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NRT TAX TRAPS AND THE NON-SPECIALIST ADVISOR

— *Michael Goldberg, Tax Partner, Minden Gross LLP, MERITAS law firms worldwide and founder of "Tax Talk with Michael Goldberg", a quarterly conference call about current, relevant and real life tax situations for professional advisors who serve high net worth clients.*

This article is the first instalment in a four-part series that will appear in Tax Notes over the next few months.

The purpose of this series of articles ("Series") is to provide non-specialist advisors with a high-level overview of some the tax traps[1] that can impact non-resident trusts ("NRTs") with a focus on the recently expanded rules relating to NRTs in section 94 of the *Income Tax Act (Canada)* ("Act")[2] ("Section 94 NRT Rules"). Unfortunately, given the high level of complexity of the rules that apply to NRTs and, in particular, the new Section 94 NRT Rules, achieving even this limited objective will not be easy.

This first instalment of the Series will tackle issues associated with the concept of "residency" in Canadian tax law and how residency concepts have recently been expanded under the Section 94 NRT Rules. Following the residency discussion, a few real life examples of how the Section 94 NRT Rules could impact a non-specialist advisor's practice and his or her clients' affairs will be provided. These examples will be fleshed out during the discussions in later instalments of the Series.

The second and third instalments of the Series will delve into certain technical aspects of the Section 94 NRT Rules, which will focus on how easily Pure NRTs (as defined below) can become caught by these rules. In addition, the third instalment will review some of the relieving provisions in the Section 94 NRT Rules and will discuss why these provisions will often be of limited relief. To add insult to injury, the third instalment of the Series will close with a discussion of the broad and unfair joint and several liability provisions found in the Section 94 NRT Rules.

The fourth and final instalment of the Series will explore what happens when trusts become ensnared and later escape from the Section 94 NRT Rules and it will also review how these rules can negatively impact common cross-border Canada–US testamentary planning for Canadian clients with US beneficiaries. As a bonus, the last instalment will also review some issues involving Pure NRTs and, in particular, will review a potential trap highlighted by a recent Canada Revenue Agency ("CRA") technical interpretation dealing with distributions from Pure NRTs.

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[1] There are many other traps that will not be canvassed in the Series. For some recent far more detailed discussions of the Section 94 NRT Rules see, for example, Bruce M. Harris, Kathy M. Munro, and Angela M. Ross, "The Long and Winding Road: Sections 94, 94.1, and 94.2," 2013 Conference Report, (Toronto: Canadian Tax Foundation, 2014), 23: 1-60 and Tony Schweitzer and Jesse Brodlieb, "Canadian Taxation of Income Earned and Distributed by a Subsection 94(3) Trust" in "International Tax Planning," (2013), vol. 61, no. 2 Canadian Tax Journal, 461-478.

[2] Unless otherwise noted all statutory references are to the Act.

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Canadian Tax Residency

Canada taxes Canadian residents on their worldwide income.[3] As a result, the determination of a taxpayer's residency status is of primary importance when considering Canada's right to levy tax. Unfortunately, the determination of a trust's residency status is complex.

Common Law or factual residency

Under Canadian taxation principles a trust will be a factual resident in Canada if, pursuant to common law principles, the location of its "central management and control"[4] is found to be in Canada. This concept is short-hand lawyer speak that is intended to allow one to determine the residency of a trust by identifying if the people who are really making decisions for the trust are doing so in Canada or not.

While the location of central management and control of a trust will usually be determined by examining where the trustees make their decisions, the test is fact based so that if the real decision makers are not the trustees, then the trust's common law or factual residency will be the location of those persons who are actually the real decision makers. The first time that the "central management and control" concept was applied to a trust in Canada was in *Garron*, where the Supreme Court of Canada ("SCC") determined that although the trustee of the offshore trust under review was not a Canadian resident, Mr. Garron, a Canadian resident who was not a trustee of the trust, had central management and control of the trust because he had too many powers and directed the decision making of the trustees. As a result, the SCC determined that the trust was a common-law resident of Canada.[5]

Pure NRTs

Putting situations like Garron aside, with proper attention to how a trust is established and provided that central management and control is truly not taking place in Canada then it is possible for a trust to be a non-resident of Canada. This type of legally and factually non-resident trust will be referred to as a "Pure NRT" throughout the Series.

The Section 94 NRT Rules

Under the Section 94 NRT Rules, which were enacted in 2013 and are generally effective after 2006, an otherwise Pure NRT can be deemed to be a resident of Canada for most purposes of the Act in a broad spectrum of situations. How this can occur will be the primary focus of the Series.[6] Throughout the remainder of the Series trusts caught under these rules will be referred to as "Section 94 NRTs".

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[3] As set out in section 3.

[4] See *Fundy Settlement v. Canada*, 2012 SCC 14. The decision is alternatively known as *Garron* and *St. Michael Trust*. In the Series the case will be referred to as *Garron*.

[5] The "central management and control" test espoused in *Garron* has been followed in two recent domestic trust decisions, *Discovery Trust v. Minister of National Revenue*, 2015 NTLD(G) 86, and in *Boettger c. Québec (Agence du revenue)*, 2015 QCCS 7517 (French only).

[6] The Series will not review the workings of section 94 prior to the enactment of the Section 94 NRT Rules.

The Section 94 NRT Rules — They can happen to you — real life examples[7]

I imagine that many readers might think that NRTs of any type are exotic creatures that have nothing to do with their practices. However, in today's world of cross-border families I believe that at some point in time nearly all advisors, including non-specialists, will need to consider whether trusts they are dealing with could be NRTs and, as a result, they will end up having to deal with the Section 94 NRT Rules. To try and prove this point to you, some real life examples of situations that can involve NRTs are described below.

Example 1 — New immigrant to Canada

The most straightforward NRT situation that I can imagine involves a typical wealthy immigrant. Unfortunately, due to the elimination of the immigrant trust rules in Budget 2014,[8] any immigrant to Canada who has settled or made just about any type of loan or transfer to an otherwise Pure NRT will, except in extremely limited circumstances, cause that trust to be caught by the new Section 94 NRT rules once they immigrate to Canada.

Example 2 — Granny Trust — provision of services by Canadian resident

If a Canadian resident client has an offshore granny who creates a trust for, among others, the Canadian resident client that trust could be a Pure NRT – completely free from Canadian tax. However, there are many ways that this status can be lost. For example, if a Canadian resident provides services to the Pure NRT without receiving arm's length consideration then Pure NRT's status could be jeopardized and the trust could become a Section 94 NRT.

Example 3 — Canadian subsidiary of EU family Business — non-interest bearing loan

A variant of the preceding granny trust example could involve a purely Canadian resident client who wants to help his family expand its European business into Canada by setting up and managing a Canadian subsidiary of the European corporate group. In this situation, the Canadian resident client will earn arm's length compensation from the subsidiary. However, if the client or any other Canadian resident makes a low or non-interest bearing loan (e.g., to help fund the subsidiary) that directly or indirectly benefits a Pure NRT that is a shareholder of the European corporate group then that otherwise Pure NRT could become subject to the Section 94 NRT Rules.[9]

Example 4 — Canadian estate planning for US beneficiaries

Another typical situation that I see in my practice involves Canadian clients whose children have emigrated from Canada to the United States. In these situations it is common for the Canadian client's US advisors to request that the Canadian clients' Wills are structured so that their estates fund or "pour-over" into one or more US trusts set up for the clients' US beneficiaries. Unfortunately, due to the expanded scope of the new Section 94 NRT Rules, such planning is likely to be impacted by these new rules.

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Hopefully, these innocent and rather straightforward examples have gotten your attention. However, keeping it during future instalments of the Series is going to be much more difficult. This is because the Section 94 NRT Rules are incredibly complex and there doesn't appear to be any way to even begin to appreciate just how these rules might impact clients or advisors without reviewing the Section 94 NRT Rules in an at least "somewhat" technical manner. This review will begin in the next instalment of the Series.

Thanks to members of the Minden Gross LLP Tax Group for reviewing earlier versions of this series of articles. All errors and omissions are my own.

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[7] A more detailed discussion of the examples discussed below will follow in later instalments of the Series.

[8] See Bill C-43, the *Economic Action Plan 2014 Act*, No. 2; SC 2014, c. 39; Royal Assent December 16, 2014.

[9] As is discussed later in the Series there may be arguments that pure demand loans would not cause the Pure NRT to become a Section 94 NRT.

CURRENT ITEMS OF INTEREST

CRA Releases Information Circular for Registered Disability Savings Plans

The CRA has released IC99-1R1 which is a comprehensive document on the rules surrounding registered disability savings plans ("RDSPs"). Part I of the circular discusses various definitions, contribution and withdrawal limits, rollovers, registration status, transfer, and other related rules. Part II discusses the RDSP rules that apply to issuers, and Part III provides contact information for the CRA and Employment and Social Development Canada ("ESDC") for further information regarding RDSP registration and grant payments respectively.

Minister of National Revenue Announced Improvements to CRA Correspondence

Diane Lebouthillier has announced that beginning in February 2016, the CRA will send Canadians a simplified Notice of Assessment ("NOA"). The improvements are based upon a review which focused on the design, format, and language of the correspondence. The CRA has also revised its Benefits Notice which will be sent to benefits recipients in July 2016. The new NOA and Benefits Notice will contain the most important information on the first page. The new documents use plain language and have a clear presentation, which will make reading them easier for the average taxpayer. Within the next year, the CRA is expected to re-design 75% of its correspondence.

More 2015 Tax Relief for Western Livestock Producers

Agriculture and Agri-Food Canada released a list of additional designated regions in western provinces. Livestock producers facing feed shortages in these prescribed drought regions may defer a portion of their 2015 sale proceeds of breeding livestock to the subsequent year.

The cost of replacing animals next year will offset the deferred income which ultimately reduces the tax burden from the original sale. Producers may request income deferral on their 2015 tax returns.

CRA Releases New Circular on Tax Collection Policies

The CRA released Information Circular IC98-1R5, which replaces IC98-1R4. The circular provides a brief summary of the CRA's various tax collection policies. Recent legislative and policy changes are reflected in this version.

Bill C-4 Receives Its First Reading

Bill C-4, *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*, was first read in the House of Commons on January 28, 2016. The bill proposes to repeal the reporting requirements for labour organizations and labour trusts under section 149.01 of the *Income Tax Act*.

The reporting requirements were originally enacted by Bill C-377 in 2015. Under section 149.01, labour organizations would be required to disclose financial information and certain information pertaining to their political and lobbying activities to the CRA. Currently, labour organizations are not required to report since the Minister of National Revenue announced in December 2015 that she was waiving these requirements.

CRA Releases Monthly Prescribed Rate for Leasing Rules

The prescribed monthly rate for the purpose of the leasing rules is 2.90% for March 2016. To recap: January 2016 was 3.17% and February 2016 was 3.04%.

Auditor General Releases 2015 Fall Reports

The Auditor General released the results of seven audits completed since last fall to Parliament. The reports are as follows: Implementing Gender-Based Analysis, Controlling Exports at the Border, Implementing the Labrador Inuit Land Claims Agreement, Information Technology Shared Services, Canadian Armed Forces Housing, Canada Pension Plan Disability Program, and Establishing the First Nations Health Authority in British Columbia.

Political Activities Audit Program for Charities Winding Down

On January 20, 2016, Diane Lebouthillier, Minister of National Revenue, announced that the CRA's review of registered charities' political activities will begin to wind down. To date, the program has resulted in the review of 30 charities, five of which have had their registration revoked for reasons unrelated to their political activities. Twenty-four further audits are currently in progress and the program will be finished upon their completion.

The results of the program indicate that charities are in compliance with the rules pertaining to involvement in political activities. The CRA will be publishing an annual report containing information about its activities and contribution to an effective regulatory framework for registered charities.

PBO Releases Report on Changes to the Federal Personal Tax Regime

The Office of the Parliamentary Budget Officer (PBO) released *The Fiscal and Distributional Impact of Changes to the Federal Personal Income Tax Regime*. The report analyzes the fiscal effects and distributional impact of the following tax changes:

- Introducing a 33% personal tax rate on taxable income exceeding $200,000 for 2016 and subsequent years;
- Reducing the personal tax rate for the second tax bracket (income of $45,283 to $90,563 in 2016) from 22% to 20.5% for 2016 and subsequent years;
- Reducing the personal rate for the first tax bracket from 15% to 14% (a hypothetical analysis of an alternative tax proposal).

The report estimates that the net fiscal impact of the first two changes will be a $0.4 billion reduction in revenues for 2015-2016 and an average annual $1.7 billion reduction in revenues from 2016-2017 to 2020-2021.

CRA Releases Its Annual Report to Parliament

The CRA Annual Report to Parliament 2014-2015 was released on January 25, 2016. The report contains an analysis of the CRA's performance over the past year, a rating of its achievements against pre-determined benchmarks, and an assessment of the reliability of the information discussed in the report itself. The Auditor General of Canada also contributed to the report with an audit of the agency and financial statements.

New Canada Child Benefit To Be Included in Federal Budget

In a news release on January 29, 2016, the Department of Finance provided a new hint about the contents of the 2016 federal budget. The release mentioned that the new Canada Child Benefit will be included in the budget with payments beginning July 2016.

GRENON V. THE QUEEN: DEDUCTION FOR LEGAL FEES IN DETERMINING SUPPORT OBLIGATIONS[1]

— *Margaret Macdonald, Associate Dentons Canada LLP, Vancouver*

***Grenon v. the Queen*, 2016 DTC 5009 (Federal Court of Appeal)**

In *Grenon v. The Queen*[2] the Federal Court of Appeal, upholding a long line of case law, denied the Appellant a deduction for legal fees he paid in the course of determining his obligation to pay support to his ex-wife. The Court's basis for denying the deduction was that the Appellant was a "payor" of support rather than a "recipient" of support. This position has been criticized in prior case law but appears to be correct in law.

However, where there is shared or split custody between parents, there may be a way to avoid the result in *Grenon*: if the court order or separation agreement requires both parties to pay support to the other, with one party paying the net amount, then the net payor can claim to have paid legal fees in the course of earning income from property (the amount payable by the other spouse), so that the legal fees are deductible. As discussed below, this process has been allowed under a different provision, paragraph 118(1)(*b*).

The Decision in *Grenon*

On a consistent basis, the Tax Court of Canada and the Federal Court of Appeal have agreed that taxpayers who pay legal fees in the course of making or increasing a claim for support may deduct those fees under subsection 9(2) of the Act,[3] and that such deduction is not prohibited by paragraph 18(1)(*a*). Their reasoning is that the right to support is "a right of any kind whatever" within the definition of "property" in subsection 248(1), so the legal fees paid to quantify that right are expenses incurred in the course of earning income from property.[4]

On the other hand, the corresponding deduction for legal fees to prevent or reduce support payments has consistently been denied because there is no income-earning purpose associated with the fees.

Grenon challenged both this reasoning and the fairness of the Act's application with a section 15 Charter[5] challenge, on the basis that the operation of the Act resulted in an adverse effect on men. The Court did not accept either argument.

It is hard to fault the Court's interpretation of the Act: the law is as clear as can be that expenses incurred outside of an income-earning purpose are personal in nature and not deductible. Nor can one doubt that the mere fact that the support recipient may deduct her legal fees means that the payor should be able to deduct his. For example, if a private tenant were to sue a landlord over the amount of rent payable, the tenant could not deduct his or her legal

[1] Many thanks to Joel Nitikman for providing feedback and edits to an earlier version of this paper.

[2] 2016 DTC 5009 (F.C.A.), aff'ing 2014 DTC 1207 (T.C.C.).

[3] *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended (the "Act"). All statutory references are to the Act unless otherwise stated.

[4] The expenses are deductible in the current year rather than treated as capital in nature because the right to support is a "pre-existing" right that arises by operation of the law, rather than a right that must be established by the recipient: *supra*, note 2, *Grenon*, FCA, at paragraphs 10-12.

[5] *Canadian Charter of Rights and Freedoms* (*Constitution Acts*, 1867 to 1982, Part I).

fees while the landlord could. In that sense, the result in *Grenon* is correct both in law and in policy.

Nevertheless, the result has been criticized by the Court due to a perception that the availability of the deduction to one parent in a marital dispute and not the other gives rise to unfairness and inequity.[6] The criticisms of the law in this area perhaps fail to recognize the potential breadth of the deduction's availability:[7] the deduction could likely be available to both parents in situations of shared or split custody if orders or agreements are drafted in such a way as to impose legal obligations on both parties.

Deductibility of Legal Fees in Situations of Shared or Split Custody

Under the *Federal Child Support Guidelines*,[8] if parents have either shared custody (the children spend at least 40% of their time with each parent) or split custody (each parent has custody of at least one child), child support payments usually are still due by one parent to the other. The amount of child support that is paid is typically determined by comparing what each parent would otherwise owe based on their respective income levels and setting those two amounts off against each other to determine the net payor's liability.

The question of whether an order or agreement imposes a legal obligation on the net recipient of support in cases of shared or split custody is the subject of Canada Revenue Agency ("CRA") analysis in a related area: the availability of the eligible dependent tax credit in paragraph 118(1)(*b*).[9] Under section 118, if a party is paying support in respect of a child they may not claim the eligible dependent tax credit in respect of that child.[10] However, if both parents are precluded from claiming the credit because both parents pay support, the limitation does not apply.[11]

Although the provisions under section 118 apply a legislative rather than a common-law definition of "support", principles can be drawn from the approach taken to section 118 when considering the deductibility of legal fees. The CRA's view is that there is an obligation on both parents to pay "support"[12] in the context of section 118 when there is a "clear legal agreement or court order that explicitly states that child support amounts must be paid"[13] by both parents, even though one parent may be the only party actually making a payment.

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[6] In *Grenon* the Tax Court commented that the availability of the deduction to the support recipient but not its payor can give rise to "serious inequities" that are "aching to be addressed by Parliament": *supra*, note 2 at paragraph 33. See also *Mills v the Queen*, 2014 DTC 1138 (T.C.C.) at para 20. Despite this potential inequity, Parliament supported the result when child support amounts became non-taxable in the 1990s, by creating an exception for child support payments to the rule in paragraph 18(1)(*c*) that no deduction may be made for expenses incurred to earn income exempt from tax: the definition of "exempt income" in subsection 248(1) was amended to exclude child support amounts. This has been taken by the Federal Court of Appeal as an endorsement of the state of the law in this area: see *supra*, note 2, *Grenon*, FCA, at paragraph 8 and note 3, *Nadeau* at paragraph 33.

[7] See *supra*, note 2, at paragraph 34, wherein the Tax Court lays out four scenarios and identifies which party would be entitled to the deduction in each case.

[8] SOR/97-175 (the "Guidelines").

[9] See, for example, Ministerial correspondence 2014-0532311M4 and Technical Interpretations 2013-0502091E5, 2012-0445401E5, and 2011-0396611E5.

[10] The Act, *supra*, note 4, at subsection 118(5).

[11] The Act, *supra*, note 4, at subsection 118(5.1).

[12] As defined in subsection 56.1(4) of the Act.

[13] 2014-0532311M4 and *Ibid*.

The CRA's view is that when custody is shared between the parents, determining support strictly by the Guidelines does not give rise to a legal obligation on the net recipient of support. The reason for that is the methodology used in calculating support: under the Guidelines, the Court first looks at a setoff of what each party would otherwise owe and then uses its discretion to determine whether the setoff amount is appropriate, following which a single payment is incorporated into the court order regarding support.[14] This does not give rise to a true legal obligation on behalf of the net recipient. However, where a court or the parties deviate from the approach set out by the Guidelines and come to an order or agreement that identifies the net recipient's obligations and the net payor's obligations separately, even if that results in the same amount as would be reached under the Guidelines, then the CRA considers both parties to be paying support.[15]

The same reasoning could be applied in the context of deductibility of legal fees. If a court order or separation agreement imposed a legal obligation to pay support on both parents, the right to receive the support amount, despite being merely a setoff amount, would create for the net payor a "right of any kind" such that the net payor's legal fees paid to establish or increase that right would have an income-earning purpose.

This may lead to further criticism of the law because the deduction's availability to parents that share or split custody of their children would be based on the form of the agreement or order rather than the substance of it.[16] However, it could be seen to resolve some of the perceived inequities by making the deduction more widely available.

A number of tax lawyers from Dentons Canada LLP write commentary for Wolters Kluwer's Canadian Tax Reporter *and sit on its Editorial Board as well as on the Editorial Board for Wolters Kluwer's* Income Tax Act with Regulations, Annotated. *Dentons Canada lawyers also write the commentary for Wolters Kluwer's* Federal Tax Practice *reporter and the summaries for Wolters Kluwer's* Window on Canadian Tax. *Dentons Canada lawyers wrote the commentary for* Canada–U.S. Tax Treaty: A Practical Interpretation *and have authored other books published by Wolters Kluwer:* Canadian Transfer Pricing *(2nd Edition, 2011);* Federal Tax Practice*;* Charities, Non-Profits, and Philanthropy under the Income Tax Act*; and* Corporation Capital Tax in Canada. *Tony Schweitzer, a Tax Partner with the Toronto office of Dentons Canada LLP and a member of the Editorial Board of Wolters Kluwer's* Canadian Tax Reporter*, is the editor of the firm's regular monthly feature articles appearing in* Tax Topics.

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[14] See, for example, *Mills*, *supra*, *Melnyk v the Queen*, 2008 DTC 2311 (T.C.C.), and *Ladell v. R.*, 2011 DTC 1240 (T.C.C.). Also see *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, [2005] S.C.J. No. 65, 2005 S.C.C. 63 for an analysis of section 9 of the Guidelines in the family law context.

[15] See Ibid.

[16] This sort of criticism was raised in the context of section 118 in *Ochitwa v. the Queen*, 2014 DTC 1195 (T.C.C.) at paragraphs 8-9, cited in *Belway v. The Queen*, 2015 DTC 1211 (T.C.C.) at paragraph 38.

RECENT CASES

Corporate taxpayer's choice of different taxation year ends in different provinces to avoid significant tax in one province held to be abusive tax avoidance

Peet, a B.C. resident, and his holding corporation, Pi Capital, owned shares of a technology company, ALI. Peet incorporated the corporate taxpayer, Veracity, on June 10, 2002, under the laws of B.C. with a June 30 year end for B.C. tax purposes. Peet and Pi Capital transferred their shares of ALI to Veracity on a tax-deferred basis under section 85 of the federal *Income Tax Act* (the "ITA"). In July 2002, Veracity sold its ALI shares to a third party for $23,468,554 cash, and transferred most of the proceeds, by way of interest-free demand loan, to Pi Capital. In late July 2002, Veracity purchased units of a Quebec-based publicly traded natural gas utility partnership ("Gaz Metro") for $266,337, which resulted in Veracity having a permanent establishment in Quebec for ITA purposes and an "establishment" in Quebec for purposes of the Quebec *Taxation Act*. Veracity selected August 31 as its year end for Quebec tax purposes. The foregoing series of transactions enabled Veracity: (a) to report a taxable capital gain (on its sale of its ALI shares) of $9,698,646 in B.C. (the "Capital Gain"), but on the basis that 90% of its income was attributable to Quebec instead of to B.C.; (b) at the same time to report that same income in Quebec on the basis that 100% of the Capital Gain was attributable to B.C.; and (c) to thereby ensure that 90% of the Capital Gain was not taxed in B.C. or in any other province. Administering the B.C. *Income Tax Act* (the "B.C. Act") on behalf of the BC Department of Finance, the Minister reassessed Veracity for 2003 under the B.C. GAAR, re-allocating 100% of Veracity's taxable income in that year from Quebec to B.C., and increasing its B.C. tax payable to $1,175,249. (The GAAR provisions of 68.1 of the B.C. Act are modeled after the GAAR provisions in section 245 of the ITA.) Veracity appealed to the Supreme Court of British Columbia.

Veracity's appeal was dismissed. There was a tax benefit for Veracity. There was also a series of tax avoidance transactions undertaken to obtain a reduction in B.C. tax paid by Veracity through the implementation of what was known as the "Quebec Year-end Shuffle" strategy (the "Q-Yes Plan"), which had been suggested to Veracity by its tax advisors. One of these avoidance transactions involved the filing of returns on the basis of different fiscal year ends for federal and B.C. tax purposes on the one hand, and for Quebec tax purposes on the other. These avoidance transactions, moreover, were abusive, since the applicable provisions in the ITA, the B.C. Act, and the Quebec tax legislation were never intended to permit a taxpayer to use different fiscal year ends in different jurisdictions for the same income in the same taxation year. In conclusion, therefore, the Q-Yes Plan abused section 84 of the ITA, the legislative provisions dealing with the allocation of a corporation's taxable income between provinces, and the provisions dealing with fiscal year ends.

¶49,252, *Veracity Capital Corporation v. The Queen*, 2015 DTC 5136

Application for rectification allowed where transaction not reflecting intention of parties

The taxpayers, which were all members of a corporate group, entered into a series of transactions which were intended to realize losses for a member of that group. Those losses would be claimed to offset gains previously realized through hedge contracts. The transactions were effected but, on assessment, the minister disallowed the loss claims on the basis that section 98(5) of the *Income Tax Act* applied. The effect of that section was that one of the series of transactions was not effected on a taxable basis but on a rollover basis. The parties applied for an order rectifying the transactions in question such that section 98(5) would not apply to prevent the losses from being claimed.

The application was allowed. The Court held that rectification is an equitable remedy designed to correct a mistake in carrying out the settled intention of the parties as established by the evidence. Rectification is a discretionary remedy, which is not to be used to vary the intentions of the parties or to correct erroneous beliefs as to what was intended. The Court reviewed recent jurisprudence on the remedy of rectification, and held that the Courts have utilized it to ensure that instruments evidencing corporate transactions comport with the actual intentions of the parties. Specifically, the Courts have provided rectification to remedy an unintended tax assessment where the parties had intended to carry out transactions on a tax and accounting-neutral basis. The Court reviewed the evidence and concluded that at all material times the parties had a continuing specific intention to carry out the transactions in order to create a tax loss to offset the accrued foreign exchange gains realized on hedge contracts and that, by mistake, that intention was not realized. It concluded that in the circumstances, and based on the jurisprudence, the parties were entitled to rectification.

¶49,245, *Canada Life v. Canada (AG)*, 2015 DTC 5128

Taxpayer not entitled to moving expense deduction for meal costs

The taxpayer moved from Saskatchewan to Ontario and claimed moving expenses of $5,616.63 in relation to that move. Part of her claim was for $1,530 for temporary living expenses, calculated as $51 in meal expenses per day for 15 days, for each of herself and her spouse. No claim was made for lodging expenses and, as the meal expenses had been calculated using the simplified method, no receipts were provided. The minister accepted her move as an eligible relocation, but disallowed the claim for temporary living expenses. The taxpayer appealed from that assessment.

The appeal was dismissed. The claim for temporary living expenses had been made under section 62(3)(*c*), which provides that a deduction may be made in connection with an eligible relocation for the cost to the taxpayer of meals and lodgings near the old or new residence, for a period not exceeding 15 days. The appellant took the position that meal expenses could be claimed under that provision without claiming expenses for lodging, and that where such meal expenses were claimed using the simplified method, no receipts were required. The Court disagreed, holding that the appellant could rely on section 62(3)(*c*) only if she could show she actually incurred expenses for temporary living expenses. In the Court's view, the expenses allowed under that section are those expenses incurred when one is required to live in temporary accommodations either near the old residence or near the new residence, but not in the old or new residence. The taxpayer was required to submit receipts for lodging even if she used the simplified method to calculate her meal expenses, as the receipts for lodging would have supported her position that she incurred expenses for meals. The Court held that the taxpayer apparently did not incur an expense for lodgings near either her old or new residence and that, in its view, section 62(3)(*c*) was not applicable in the circumstances.

¶49,243, *Skrien v. The Queen*, 2015 DTC 1239

Limitation period for objection not running where Notice of Assessment sent to wrong address

In September 2012, the Canada Revenue Agency issued Notices of Reassessment for the taxpayer for the 2009 and 2010 taxation years, and a Notice of Assessment for the 2011 taxation year. All of the notices were sent by mail but were not, according to the taxpayer, received by him. He became aware of a tax amount outstanding for previous years when he received his Notice of Assessment for the 2012 taxation year in the spring of 2014. He then brought an application for an extension of time to file Notices of Objection for the 2009, 2010 and 2011 taxation years. The Canada Revenue Agency took the position that the deadline for making such an application was no later than one year after the date by which the original Notice of Objection for the taxation year in question must have been served. Consequently, the application deadline had passed for all of the taxation years in issue.

The application was dismissed. During the course of the hearing of the application, it was determined that the address to which the notices at issue were sent was not the taxpayer's correct address, and that some items of correspondence sent to the taxpayer had been returned to the CRA as undelivered. The notices had been sent to the correct street address for the taxpayer's condominium complex, but had failed to specify the number of the taxpayer's unit. The Court held that where a taxpayer alleges that a Notice of Assessment or Reassessment was not communicated to him, the Minister bears the burden of proving that the notice was mailed or otherwise communicated to the taxpayer. As well, it is incumbent upon the Minister to mail or otherwise send a Notice of Assessment or Reassessment to a taxpayer's correct address. The jurisprudence provides that the fact that a notice which is sent to a wrong address leads to the conclusion that it was not issued at all. The Court concluded that the Notices of Assessment and Reassessment had therefore not been sent to the taxpayer and that the applicable limitation period had not begun to run. Consequently, the taxpayer's Notices of Objection for the 2009, 2010 and 2011 taxation years had been timely served, and the issue of the timing of his application for an extension of time was moot.

¶49,240, *Pilgrim v. The Queen*, 2015 DTC 1236

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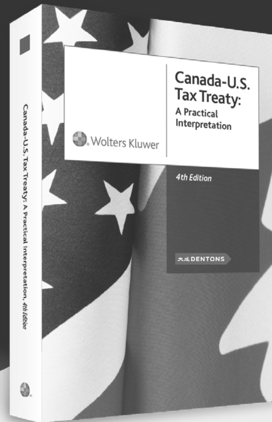

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