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FOURTH QUARTER 2022

Kurt Rosentreter Tax Planning Tips 4th Quarter 2022

Tax Tidbits . . . some quick points to consider

- The interest rate on overdue taxes for the fourth quarter of 2022 (October 1 – December 31, 2022) has increased by 1% to 7%. Make sure to get those payments in to CRA on time!
- No input tax credit (ITC) can be claimed if the vendor does not have a valid GST/HST number at the time of the transaction. You can check the validity of an entity's GST/HST business number at CRA's online "GST/HST registry."
- There are approximately $1.4 billion in uncashed cheques in CRA's bank accounts. Even cheques that are over a decade old can be reissued. Call CRA or visit your CRA "My Account" online to check whether you have an uncashed cheque.

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Crowdfunding: Taxable or Not?

Kurt's Comments:

Amounts raised by crowdfunding campaigns may be taxable or non-taxable, depending on the circumstances. Ensure to provide details on these activities so that the amounts are properly reported.

A June 2, 2022 Technical Interpretation discussed the taxability of funds received through crowdfunding campaigns. CRA first noted that amounts received through a crowdfunding arrangement could represent loans, capital contributions, gifts, income or a combination of two or more of these. This means that the funds received could be taxable (such as business income) or not (such as a windfall, gift or voluntary payment). As the terms and conditions for each campaign vary greatly, the determination of tax status must be conducted on a case-by-case basis.

Where an amount is not a windfall, gift or other voluntary payment, the amount may be taxable if it constitutes income from a source. To be a non-taxable gift or other voluntary payment, the following conditions must be met:

- there is a voluntary transfer of property;
- the donor freely disposes of their property to the donee; and
- the donee confers no right, privilege, material benefit or advantage on the donor or on a person designated by the donor.

CRA opined that contributions would likely be considered non-taxable gifts in the case of a "Go Fund Me" campaign created by family members of an individual with cancer to assist in that individual's treatment.

In an August 23, 2019 Technical Interpretation, CRA considered whether an employer's contribution to their employee's crowdfunding campaign to assist with the cost of additional therapies and support for the employee's recently born child would be received in the recipient's capacity as an employee (taxable) or individual (not taxable).

Crowdfunding: (Continued)

CRA indicated that, where the person is dealing at arm's length with the employer and is not a person of influence (such as an executive who controls employer decisions), the benefit or amount would generally be received in the person's capacity as an individual (non-taxable) where the amount is:

- provided for humanitarian or philanthropic reasons;
- provided voluntarily;
- not based on employment factors such as performance, position or years of service; and
- not provided in exchange for employment services.

If considered non-taxable, CRA opined that, as the contribution was not an expense incurred to gain or produce income, it would not be deductible.

Trusts: New and Expanded Disclosure Requirements

Legislation has been proposed for trusts (including estates) with years ending on December 31, 2022 and onwards that would significantly expand the reporting rules. More trusts would be required to file tax returns, and more information would be required to be disclosed in these returns. In addition, sizable penalties would be introduced for non-compliance.

More trusts and estates required to file

Under the existing rules, trusts are exempt from filing a T3 tax return if they have no taxes payable and no dispositions of capital property. However, under the proposals, tax returns will be required for all Canadian resident express trusts (this generally means trusts created deliberately) that do not meet at least one of a number of exceptions. Some of the more common exceptions include the following:

- trusts in existence for less than three months at the end of the year;
- trusts holding only assets within a prescribed listing (including items such as cash and publicly listed shares) with a total fair market value that does not exceed $50,000 at any time in the year;

Trusts: (Continued)

- trusts required by law or under rules of professional conduct to hold funds related to the activity regulated thereunder, excluding any trust that is maintained as a separate trust for a particular client (this would apply to a lawyer's general trust account, but not specific client accounts); and
- registered charities and non-profit clubs, societies or associations.

Reporting will be required where a trust acts as an agent for its beneficiaries (referred to as bare trusts in the government's explanatory notes). No details on the intended breadth of such trusts have been provided by the Department of Finance or CRA to date.

More disclosure of parties to trusts

Where a trust is required to file a tax return, the identity, including residency, of all of the following people must be disclosed:

- trustees, beneficiaries and settlors; and
- anyone that has the ability (through the terms of the trust or a related agreement) to exert influence over trustee decisions regarding the income or capital of the trust.

The requirement to provide information in respect of the beneficiaries would be met if beneficiary information is provided for all whose identity is known or ascertainable with reasonable effort by the person making the return at the time of filing the return. Where there are beneficiaries whose identity is not known or ascertainable with reasonable effort, the person making the return would be required to provide sufficiently detailed information to determine with certainty whether any particular person is a beneficiary of the trust. For example, where the beneficiaries are both the current and future grandchildren of the settlor, details in respect of the current children must be provided in addition to details of the trust terms describing the future class of beneficiaries.

The new rules would not require the disclosure of information subject to solicitor-client privilege.

Kurt's Comments:

Make a list of all arrangements that you and your family have that may be considered a trust or bare trust. Review them with a professional to determine whether they would be subject to the rules. Obtain the relevant information that will be required for the filing of the particular trust returns.

Trusts: (Continued)

Substantial penalties

Failure to make the required filings and disclosures on time attract penalties of $25 per day, to a maximum of $2,500, as well as further penalties on any unpaid taxes. New gross negligence penalties have been proposed, applicable to filings not made on time and inaccurate filings. These penalties are proposed to be the greater of $2,500 and 5% of the highest total fair market value of the trust's property at any time in the year. These will apply to any person or partnership subject to the new regime, leading to the concern that multiple persons could be subject to these substantial penalties for a single trust.

Director Liability: Is Asking About Source Deductions Enough?

Directors can be personally liable for payroll source deductions (CPP, EI and income tax withholdings) and GST/HST unless they exercise due diligence to prevent the corporation from failing to remit these amounts on a timely basis.

An August 31, 2022 Tax Court of Canada case found that the director was not duly diligent and therefore was personally liable for the corporation's unremitted payroll deductions, interest and penalties of $78,121 from January 2011 to April 2012.
The taxpayer argued that he was duly diligent as he asked at the directors' meeting each month whether the tax remittances were up-to-date and received oral confirmations that they were. The taxpayer stated that he had "checked the box" at each directors' meeting. He also argued that his decisions were driven by materiality; he focused his efforts on the corporation's overall well-being and safeguarding the millions of dollars of investment, rather than the payroll remittances that he considered "tiny."

Taxpayer Loses

The Court ruled that the taxpayer was not duly diligent in preventing the failure to make adequate payments. It noted that the taxpayer never contacted CRA to confirm whether payroll remittances were current, which was particularly problematic as he was unable to obtain reliable financial statements and was aware of the difficult financial situation. While it was the taxpayer's view that this was someone else's job, there was no evidence of the taxpayer ever asking anyone else to follow up

Kurt's Comments:

Prior to accepting any role as a director, ensure to fully understand your responsibilities and potential exposure to personal liability. If currently acting as a director, make sure to be duly diligent in ensuring payroll and GST/HST payments are properly made.

Executor: Whether to Accept This Role

Individuals may be asked to take on various roles in respect of loved ones, friends, clients or others. One role that is particularly riddled with challenges is that of an estate executor. While an individual may carry out their duties in an appropriate manner, it is important to consider the risks of unhappy beneficiaries and any other undesirable outcomes, including litigation and/or strained relationships.

A March 4, 2022 Tax Court of Canada case reviewed whether the taxpayer was personally liable for the estate's tax debts. On the death of the taxpayer's father in 1994, the taxpayer and his brother became executors of the estate. The taxpayer argued that he renounced his role of executor two months after the death of his father and therefore should not be held liable for the estate's tax debts.

Kurt's Comments:

Acting as an executor comes with significant responsibilities. Failure to properly administer the estate can result in personal liability. If you choose to decline the role, you must do so properly and not act as an executor.

The father left most of his estate to the taxpayer's brother, as well as a portion to grandchildren and great-grandchildren. The taxpayer accepted this decision but wanted to ensure that his daughter received her share of the estate. To this effect, in 2010, the taxpayer and his brother took steps to distribute a balance of $240,000 payable to the taxpayer's daughter, secured by a mortgage against one of the estate's properties. That is, the taxpayer's daughter was essentially provided a $240,000 receivable from the estate. No clearance certificate was obtained, and the estate was in arrears with its taxes. In 2016, the brother died.

While the taxpayer argued that he renounced his role as executor and provided an alleged handwritten note from 1994 to that effect, the Court did not accept that he formally renounced his role. While the Court acknowledged that the taxpayer may not have understood everything about being an executor or every aspect of a land transfer, the Court believed he understood that he was signing as an executor. As he was the executor when the mortgage was secured and did not obtain a clearance certificate, he was held personally liable for the estate's tax debts.

The Court further stated that even if it did find that the taxpayer had properly renounced his role, the taxpayer acted as a "trustee de son tort" (a person who is not appointed as a trustee but whose course of conduct suggests that he be treated as one), and for income tax purposes, he would have been considered a "legal representative."

Tips Collected Electronically: Withholding Requirements

Where tips are "paid" by an employer, they are pensionable and insurable. In such cases, the employer must also withhold income tax and report the amounts on the employee's T4.

CRA's current administrative policy is that if the tip is controlled by the employer (controlled tips) and then transferred to the employee, it is considered to be paid by the employer. In contrast, direct tips are considered to have been paid directly by the customer to the employee. Therefore, the tips are neither insurable nor pensionable, income tax deductions are not required to be withheld and amounts are not required to be reported on the T4.

Controlled tips are generally those where the employer has influence over the collection or distribution formula. CRA has provided several examples of controlled tips, including the following:

- the employer adds a mandatory service charge to a customer's bill to cover tips;
- tips are allocated to employees using a tip-sharing formula determined by the employer; and
- cash tips are deposited into the employer's bank account and become, or are even commingled with, the property of the employer, and then are paid out to the employees.

Direct tips are paid directly to the employee by the customer, where the employer has no control over the tip amount or its distribution. CRA has also provided several examples of direct tips, including the following:

- a customer leaves money on the table at the end of the meal and the server keeps the whole amount;
- the employees and not the employer decide how the tips are pooled or shared among employees;
- a customer includes an amount for a tip when paying the bill by credit or debit card, and the employer returns the tip amount in cash to the employee at the end of the shift. In exceptional situations, the cash tips could be paid out the day after, for example, if there was not enough available cash on hand; and
- the restaurant owner informs the server that if a customer pays by credit or debit card and includes a voluntary tip, the restaurant will return the full tip amount to the server in cash at the end of each shift.

Tips Collected Electronically: (Continued)

An August 31, 2022 Federal Court of Appeal case reviewed whether the electronic tips left by restaurant customers (e.g. paid by credit or debit cards) that were distributed by the restaurant to the servers were considered "paid" and therefore pensionable and insurable. Only a portion of the electronic tip was distributed to the servers, based upon the particular tipping arrangement at the restaurant (some funds were retained for items such as credit card fees and tip-outs to the kitchen staff). Amounts were transferred to the servers the day after the particular shift was worked. The Tax Court of Canada (TCC) previously held that the amounts transferred to servers were paid by the employer, and therefore, pensionable and insurable.

Taxpayer loses

The FCA found that the TCC did not err in its finding. In particular, the TCC noted that the electronic tips had not previously been in the server's possession. Instead, the customers had provided the electronic tips to the employer as part of a single transaction to settle the dining bill. The TCC followed a 1986 Supreme Court of Canada case that found that the word paid could be interpreted broadly to mean the mere distribution of an amount by the employer to the employee.

The FCA also stated that factors such as the following are not determinative and might be of little to no relevance when determining whether an amount is paid by an employer:

- when the amount is paid;
- whether the server is paid all or some of their own tips or pooled tips;
- whether the employer keeps a portion of the tips; and
- whether the tips are distributed under a collective agreement, a written contract, an oral agreement or otherwise.

The case did not deal with any cash tips the servers may have received or tip-outs received by kitchen staff, on-site management or support staff. Likewise, the FCA was not concerned with the total electronic tips left for the servers, but only the net amount paid out the next day.

It remains to be seen whether CRA's administrative policy will be changed to reflect the courts' rulings. As of October 10, 2022, the CRA website did not have information showing an integration of the courts' rulings into their administrative policy.

Kurt's Comments:

Restaurant operators should be vigilant for developments on this issue and be prepared to adjust tipping policies, and/or reporting and withholding policies if necessary.

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