

# TAXTimes

Published twice monthly

2017 Issue No. 16 — August 25, 2017

## IN THIS ISSUE

Commentary .....	1
Recent Government Publications .....	3
Supreme Court Appeals.....	3
News Releases .....	3
Notice to Industry: Final List of Designated Regions for 2016 Under the Livestock Tax Deferral Provision .....	3
Organisation for Economic Co-Operation and Development (OECD) .....	6
Case Law Update .....	6
McCarthy Tétrault Commentary Update to <i>Canada Tax Service, Release 1629</i> .....	8

## COMMENTARY

### INCOME SPLITTING: IS IT TIME TO RE-VISIT A 1966 CANADIAN TAX REFORM IDEA?

The following article was written by Kim G C Moody, FCA, TEP, and Kenneth Keung, CA, CPA (CO, USA), CFP, LLB, MTAX, TEP, Directors, Canadian Tax Advisory at Moodys Gartner, dated August 9, 2017.

On July 18, 2017, a blockbuster package of proposed tax law changes (the “proposals”) aimed at private corporations and their shareholders, was released by the Department of Finance. The proposed changes target common tax management practices available to private business owners, such as income splitting amongst family members, investing in passive assets with corporate funds, and repatriation of corporate earnings as capital gains rather than dividends.

In many ways, the broad-sweeping proposals and the accompanying “consultation document”, heavily laced with offensive rhetoric, reads like a class warfare manifesto against private businesses. Many in the business and professional community have started rallying against such damaging rhetoric and the countless unintended consequences arising from the proposals (including effective tax rates of 73% on certain passive income, and 93% on the death of certain non-active shareholders

of private corporations). We heartily agree with such criticisms. These proposals, if implemented, will — without a doubt — have a negative effect on Canada’s economy.

Notwithstanding, the purpose of this article is to explore the other side of the argument of one of the proposals: Income splitting. What is income splitting? An example is the paying of dividends to family shareholders (active or non-active), which often results in a reduced overall family tax burden as compared to the situation where dividends were simply paid to the active shareholder. Is income splitting really that offensive and unfair as suggested by our government?

A typical private business is often started and capitalized with family assets. In many cases, the operations of the business are run by family members. Often, but not always, one of the spouses/common-law partners stays home to raise the children while the other focuses on the operations of the business. In many cases, both spouses/common-law partners (and sometimes the children either directly or indirectly) are shareholders of the business. Such an arrangement allows the eventual rewards of the business — often after many years of struggle to make the business successful against the odds — to be split amongst the family. Any dividends or capital gains realized are taxed according to each family member’s individual tax brackets (with the exception of minors who are generally always taxed at the top marginal tax rate under the current “kiddie tax” regime).



Part of the proposals will extend the “kiddie tax” regime to adults. Starting in 2018, not only will minors be taxed at top marginal tax rates, but any dividend or capital gain realized by family members — including spouses and common-law partners — over a “reasonable” amount will also be taxed at the top marginal tax rate (with additional requirements applying to those between 18 and 24 years old). Repealing the common practice of income-splitting with a spouse/common-law partner (or another family member who does not directly contribute to the business) has intuitive appeal at first glance: Why should someone get something unless they’ve worked for it? However, is a reasonableness test appropriate in a spouse or common-law partner scenario when the province’s



**THOMSON REUTERS®**

One Corporate Plaza, 2075 Kennedy Road,  
Toronto, Ontario M1T 3V4  
Customer Support  
1-416-609-3800 (Toronto & International)  
1-800-387-5164 (Toll Free Canada & U.S.)  
Fax 1-416-298-5082 (Toronto)  
Fax 1-877-750-9041 (Toll Free Canada Only)  
Email [CustomerSupport.LegalTaxCanada@TR.com](mailto:CustomerSupport.LegalTaxCanada@TR.com)  
Content Editor: Joscelyn Affonso  
Contributing Editors: Carolyn Agasild and Scott McVicar  
©2017 Thomson Reuters Canada Limited

**NOTICE AND DISCLAIMER:** All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written consent of the publisher (Thomson Reuters Canada, a division of Thomson Reuters Canada Limited).

Thomson Reuters Canada and all persons involved in the preparation and sale of this publication disclaim any warranty as to accuracy or currency of the publication. This publication is provided on the understanding and basis that none of Thomson Reuters Canada, the author/s or other persons involved in the creation of this publication shall be responsible for the accuracy or currency of the contents, or for the results of any action taken on the basis of the information contained in this publication, or for any errors or omissions contained herein.

No one involved in this publication is attempting herein to render legal, accounting or other professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The analysis contained herein should in no way be construed as being either official or unofficial policy of any governmental body.

various matrimonial property regimes grant property rights to such persons, regardless of who contributes to the business? Is basing taxation on an individual-by-individual basis, rather than on a family unit basis, the right or fair approach? Do the proposals contradict our current government’s emphasis on gender equality when many entrepreneurial families have a stay-at-home parent?

It turns out that our forefathers already thought about many of these questions over 50 years ago. In 1966, the Royal Commission on Taxation, chaired by Kenneth Carter, carried out a comprehensive review to recommend reforms to the Canadian tax system. Part of that review was to determine the proper taxing unit in Canada. The Commission noted the substantial contribution each family member usually makes to the family’s finances, and strongly recommended the family unit be the appropriate taxing unit: *“We believe firmly that the family is today, as it has been for many centuries, the basic economic unit in society.”* While many things have changed over the last 50 years, we submit that this assertion remains just as true today, particularly with respect to families that run businesses. A spouse/common-law partner who stays home to raise children and manage the household is as much a key ingredient to the family’s success as the other spouse’s day-to-day hustle for the business. When you combine that with the fact that non-active spouses/common-law partners have property rights with respect to family assets that have been used — directly or indirectly — to grow the business, is it really offensive from a tax policy perspective for the non-active spouse/common-law partner or other family member to receive dividends, or realize capital gains despite not having expended the same level of direct effort in the business as other family members?

Today, the Carter Commission Report largely forms the foundation of the modern Canadian tax regime. However, the government went against the Commission’s recommendation with respect to adopting the family as the taxing unit, and decided on the individual as the proper taxing unit. This is why today we file tax returns as individuals, whereas in the U.S. there is a form of the family as the taxing unit (for example, couples can file joint tax returns if desired). As expected, over the years, taxpayers have found many ways to split income despite the taxing unit being the individual, and the Canadian government has occasionally responded by compounding the complexity of the *Income Tax Act* to prevent it. These preventive measures have included the so-called “attribution rules,” introduced in 1985, which, if applicable, attribute certain income back to the transferor if property is transferred between spouses/common-law partners or minors with certain exceptions, the “kiddie tax” regime, introduced in 2000, and other rules beyond the scope of this article. There are also existing rules that prevent the deduction of unreasonable salaries or other amounts when computing business income.

By extending the “kiddie tax” rules to adults, the government will completely deny a family’s ability to income split amongst adults who are not active in the business, thereby ignoring the reality that the family is the basic economic unit of society, that non-active spouses/common-law partners contribute significantly to the

success of the family business, and the fact that those spouses/common-law partners have property rights with respect to such family business assets. We routinely deal with many successful entrepreneurs and almost all of them credit their success to their family, irrespective of whether they are active in the business or not. Such entrepreneurs also acknowledge that every member of their family bears some degree of risk associated with their business. In their eyes, their own success is indistinguishable from their family's success.

What does this proposed change mean to the bottom-line of the owners of a family business? Let's assume a business has \$300,000 of after-tax corporate profits, and is owned by two spouses. The private corporation pays \$150,000 of dividends to each spouse. Under existing rules, assuming they are residents of Ontario, the family's personal tax burden is approximately \$68,000. Under the proposals, if the two spouses contribute equally to the business, then their tax burden remains the same as under the existing rules. However, if one of the spouses is a stay-at-home parent and not active in the business, the total tax burden increases to approximately \$90,000. Beyond the increased tax burden, for stay-at-home parents, gender inequality will likely also be an unfortunate consequence of the proposals. Is all of this fair? Not in our view.

The proposals will specifically disallow the splitting of dividends or capital gains from private corporations, but in contrast, our government has allowed the splitting of pension income between spouses/common-law partners since 2007. This results in a glaring taxation distinction between pension income and business income. Is this fair? Not in our view.

The resulting tax rules that the government is proposing to prevent income splitting are some of the most complicated tax rules we have ever seen. The average small business owner — who usually does not have the resources to have an internal tax department to interpret and navigate complex tax rules — will be burdened with extreme complexity. Is this fair? Not in our view.

We believe that what is old is new again. Just as it was in 1966, and for many centuries, the economic unit today is still the family unit. Rather than playing an endless cat and mouse game with taxpayers on income splitting (which results in very complex legislation that will likely not be workable in practice) — all in the name of "fairness" — we believe the Government should revisit the Carter Commission's recommendation of basing taxation on the family unit. This, in our view, would be a worthwhile tax reform initiative for Canada. And it would be fair.

\* Reproduced by permission.

## RECENT GOVERNMENT PUBLICATIONS

On August 14, 2017 the Canada Revenue Agency released "[Guidance on the Common Reporting Standard, Part XIX of the Income Tax Act](#)" dated July 6, 2017. The guidance is to help

financial institutions, their advisors, and Canada Revenue Agency officials with the due diligence and reporting obligations relating to the Common Reporting Standard (CRS), formally referred to as the "Standard for Automatic Exchange of Financial Account Information in Tax Matters". The CRS was implemented by the addition of Part XIX to the *Income Tax Act*.

## SUPREME COURT APPEALS

The Supreme Court of Canada appeals tables on *TaxPartner* and *Taxnet Pro* have been updated through the S.C.C. *Bulletin of Proceedings* dated July 28, 2017.

The *Notices of Appeal to Federal Court of Appeal Filed* table has been updated on *TaxPartner* and *Taxnet Pro* for appeals filed through August 10, 2017.

## NEWS RELEASES

### NOTICE TO INDUSTRY: FINAL LIST OF DESIGNATED REGIONS FOR 2016 UNDER THE LIVESTOCK TAX DEFERRAL PROVISION

On August 4, 2017 Agriculture and Agri-Food Canada released the following news release regarding tax relief measures for designated regions under the livestock tax deferral provision for 2016.

The final list of designated regions where livestock tax deferral has been authorized for 2016 due to drought conditions in British Columbia, Alberta, Ontario, Quebec and Nova Scotia is now available.

The livestock tax deferral provision allows producers in designated drought regions who are facing feed shortages, to defer a portion of their sale proceeds of breeding livestock to the next year. The cost of replacing the animals in the next year offsets the deferred income, thereby reducing the tax burden associated with the original sale. Eligible producers can request the tax deferral when filing their 2016 income tax returns, or if they have already filed, submit an adjustment request directly to the Canada Revenue Agency.

For 2017, federal officials are working closely with their provincial counterparts and emergency management personnel to understand the impacts of the current wild fires in British Columbia on agricultural operations. Agriculture and Agri-Food Canada recognizes the pressure B.C. livestock producers are under and will work with them and the provincial government to explore all options for assistance, including the potential for livestock tax deferral.

### Quick Facts

- Low moisture levels resulted in significant forage shortages for livestock producers in British Columbia, Alberta,

Ontario, Quebec and Nova Scotia. One option for producers is to reduce their breeding herd in order to manage feed supplies.

- In addition to the livestock tax deferral provision, producers have access to assistance through existing Growing Forward 2 Business Risk Management programs, which include AgrilInsurance, AgriStability and AgrilInvest.

## Contacts

### Media Relations

Agriculture and Agri-Food Canada  
Ottawa, Ontario  
613-773-7972  
1-866-345-7972

## 2016 Final List of Designated Regions

### British Columbia — 2016 Tax Deferral

- \*Census Subdivision of East Kootenay A\*\*\*
- \*Census Subdivision Kitimat-Stikine A\*\*
- \*Census Subdivision Kitimat-Stikine B\*\*
- \*Census Subdivision Kitimat-Stikine D\*\*
- \*Census Subdivision of Skeena—Queen Charlotte D\*\*\*
- \*Census Subdivision Skeena—Queen Charlotte E\*\*

\* Based on the 2011 Census

\*\* Second designation

\*\*\* Final designation

### Alberta — 2016 Tax Deferral

- City of Calgary\*\*
- Clearwater County
- County of Newell\*\*
- Improvement District No. 9 Banff
- Kananaskis Improvement District
- Kneehill County\*\*\*
- Lacombe County\*\*\*
- Lethbridge County
- Mackenzie County\*\*
- Mountain View County
- Municipal District of Bighorn No. 8
- Municipal District of Foothills No. 31
- Municipal District of Pincher Creek No. 9
- Municipal District of Ranchland No. 66
- Municipal District of Taber\*\*\*
- Municipal District of Willow Creek No. 26
- Municipality of Crowsnest Pass
- Red Deer County
- Rocky View County
- Vulcan County
- Wheatland County

\*\* Second designation

\*\*\* Final designation

### Ontario — 2016 Tax Deferral

- City of Barrie
- City of Belleville\*\*
- City of Brampton
- City of Burlington\*\*\*
- City of Clarence-Rockland
- City of Cornwall\*\*\*
- City of Hamilton
- City of Kawartha Lakes
- City of Kingston\*\*
- City of Markham
- City of Mississauga\*\*\*
- City of Niagara Falls\*\*
- City of Oshawa
- City of Ottawa
- City of Peterborough
- City of Pickering
- City of Port Colborne\*\*
- City of Prince Edward
- City of Quinte West
- City of St. Catharines\*\*
- City of Thorold\*\*\*
- City of Toronto
- City of Vaughan
- City of Welland\*\*
- Haldimand County\*\*
- Municipality of Brighton
- Municipality of Centre Hastings\*\*
- Municipality of Clarington
- Municipality of Highlands East
- Municipality of Marmora and Lake
- Municipality of North Grenville
- Municipality of Port Hope
- Municipality of South Dundas
- Municipality of The Nation
- Municipality of Trent Hills
- Municipality of Trent Lakes
- Municipality of Tweed\*\*
- Norfolk County\*\*\*
- Town of Ajax
- Town of Aurora
- Town of Bracebridge
- Town of Bradford West Gwillimbury
- Town of Caledon
- Town of East Gwillimbury
- Town of Fort Erie\*\*
- Town of Georgina
- Town of Gravenhurst
- Town of Greater Napanee\*\*
- Town of Grimsby\*\*
- Town of Halton Hills\*\*\*
- Town of Innisfil
- Town of Lincoln\*\*

- Town of Mono
  - Town of New Tecumseth
  - Town of Newmarket
  - Town of Niagara-on-the-Lake\*\*
  - Town of Oakville\*\*\*
  - Town of Pelham\*\*
  - Town of Richmond Hill
  - Town of Wasaga Beach\*\*\*
  - Town of Whitby
  - Town of Whitchurch-Stouffville
  - Township of Addington Highlands\*\*\*
  - Township of Adjala-Tosorontio
  - Township of Alfred and Plantagenet
  - Township of Algonquin Highlands
  - Township of Alnwick/Haldimand
  - Township of Amaranth
  - Township of Asphodel-Norwood
  - Township of Athens\*\*\*
  - Township of Augusta
  - Township of Beckwith\*\*\*
  - Township of Brock
  - Township of Cavan Monaghan
  - Township of Central Frontenac\*\*\*
  - Township of Champlain
  - Township of Clearview
  - Township of Cramahe
  - Township of Douro-Dummer
  - Township of Drummond/North Elmsley\*\*\*
  - Township of East Hawkesbury
  - Township of Edwardsburgh/Cardinal
  - Township of Elizabethtown-Kitley\*\*\*
  - Township of Essa
  - Township of Front of Yonge\*\*\*
  - Township of Frontenac Islands\*\*
  - Township of Havelock-Belmont-Methuen
  - Township of King
  - Township of Lake of Bays
  - Township of Leeds and the Thousand Islands\*\*
  - Township of Limerick\*\*\*
  - Township of Loyalist\*\*
  - Township of Madoc\*\*
  - Township of Melancthon
  - Town of Milton\*\*\*
  - Township of Minden Hills
  - Township of Montague
  - Township of Mulmur
  - Township of North Dundas
  - Township of North Glengarry
  - Township of North Kawartha
  - Township of North Stormont
  - Township of Oro-Medonte
  - Township of Otonabee-South Monaghan
  - Township of Puslinch\*\*\*
  - Township of Ramara
  - Township of Rideau Lakes\*\*\*
  - Township of Russell
  - Township of Scugog
  - Township of Selwyn
  - Township of Severn
  - Township of South Frontenac\*\*
  - Township of South Glengarry
  - Township of South Stormont
  - Township of Springwater
  - Township of Stirling-Rawdon
  - Township of Stone Mills\*\*
  - Township of Tay\*\*\*
  - Township of Tay Valley\*\*\*
  - Township of Tiny\*\*\*
  - Township of Tudor and Cashel\*\*\*
  - Township of Tyendinaga\*\*
  - Township of Uxbridge
  - Township of Wainfleet\*\*
  - Township of West Lincoln\*\*
  - Township of Wollaston\*\*\*
  - United Townships of Dysart, Dudley, Harcourt, Guilford, Harburn, Bruton, Havelock, Eyre and Clyde
  - Village of Merrickville-Wolford
- \*\* Second designation  
\*\*\* Final designation
- Quebec — 2016 Tax Deferral**
- Census Subdivision of Lac-Ernest\*\*\*
  - City of Gatineau
  - City of Lachute
  - City of Mirabel
  - City of Saint-Jérôme
  - City of Salaberry-de-Valleyfield\*\*\*
  - Municipality of Mille-Isles
  - Municipality of Boileau
  - Municipality of Bowman
  - Municipality of Cantley
  - Municipality of Chelsea
  - Municipality of Denholm
  - Municipality of Duhamel\*\*
  - Municipality of Elgin\*\*\*
  - Municipality of Franklin\*\*\*
  - Municipality of Grenville-sur-la-Rouge
  - Township of Godmanchester\*\*\*
  - Municipality of Hinchinbrooke\*\*\*
  - Municipality of Huberdeau
  - Municipality of Kazabazua\*\*\*
  - Municipality of La Conception
  - Municipality of La Minerve
  - Municipality of La Pêche
  - Municipality of Labelle\*\*\*
  - Municipality of Lac-des-Plages
  - Municipality of Lac-Sainte-Marie
  - Municipality of Lac-Simon
  - Municipality of L'Ange-Gardien
  - Municipality of Les Cèdres

- Municipality of Mayo
- Municipality of Montcalm
- Municipality of Montpellier
- Municipality of Morin-Heights
- Municipality of Mulgrave-et-Derry
- Municipality of Namur
- Municipality of Notre-Dame-de-Bonsecours
- Municipality of Notre-Dame-de-la-Paix
- Municipality of Notre-Dame-de-la-Salette
- Municipality of Notre-Dame-du-Laus
- Municipality of Oka
- Municipality of Ormstown\*\*\*
- Municipality of Papineauville
- Municipality of Plaisance
- Municipality of Pontiac
- Municipality of Ripon
- Municipality of Saint-Adolphe-d'Howard
- Municipality of Saint-Anicet\*\*\*
- Municipality of Saint-André-Avelin
- Municipality of Saint-André-d'Argenteuil
- Municipality of Sainte-Barbe\*\*\*
- Municipality of Saint-Clet
- Municipality of Sainte-Justine-de-Newton
- Municipality of Sainte-Marthe
- Municipality of Saint-Faustin-Lac-Carré
- Municipality of Saint-Joseph-du-Lac
- Municipality of Saint-Placide
- Municipality of Saint-Polycarpe
- Municipality of Saint-Sixte
- Municipality of Saint-Stanislas-de-Kostka\*\*\*
- Municipality of Saint-Télesphore
- Municipality of Très-Saint-Rédempteur
- Municipality of Val-des-Bois
- Municipality of Val-des-Monts
- Municipality of Wentworth-Nord
- Parish of Brébeuf
- Parish of Saint-Louis-de-Gonzague\*\*\*
- Town of Boisbriand
- Town of Brownsburg-Chatham
- Town of Coteau-du-Lac
- Town of Mont-Tremblant
- Town of Rigaud
- Town of Saint-Colomban
- Town of Sainte-Agathe-des-Monts
- Town of Saint-Eustache
- Town of Saint-Sauveur
- Town of Vaudreuil-Dorion
- Township of Amherst
- Township of Arundel
- Township of Dundee\*\*\*
- Township of Gore
- Township of Harrington
- Township of Lochaber
- Township of Lochaber-Partie-Ouest
- Township of Low\*\*\*

- Township of Wentworth

\*\* Second designation

\*\*\* Final designation

#### **Nova Scotia — 2016 Tax Deferral**

- District of Clare\*\*\*
- District of Digby\*\*\*
- Municipality of the County of Annapolis\*\*
- Municipality of the County of Kings\*\*
- Municipality of the District of Argyle\*\*
- Municipality of the District of Barrington\*\*
- Municipality of the District of Chester\*\*
- Municipality of the District of Lunenburg\*\*
- Municipality of the District of Shelburne\*\*
- Municipality of the District of West Hants\*\*
- Municipality of the District of Yarmouth\*\*
- Region of Queens\*\*\*

\*\* Second designation

\*\*\* Final designation

## **ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)**

On July 11, 2017, the OECD released the draft contents of the 2017 Update to the OECD Model Tax Convention. Interested parties were invited to provide comments with respect to parts of the 2017 Update to the OECD Model Tax Convention that had not previously been released for comments.

## **CASE LAW UPDATE**

### **BURLINGTON RESOURCES FINANCE COMPANY v. R.**

Tax Court of Canada [General Procedure]

D'Auray J.

August 3, 2017

Citation: 2017 CarswellNat 3752, 2017 TCC 144

**Tax — Income tax — Administration and enforcement — Practice and procedure on appeals — Discovery — Taxpayer's parent company provided guarantees when it borrowed funds from third parties, which funds were then loaned to sister companies — Taxpayer claimed deductions for guarantee fees paid to parent company — Minister reassessed taxpayer, disallowing deductions on bases including that guarantee arrangement was not on arm's length terms — Taxpayer appealed — In discovery, taxpayer refused to answer certain questions — Minister brought motion for order directing taxpayer to answer disputed questions — MOTION ALLOWED IN PART — Minister could not be denied access to information and documents because taxpayer failed to adequately maintain system of records or destroyed certain documents in accordance with their retention policy — Cost,**

time and effort involved for taxpayer to respond to any relevant questions would not be disproportionate, given amount of money involved, importance of case and complexity of issues — Minister was not attempting to examine on basis of assessment that was not set out in pleadings and, on proper reading of pleadings, issue of arm's length transfer pricing was still live — Questions relating to whether guarantee fees were necessary for parent company to give guarantee and on parent company's concerns about taxpayer meeting obligations were speculative — Questions relating to other guarantees within corporate family, to parent company's use of taxpayer's credit rating imputed from related companies, about liquidity of taxpayer's assets, and parent company's capital contributions were relevant — Questions relating to credit ratings of taxpayer and parent company were relevant but, to extent that they sought expressions of opinion, were improper — Some of disputed questions had already been sufficiently answered — Questions requesting certain types of documents were too vague and broad to be answered — Requests that taxpayer provide documents mentioning request to parent company for guarantee and mentioning considerations, reasons and request for guarantee fees were relevant, as were requests for documents relating to credit ratings of parent company and sister companies — Questions that amounted to requests for work product did not have to be answered — Questions about arm's length terms of guarantee and guarantee fees had to be answered so Minister could find out what taxpayer's position at trial would be — Some of taxpayer's purportedly "non-responsive" answers to questions were adequate but others had to be better answered — Taxpayer was required to answer why documents were being produced with some general sense of their proposed relevance — Answers taking questions "under advisement" amounted to refusals but questions were of marginal relevance that need not be answered.

#### **GREITHER ESTATE v. CANADA (AG)**

British Columbia Supreme Court

Mayer J.

June 2, 2017

Citation: 2017 CarswellBC 1584, 2017 BCSC 994

**Tax — Income tax — Miscellaneous — Remedy corporate mistake** — Numbered corporation was jointly owned by German residents wife and husband, and owned property in BC — When wife died, she was deemed to have disposed of her share in numbered corporation at fair market value of \$1,951,458 and wife's estate paid capital gains tax — Pursuant to estate agreement and on advice of tax lawyer, related company F Ltd. purchased wife's share in numbered corporation from estate for promissory note of \$1,951,457 and preferred share of \$1 — Husband sold his share in numbered corporation to F Ltd. for promissory note of \$1 and one preferred share worth \$1,951,457 — CRA assessed estate for tax on basis that s. 212.1(1) of *Income Tax Act* applied to deem it to have received divided from F Ltd. — Tax lawyer had not considered this section — Estate brought petition for order to remedy corporate mistake, pursuant to s. 229 of *Business Corporations Act* (BCA), such that F Ltd. paid estate with preferred share worth \$1,951,457 and promissory note worth \$1 — Petition dismissed — Corporate mistake

engaging discretionary power pursuant to s. 229(2) of BCA did not occur — Mistake of not completing transaction in most tax effective manner did not fall within s. 229(1)(a) through (d) — Estate did what it planned to do but transaction did not have desired tax effect — There was no omission, defect, error or irregularity resulting in prescribed event — Estate was not applying for remedy of equitable rectification, but even if it did, rectification was not available for purposes of engaging in retroactive tax planning.

#### **GRENON, J.T. v. R.**

Federal Court of Appeal

Webb J.A. (Scott and Gleason JJ.A. concurring)

August 9, 2017

Citation: 2017 CarswellNat 3765, 2017 FCA 167

**Tax — Income tax — Administration and enforcement — Collection of tax — Jeopardy assessments** — CRA collected \$12.75 million from taxpayer pursuant to jeopardy order — Jeopardy order was set aside on consent and monies were returned to taxpayer — Taxpayer sought interest on his payment, but Minister refused on basis that interest was not payable on funds paid as consequence of jeopardy order, even if order was subsequently set aside — Federal Court judge dismissed taxpayer's application for judicial review — Judge held that Minister reasonably interpreted *Income Tax Act* as imposing no obligation to pay interest in respect of fund seized under jeopardy order — Judge held that fact that taxpayer had appealed his tax assessment did not necessarily bring him within terms of s. 164(1.1) of Act given its stipulation that it did not apply where jeopardy order had been granted — Corresponding obligation, in s. 164(3) of Act, to pay interest on amounts repaid under s. 164(1.1) of Act did not apply to taxpayer — Judge held that funds seized under jeopardy order could not be treated as if they had been paid by taxpayer voluntarily, even though taxpayer might have voluntarily left them in Minister's hands — Taxpayer appealed — APPEAL ALLOWED — Declaration was made that interest was payable — Decision of Minister to interpret s. 164(1.1) of Act such that no interest was payable to taxpayer as provided in s. 164(3) of Act on refunded amount was neither correct nor reasonable — Setting aside jeopardy order meant that s. 164(1.1) of Act should be read as if jeopardy order had never been issued and that no authorization had been granted under s. 225.2(2) of Act in respect of amount assessed — Since taxpayer had appealed reassessments and had applied in writing for refund, other conditions of subsection had been satisfied and interest was payable under s. 164(3) of Act — This interpretation was consistent with context and purpose of Act — There would be no loss to government if it paid interest on refunded amount since it would have to be repaid if portion of refunded amount was ultimately determined to be payable — There would be loss to taxpayer if interest was not paid on refunded amount and he ultimately owed less than refunded amount.

## McCARTHY TÉTRAULT COMMENTARY UPDATE TO CANADA TAX SERVICE, RELEASE 1629

The commentary to the following provisions has been updated for the noted reasons:

- **20(16)–(16.3):** commentary updated to reflect the addition of 20(16.1)(c) by S.C. 2016 c. 12 (Bill C-29) and to reflect recent CRA publications;
- **118.1(9); 118.1(12):** commentary updated to reflect recent CRA Views Documents;
- **125:** commentary updated to reflect the amendment of 125(1.1)(b)–(e) by S.C. 2016, c. 7 (Bill C-15), the amendment of 125(1)(a), (5), (5.1) and (7) “specified partnership income” and the addition of 125(3.1), (3.2), (7) “designated member”, “specified corporate income”, (8), (9) and (10) by S.C. 2016 c. 12 (Bill C-29), and to reflect amendments to related provisions, recent cases and CRA Views Documents;
- **132:** commentary updated to reflect the amendment of 132(1)(a)(i), and 132(4) “capital gains redemptions” and “refundable capital gains tax on hand” A(a) and (b) by S.C. 2016, c. 7 (Bill C-15); and
- **256:** commentary updated to reflect the amendment of 256(2) and (8)(b) by S.C. 2016 c. 12 (Bill C-29) and to refer to recent CRA publications.