner of a limited partnership or one of the members of any other partnership, as the case may be, discloses such transaction or series of transactions to Revenu Québec, in accordance with the mandatory disclosure rules,²⁶ no later than the filing deadline of the tax return for the taxation year concerned or the date when the members of the partnership are required to file an information return for the fiscal year concerned or the date when they would be required to file it had the Minister of Revenue not waived such requirement.

However, according to the jurisprudence, a taxpayer can also avoid a penalty by submitting a successful defence of due diligence.

❑ Penalty on the promoter where the GAAR applies

The tax legislation will be amended to stipulate that, where the GAAR applies to an avoidance transaction and a penalty is imposed on a taxpayer pursuant to the application of the GAAR to such transaction, the promoter of such avoidance transaction will incur a penalty equal to 12.5% of all the amounts each of which represents the consideration received or receivable, directly or indirectly, from a person (including a partnership) by the promoter, or by a person or a partnership to which the promoter is associated with or related to,²⁷ in relation to such transaction.

For the purposes of this measure, a promoter of an avoidance transaction is any person, including a partnership, who satisfies the following conditions:

- the person marketed or promoted the avoidance transaction or otherwise encouraged its growth or the interest it arouses;

26 These rules are discussed in section 1 of the appendix.

27 *Supra*, note 21.

- he or a person or a partnership to which he is associated with or related to,²⁸ received or will be entitled to receive, directly or indirectly, consideration in respect of such marketing, promotion or encouragement;
- it is reasonable to conclude that he has played a substantial role in such marketing, promotion or encouragement.

In this regard, an employee, other than a specified employee,²⁹ of the promoter will not be considered to have played a substantial role in the marketing, promotion or encouragement, by such promoter, of an avoidance transaction. However, the conduct of an employee (including a specified employee) of a promoter will be deemed to be that of his employer for the purposes of this measure.

Since the penalty on the promoter will be tied to the penalty on the taxpayer, the promoter may avoid it in respect of each taxpayer who makes either preventive or early disclosure of the avoidance transaction (or the series of transactions that includes such transaction) in accordance with the rules and within the stipulated deadlines. The promoter may also avoid the penalty in respect of each taxpayer who successfully pleads due diligence as a defence against his own penalty.

In the case of a transaction carried out by a partnership, the promoter may avoid the penalty if the general partner makes either preventive or early disclosure of the avoidance transaction (or the series of transactions that includes such transaction) in accordance with the rules and within the stipulated deadlines. He may also avoid the penalty if the general partner successfully pleads due diligence as a defence against his own penalty.

In the case of a transaction carried out by a partnership other than a limited partnership, the promoter may avoid the penalty if one of the members of the partnership, acting on behalf of all the members, makes either preventive or early disclosure of the avoidance transaction (or the series of transactions that includes such transaction) in accordance with the rules and within the stipulated deadlines. He may also avoid the penalty in respect of each member who successfully pleads due diligence as a defence against his own penalty.

However, according to the jurisprudence, the promoter himself may plead due diligence as a defence against his penalty.

28 *Id.*

29 The expression “specified employee” of a person means an employee of the person who is a specified shareholder of the person or who does not deal at arm’s length with the person (section 1 of the Taxation Act).

❑ Application date

The announced measures concerning the penalty on the taxpayer and the penalty on the promoter will apply regarding a transaction carried out on or after the day of publication of this information bulletin. However, they will not apply regarding a transaction carried out as part of a series of transactions, leaving aside section 1.5 of the Taxation Act, that began before the day of publication of this information bulletin and that is completed before January 1, 2010.

2.4 Preventive disclosure mechanism

The objectives of the extension of the period of limitation and the introduction of a penalty regime where the GAAR applies are respectively to allow the tax administration more time to identify ATP schemes and to change the risk/reward ratio that currently favours the taxpayer.

Moreover, where a taxpayer informs the tax administration of a tax planning transaction, the tax administration is able to carry out its auditing work in a timely manner, i.e. with no need for additional time. In addition, in such a case, the need to change the risk/reward ratio of the taxpayer also becomes redundant.

In this context, a preventive disclosure mechanism would enable a taxpayer, in the event of the GAAR otherwise applying to a transaction, to avoid extension of the period of limitation and the imposition of penalties regarding such transaction.

❑ Introduction of a preventive disclosure mechanism

The tax legislation will be amended to introduce a preventive disclosure mechanism that will enable a taxpayer, in the event of the GAAR otherwise applying to a transaction, to avoid the extension of the period of limitation and the imposition of a penalty regarding such transaction where it (or the series of transactions including such transaction) is the object of preventive disclosure in accordance with the rules and within the deadlines stipulated below.

A taxpayer may make a preventive disclosure to Revenu Québec in relation to a transaction or a series of transactions he carries out.

In the case of a transaction or a series of transactions carried out by a limited partnership, the general partner may make a preventive disclosure to Revenu Québec.

In the case of a transaction or a series of transactions carried out by partnership other than a limited partnership, any member of the partnership may make a preventive disclosure to Revenu Québec. The preventive disclosure made by one member, on behalf of all the members, will be deemed made by each of the members.

The preventive disclosure of a transaction or series of transactions must be made no later than the filing deadline of the taxpayer's tax return for the taxation year during which the transaction or series of transactions began to be carried out or, in the case of a transaction or series of transactions carried out by a partnership, the date when its members are required to file an information return for the fiscal year during which the transaction or series of transactions began to be carried out or the date when they would be required to file it had the Minister of Revenue not waived the requirement.

Preventive disclosure of a transaction or a series of transactions will have to be made using a prescribed form sent within the deadline stipulated for that purpose, under separate cover, by registered mail or electronically, to the Direction principale de la lutte contre les planifications fiscales abusives of Revenu Québec, i.e. a division different than the one where taxpayers usually send their tax returns and forms.

The information that must be provided on the prescribed form, in relation to such transaction or series of transactions, must consist of a complete and detailed description of the facts – not advice or other opinions – relating to the transaction or series of transactions as well as a statement of the tax consequences resulting from the transaction or series of transactions. In addition, the description of the facts and tax consequences resulting from the transaction or series of transactions must be sufficiently detailed to enable analysis of the transaction or series of transactions and an understanding of the resulting tax consequences.

For the purposes of the GAAR, preventive disclosure may at no time be likened to an admission or confession as to the application of this rule to the disclosed transaction.

Moreover, the simple transmission of the prescribed form, under separate cover, by registered mail or electronically, will serve as acknowledgement of receipt.

Lastly, if, in the 120 days following transmission of the prescribed form, Revenu Québec does not communicate with the person who made the disclosure to obtain additional information in relation to the transaction or series of transactions or the resulting tax consequences, the prescribed form will then be considered as having been sent within the required deadline, and completed in the required form, i.e. containing sufficiently detailed information for Revenu Québec to be able to analyze the transaction or series of transactions and understand the resulting tax consequences.

□ Application date

The measures relating to the mechanism for preventive disclosure will apply to transactions carried out on or after the day of publication of this information bulletin.

However, in the case of a transaction carried out as part of a series of transactions that began on a taxation year or on a fiscal year, as the case may be, ended before the day of publication of this information bulletin, the preventive disclosure could be done no later than six months after that day.