

MEASURES DESIGNED TO PROTECT THE INTEGRITY AND FAIRNESS OF QUÉBEC'S TAX SYSTEM

Several measures, including the general anti-avoidance rule (GAAR), have been introduced into the legislation over the years to protect the base of Québec's tax system and counter planning that undermines the system's integrity.

Consultations were therefore held in 2009 as part of the legislative review to fight aggressive tax planning (ATP).¹

As a result of these consultations, a new mandatory disclosure mechanism was introduced to help tax authorities quickly identify certain behaviours for which the risk of non-compliance to the purpose and spirit of the tax legislation was deemed higher.² The GAAR was also amended as regards the risk/return ratio generally associated with ATP.

More recently, these measures have been amended to counter certain types of transactions.³

As part of the Tax Fairness Action Plan,⁴ and as mentioned in the March 21, 2019 budget,⁵ additional measures will be put in place to protect the integrity and fairness of Québec's tax system.

These measures are in line with the joint approach of the Ministère des Finances and Revenu Québec to fight ATP, and will focus on sham transactions and nominee agreements as well as on strengthening the current mandatory disclosure mechanism.

❑ Sham transactions

A sham is a complex transaction or series of transactions which has an element of deception aimed at misleading the tax authorities as to a taxpayer's identity or the actual nature of a transaction or series of transactions.

¹ MINISTÈRE DES FINANCES DU QUÉBEC, *Discussion Paper on Aggressive Tax Planning*, January 30, 2009.

² MINISTÈRE DES FINANCES DU QUÉBEC, *Information Bulletin 2009-5*, October 15, 2009, pp. 6-16.

³ MINISTÈRE DES FINANCES DU QUÉBEC, *Budget 2015-2016 – Additional Information 2015-2016*, March 26, 2015, pp. A.108-A.110; MINISTÈRE DES FINANCES DU QUÉBEC, *Information Bulletin 2017-10*, p. 2.

⁴ MINISTÈRE DES FINANCES DU QUÉBEC, *The Québec Economic Plan – Tax Havens: Tax Fairness Action Plan*, November 10, 2017.

⁵ MINISTÈRE DES FINANCES DU QUÉBEC, *Budget 2019-2020 – Additional Information*, March 21, 2019, p. B.5.

Because the taxpayer tries to hide the real facts of a transaction from the tax authorities, it is difficult for Revenu Québec to obtain all the relevant information in order to verify the validity of the self-assessment made by the taxpayer.

In order to allow Revenu Québec to better counter tax schemes based on sham transactions, a special regime will be put in place to:

- add new penalties;
- extend the reassessment issuance period;
- block access to government contracts.

■ Penalties

Given the complex nature of transactions or series of transactions involving a sham, more severe penalties for the taxpayer and for advisers and promoters of such transactions or series of transactions will be introduced into tax legislation.

■ Penalty for taxpayers

Tax legislation will be amended to introduce a penalty to be applied when Revenu Québec issues an assessment, a new assessment or an additional assessment by proving that a transaction or series of transactions involves a sham. In such cases, Revenu Québec will determine the tax consequences arising from this transaction or series of transactions not on the basis of the sham that is declared but rather on the basis of the nature of the actual transaction or series of transactions carried out by the parties involved in the sham.

More specifically, when such an assessment, reassessment or additional assessment is issued by Revenu Québec in respect of a taxpayer for a taxation year, the taxpayer will incur a penalty equal to the greater of \$25 000 and, among other things, 50% of the excess of the amount of tax he would have had to pay for that year had he not been involved in a sham on the tax that was paid as a result of the sham. This penalty will be calculated in a similar manner to the method currently used for situations involving a false statement or wilful default when Revenu Québec has demonstrated that a transaction or series of transactions involves a sham.⁶

■ Penalty for advisers and promoters

Tax legislation will be amended to introduce a penalty to be applied to an adviser or promoter when Revenu Québec has issued an assessment, a new assessment or an additional assessment to a taxpayer in respect of a transaction or series of transactions that involves a sham.

More specifically, when such an assessment, reassessment or additional assessment is issued by Revenu Québec in respect of a taxpayer for a taxation year, an adviser or promoter of the sham transaction that will be the subject of such assessment, reassessment or additional assessment will incur a penalty equal to 100% of his fees in respect of the sham transaction.

⁶ Taxation Act, s. 1049.

In this regard, the term “adviser” will have the same meaning as that provided for the obligation to disclose certain transactions,⁷ while the term “promoter” will have the same meaning as that provided for the application of the GAAR.⁸

■ Prescription period

Revenu Québec needs more time to identify and counter a transaction or series of transactions involving a sham, because such schemes are set up so as to hide from the tax authorities the actual transaction or series of transactions between the parties, and because the intention to mislead the tax authorities is generally a shared one for all parties involved in the transaction or series of transactions.

Consequently, in order to allow Revenu Québec to determine the tax consequences arising from a transaction or series of transactions involving a sham, tax legislation will be amended so that a three-year period is added to the regular three- or four-year prescription periods currently provided for the issuance of a reassessment to:

- a taxpayer who is a party to a sham;
- a taxpayer who is a member of a partnership that is a party to the sham;
- a corporation associated with the taxpayer or the partnership that is a party to the sham at the time it is made;
- a corporation associated with a taxpayer who is a member of a partnership that is a party to the sham at the time it is made;
- a person related to the taxpayer or the partnership that is a party to the sham at the time it is made;
- a person related to a taxpayer who is a member of a partnership that is a party to the sham at the time it is made.

In addition, tax legislation will be amended to suspend the prescription period otherwise applicable to the determination of a reassessment when it is issued to a taxpayer who is the subject of a formal demand concerning unnamed persons, and when the purpose of the assessment is to determine the tax consequences arising from a transaction or series of transactions involving a sham. The suspension of the prescription period begins on the day on which the authorization request in respect of this formal demand is filed with a judge of the Court of Québec and ceases as soon as the authorization request is settled in a final manner and the taxpayer has complied with the formal demand, if applicable.

⁷ *Ibid.*, s. 1079.8.1.

⁸ *Ibid.*, s. 1079.9.

■ **Ban on contracting with the State**

New rules will be introduced to eliminate from the list of government suppliers those who participate in schemes based on a sham, as well as advisers and promoters of such schemes.

More specifically, the legislation will be amended so that taxpayers who have been the subjects of a final assessment⁹ for which a penalty has been imposed in respect of a transaction or series of transactions involving a sham, as well as advisers or promoters of such a transaction or series of transactions who have been charged a penalty on the same basis, are registered with the Autorité des marchés publics in the register of enterprises ineligible for public contracts (RENA).

Such penalties will also be taken into account in the decision-making process through which the Autorité des marchés publics may grant or deny a company the authorization to conclude contracts with a public body.

■ **Effective date**

These amendments will apply to transactions carried out on or after the day of publication of this information bulletin. However, they will not apply to a transaction that is part of a series of transactions having begun the day of publication of this information bulletin and having been completed before August 1, 2019.

The measure announced concerning the suspension of the prescription period in respect of a taxpayer who is the subject of a formal demand concerning unnamed persons will apply to formal demands for which an application for authorization was filed with a judge of the Court of Québec after the day of publication of this information bulletin.

□ **Nominee agreements**

In order to ensure the proper administration of tax legislation so that Revenu Québec is promptly notified of any transaction involving a nominee, tax legislation will be amended so that the parties to a nominee agreement made as part of a transaction or series of transactions have the obligation to disclose the situation to Revenu Québec.

In this regard, the disclosure made by one of the parties to the nominee agreement will be deemed to have been made by the other party as well.

■ **Mandatory disclosure of a nominee agreement**

The disclosure of a nominee agreement must be made through the form prescribed by the Minister of Revenue and must include:

- the date of the nominee agreement;
- the identity of the parties to the nominee agreement;

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Means an assessment that is not under objection or appeal before the courts and in respect of which the deadline for filing an objection or appeal has expired, as well as an assessment in respect of which a final court judgment has been rendered.

- a full description of the facts of the transaction or series of transactions to which the nominee agreement relates and the identity of any person or entity for which such transaction or series of transactions has tax consequences;
- any other information requested in the prescribed form.

This information return must be filed with Revenu Québec no later than 90 days after the date on which the nominee agreement was concluded.

■ **Penalty**

If the parties to the nominee agreement fail to file this information return within the prescribed time limit, they will be jointly liable for a penalty of \$1 000 and an additional penalty of \$100 per day, up to a maximum of \$5 000, starting on the second day of the omission.

■ **Prescription period**

Tax legislation will be amended so that, in cases where this information return is not duly filed with Revenu Québec as previously stipulated, the prescription period otherwise applicable to a taxation year for a person participating in a nominee agreement will be suspended with respect to the tax consequences, for that year, arising from a transaction or series of transactions that occurred that year and that are part of the nominee agreement.

■ **Effective date**

These amendments will apply to nominee agreements concluded on or after the day of publication of this information bulletin.

In addition, these amendments will apply in respect of a nominee agreement concluded prior to such day where the tax consequences of the transaction or series of transactions to which the nominee agreement relates continue on or after the date of publication of this information bulletin. In this case, the disclosure containing the information described above must be filed with Revenu Québec no later than September 16, 2019.

□ **Mandatory disclosure**

As mentioned above, various measures to counter ATP were announced in 2009, including a mandatory disclosure mechanism for certain transactions,¹⁰ which was amended in 2015 so that its scope could be expanded.¹¹

Three types of transactions are covered by this mandatory disclosure mechanism: transactions for which the adviser requires confidentiality from the client,¹² transactions for which the adviser's remuneration is conditional on the occurrence of certain events¹³ and transactions involving contractual coverage to protect the client from certain events.¹⁴

¹⁰ Taxation Act, s. 1079.8.1 to 1079.8.15.

¹¹ MINISTÈRE DES FINANCES DU QUÉBEC, *Budget 2015-2016 – Additional Information 2015-2016*, March 26, 2015, pp. A.108-A.110.

¹² Taxation Act, s. 1079.8.1, par. 1, definition of “confidential transaction”.

¹³ *Ibid.*, s. 1079.8.1, par. 1, definition of “transaction involving conditional remuneration”.

¹⁴ *Ibid.*, s. 1079.8.1, par. 1, definition of “transaction with contractual protection”.

Briefly, the mandatory disclosure mechanism applies when a taxpayer, or a partnership of which the taxpayer is a member, carries out any of these transactions resulting, directly or indirectly, for a taxation year or a fiscal period, as the case may be, in a tax benefit of \$25 000 or more for the taxpayer or in an impact on the income of a taxpayer or the partnership, as the case may be, of \$100 000 or more; this transaction must be disclosed to Revenu Québec for that taxation year or fiscal period.

A taxpayer who fails to make such a disclosure incurs a penalty of up to \$100 000 and the prescription period applicable to a taxation year covered by the disclosure is extended.

Tax legislation will be amended to further extend the scope of the mandatory disclosure mechanism so that the Minister of Revenue can specify transactions or series of transactions that must be disclosed.

Revenu Québec will make public, at the time it deems appropriate, transactions that are subject to mandatory disclosure.

■ Prescribed transactions

A prescribed transaction of a taxpayer for a taxation year refers to a transaction or series of transactions carried out by a taxpayer and whose form and substance are very similar, but not necessarily identical, to those specified by Revenu Québec on a public list.

Moreover, a prescribed transaction of a taxpayer refers to a transaction or series of transactions that began after the publication by Revenu Québec of a transaction or series of transactions subject to mandatory disclosure and that is similar to that of the taxpayer.

■ Taxpayer's disclosure obligation

A taxpayer who carries out a prescribed transaction or who is a member of a partnership carrying out a transaction that will generate a tax benefit – within the meaning of the current legislation¹⁵ – will be required to file an information return in the form prescribed by the Minister of Revenue. The information must include:

- the identity of all parties involved in the prescribed transaction and the relationship between them during the course of the transaction;
- a full description of the facts of the prescribed transaction;
- a description of the tax consequences for the taxpayer resulting from the prescribed transaction;
- any other information requested in the prescribed form.

The information return must be filed with Revenu Québec on the latest of the following dates: 60 days after the day on which the prescribed transaction begins, or 120 days after the day on which Revenu Québec first makes public the prescribed transaction for which disclosure is mandatory.

¹⁵ Taxation Act, s. 1079.8.1, par. 1, definition of "tax benefit".

In this regard, a disclosure made by a member of a partnership will be deemed to have been made by each of the other members of the partnership.

- **Penalty for failure to file and prescription period**

A taxpayer who fails to file this information return will incur a penalty of up to \$100 000 and the prescription period applicable to a taxation year covered by this information return will be extended in the manner currently provided for by the legislation.¹⁶

- **Penalty relating to tax benefits**

Tax legislation will be amended so that a taxpayer incurs a penalty equal to 50% of the amount of a tax benefit generated as a result of an undisclosed prescribed transaction for a taxation year.

- **Adviser or promoter's disclosure obligation**

Tax legislation will be amended so that an adviser or promoter who commercializes or promotes a prescribed transaction whose form and substance has not required a material change when implemented for different taxpayers is required to file an information return in the form prescribed by the Minister of Revenue. The information must include:

- a full description of the facts of the prescribed transaction;
- any other information requested in the prescribed form.

In this regard, the term “adviser” will have the same meaning as that provided for the obligation to disclose certain transactions, while the term “promoter” will have the same meaning as that provided for the application of the GAAR.

The information return must be filed with Revenu Québec by an adviser or promoter on the latest of the following dates: 60 days after the day on which the adviser or promoter first commercializes or promotes the prescribed transaction, or 120 days after the day on which Revenu Québec first makes public the prescribed transaction for which disclosure is mandatory.

- **Penalty for failure to file**

An adviser or promoter who fails to file an information return will incur a penalty of \$10 000 and an additional penalty of \$1 000 per day, up to \$100 000, starting on the second day of the failure to file.

- **Penalty for fees**

An adviser or promoter who fails to file an information return will incur a penalty equal to 100% of his fees with respect to the various taxpayers to whom he commercialized or promoted the undisclosed prescribed transaction.

¹⁶ Taxation Act, s. 1079.8.13 to 1079.8.15.

■ **Effective date**

These amendments will apply to the prescribed transactions that will be included on the list made public by Revenu Québec after the publication of this information bulletin.

For information concerning this information bulletin, contact the Secteur du droit fiscal, de l'optimisation des revenus et des politiques locales et autochtones at 418 691-2236.

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