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MONTHLY TAX UPDATE SEMINAR

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GOVERNMENT RELEASES

330(1)

Consider

FINANCE RELEASES (www.fin.gc.ca)

1. [December 31, 2008](#) - Announces the entry into force of the **Tax Convention** between Canada and the **Gabonese Republic**.

"these Releases"

Contact Paul Huynh, Tax Legislation Division, 1-613-995-2980, for additional information.

2. [December 30, 2008](#) - The **2009 automobile deduction limits** and expense rates will be the **same** as those for **2008** including the **\$30,000 ceiling** on the capital cost of passenger vehicles, the **\$800 per month** limit on deductible leasing costs, the **\$300 per month** limit on allowable interest deductions, the limit on the deduction of tax-exempt allowances at **52 cents** for the first 5,000 kilometres and **46 cents** for each additional kilometre, and the **24 cents per kilometre** prescribed rate for taxable benefits.



3. [December 29, 2008](#) - Introduces draft legislation to permit certain **Canadian amateur athletes** to **defer income tax** on income from **endorsements, prizes** and other remuneration. This applies to athletes who are eligible to compete in **International** sporting events. Income may be deferred in a **qualifying account** until the earlier date of **distribution** to the athlete or, **eight years** after the last year in which the athlete was eligible to compete as a **Canadian National Team member**.
4. [December 23, 2008](#) - announces the commencement of negotiations to update the **Income Tax Treaty** between Canada and **Poland**. For further information contact Parry Athenaios, Tax Legislation Division, 1-613-992-5864.
5. [December 23, 2008, 2008-110](#) - announces that the **deadline** for **opening** a Registered Disability Savings Plan (**RDSP**), making **contributions**, and applying for the matching **Grant** and income-tested **Bond** for the **2008 contribution year** has been extended to **March 2, 2009** from December 31, 2008.

The Department of Finance noted that about **280,000 Canadians** are eligible to open **RDSPs**.

Also, as at December 23, 2008, Newfoundland and Labrador, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the Yukon have announced that **RDSP income** and **assets** will **not affect** calculations for **income support benefits**.

Quebec, New Brunswick, and Prince Edward Island have announced that RDSP payments will be **exempt** from income support reductions up to **certain limits**. The Northwest Territories announced a **limited income exemption** from Social Assistance, which will partially accommodate beneficiaries of RDSPs.

Additional information on the Grant and Bond can be found at www.hrsdc.gc.ca/disability.

See Video Tax News 330(10) for more **RDSP** details.

6. [November 10, 2008](#) - Introduces amendments to the **Functional Currency** Tax Reporting Rules.

CRA RELEASES (www.cra.gc.ca)

1. [January 12, 2009](#) - **CRA revoked** the **charitable registration** of the **Millennium Foundation** because it issued over **\$169 million** in **receipts** through **tax shelter arrangements** in which only nominal amounts were used for charitable purposes. Also, the charity failed to maintain sufficient books and records.

In addition, **CRA revoked** the **status** of **Little League Baseball Canada** as a Registered Canadian Amateur Athletic Association for incorrectly issuing more than **\$82 million** in donation **receipts** in its role as a participant in a **tax shelter arrangement**.

CRA is **reviewing** all **tax shelter-related** donation arrangements such as schemes that provide tax receipts worth more than the actual donation. CRA plans to **audit** every participating **charity, promoter** and **investor**.

We understand that the **tax shelter programs** for a number of **Canadian Amateur Athletic Associations** such as Canadian Wrestling Association, Biathlon Canada, Little League Canada, and the Canadian Lacrosse Association were handled through the **ParkLane Charitable Donation Program**.

The **Canadian Amateur Football Association's** status was **revoked** August 30, 2008.

2. January, 2009 - **Guide T4040** provides information on Registered Pension Plan, Registered Retirement Savings Plan, and Registered Retirement Income Fund contributions and **pension adjustments**.
3. January, 2009 - 9-page **Guide RC4015** provides information on the Reconciliation of **Business Income** for Tax Purposes, including **Form T1139**.
4. January, 2009 - **Guide RC4110** provides information to determine whether a worker is an **employee** or **self-employed** including:
Step 1 - CRA asks **what the intent** was and whether they intended to enter into a **contract of service** (employer-employee relationship) or a **contract for services** (business relationship). Sometimes the intention is clear through a **Written Agreement** however, this status must be **reflected** in the **actual terms** and **conditions** of the employment.
Step 2 - CRA asks questions to determine the **working relationship** such as the level of **control** the payer has over the worker, whether the worker provides **tools and equipment**, whether the worker can **subcontract** the work or hire assistants, the degree of **financial risk** taken by the worker, the degree of **responsibility** for investment and management held by the worker, the worker's **opportunity for profit**, and other relevant factors such as **written contracts**.
5. December, 2008 - 21-page **Guide T4155** provides information for **Old Age Security Returns** for **Non-Residents** including a recovery tax of 15% of the amount by which a pensioner's 2008 net world income is more than \$64,718.
6. December, 2008 - 13-page **Guide T4056** provides information for **Emigrants** and Income Tax.
7. December, 2008 - 31-page **Guide RC4064** provides **Medical and Disability-Related Information** including the Disability Certificate **Form T2201**, the new Registered Disability Savings Plan and GST/HST information.

8. December, 2008 - 45-page [Guide T4037](#) provides information on **Capital Gains** including information on principal residences, flow-through entities, and completing Schedule 3.
9. December, 2008 - 22-page [Guide P113](#) provides information on **Gifts and Income Tax** including gifts-in-kind, capital gains and losses, and cultural property.
10. December, 2008 - 22-page [Guide P134](#) provides information on Using Your Home for **Day Care** including expenses that can be claimed such as business-use-of-home expenses.
11. December, 2008 - 41-page [Guide T4004](#) provides information on **fishing income** including Form T2121.

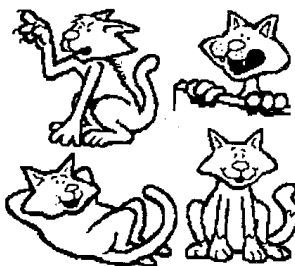
PERSONAL TAX RETURNS

330(2)

Consider

DEFINITION OF SPOUSE

In a December 9, 2008 *External Technical Interpretation* (2008-0299051M4, Shields, Renee, 1-613-957-2049), CRA notes that where the Act refers to a taxpayer's "spouse", the reference is to an individual to whom the taxpayer is **legally married** or to a **common-law partner**. In this regard, a "common-law partner" is someone the taxpayer **cohabits** with in a **conjugal relationship** and to whom at least **one** of the following situations applies:



"these spouse factors"

- (a) has so cohabited for at least **twelve** consecutive months;
- (b) is the **parent** of the taxpayer's child by birth or adoption; or
- (c) has **custody and control** of the taxpayer's child and the taxpayer's child is wholly dependent on that person for support.

(Subsection 248(1) - "common-law partner")

Also, the taxpayers are **deemed** to continue **cohabiting** in a **conjugal relationship** unless they were not cohabiting for a period of at least **90 days** due to a breakdown in the conjugal relationship.

PROVINCE OF RESIDENCE

In an October 10, 2008 *British Columbia Supreme Court* case (*Smolensky vs. H.M.Q.*, Docket 06-1994), the taxpayer was found to be a **resident in Alberta** in 2002 and 2003 even though he lived in both Vancouver and Calgary and noted that:

1. Even though Mr. Smolensky's **wife and two children** resided in a

"this residential criteria"

home in **Richmond, British Columbia**, he opened up and tended to the business of a branch office in **Calgary, Alberta**.

2. His **primary business responsibility** was in **Calgary**, from which he serviced clients in the United States, Internationally, and in British Columbia.
3. During the time that he lived in Alberta, he owned a **residence** in **Calgary**. The **residence** in Richmond is in his wife's name only.
4. Mr. Smolensky has lived in **Alberta** for a **number of years**, has an **Alberta driver's licence**, has an **Alberta Health Care card**, maintains bank accounts both in Alberta and British Columbia, is on the federal and provincial tax roles in Alberta, and his primary employment responsibility is in the office in Alberta.
5. He has **vehicles** registered in **Alberta**, a telephone in his Calgary residence, is a member of the Alberta Motor Association, and his pilot's licence shows an Alberta residence address.

The **Court** concluded that because he spends time almost **equally** in both jurisdictions, he is **resident** in **both** British Columbia and Alberta - British Columbia, because of his family and head office connections, and in Alberta because of his primary responsibility for managing the sub-office and improving it.

However, because he carried out **most** of his business in **Calgary** and of the other connections to **Alberta**, the Court concluded that his **principal place of residence** was in **Alberta**.

MEDICAL EXPENSES

In a December 19, 2008 **Tax Court** of Canada case ([Tall vs. H.M.Q., 2004-657\(IT\)1](#)), the Court noted that for a person to be a "**medical practitioner**" in Ontario for purposes of tax creditable medical expenses, he/she must practice in accordance with the **Regulated Health Professions Act**. In this case, the **Reiki practitioner** expenses did **not qualify** for a medical expense.

"sorry - no medical credit for Reiki"

ONTARIO ACUPUNCTURE - LOSES

In a December 19, 2008 **Federal Court of Appeal** case ([H.M.Q. vs. Couture, Docket: A-181-08](#)), the Federal Court **overturned** the previous Tax Court decision and determined that expenses incurred in Ontario **for acupuncture** in the years 2001 to 2004 were **not** medical expenses.

"acupuncture – loses"

The phrase "**authorized to practice**" in Subsection 118.4(2) requires formal recognition **under Ontario law** - the Regulated Health Professions Act.

The mere fact that an action is no longer prohibited does not lead to the conclusion that such action has been formally approved.

EMPLOYMENT INCOME

330(3)

Consider

AUTOMOBILE - STANDBY CHARGE

In a January 5, 2009 *Tax Court* of Canada case (Martin et al vs. H.M.Q., 2007-2808(IT)1), the Court agreed with CRA's assessment of a **standby charge** and an **operating benefit** with respect to the **personal use** of an **extended cab (F150)** on the basis that it was an "**automobile**" because it was **not** used "**all or substantially all**" of the time to transport goods, passengers or equipment.

The facts that the taxpayer did **not** have a **personal automobile** and there was **no log**, were strong indications that this test was not met.

"sorry - too much personal use here"

This case was **distinguished** from the **Mueller vs. H.M.Q. case** where the **extended cab** was **not** considered to be an **automobile** because of a lack of shoulder belts, limited leg space, lack of head protection, and that the vehicle was used in the **farming** operation. Also, the individual had a **personal vehicle**.

The Court concluded that the **books/logs** created after the fact were unreliable and, therefore, attached **very little weight** to them. The vehicles were used a considerable amount of time for **personal matters**.

PARKING PASSES

In a December 18, 2008 *Tax Court* of Canada case (Schroter, Johannsson vs. H.M.Q., 2007-4762(IT)1, 2008-598(IT)1), the Court concluded that the **parking pass** provided to Mr. Schroter by **Telus Corporation** was a **taxable benefit** because it was not given primarily for business reasons. Mr. Schroter **did not use** the vehicle to any great extent for business purposes. It was simply used to travel to and from work.

"some win/some lose"



However, Mr. Johannsson was found **not** to have a **taxable benefit** on his Telus parking pass because he needed the vehicle in the course of his duties.

HIRING AN ASSISTANT OR SUBSTITUTE

In an October 29, 2008 *External Technical Interpretation* (2008-0287661E5, Sigouin, Renee, 1-613-957-2128), CRA notes that an employee earning salary (with no commission income) may **not deduct** an amount to a **self-employed assistant** because Subparagraph 8(1)(i)(ii) only permits a deduction for a "**salary**" to an assistant or a substitute. A payment to an independent contractor is not a salary.

"these salary issues"

However, a **commissioned** sales employee **may deduct** those expenses

against commission income because the tests under Paragraph 8(1)(f) do **not** require that the expense be a “**salary**”.

SPECIAL WORKSITE

In a November 3, 2008 *External Technical Interpretation* (2008-0284191E5, Sigouin, Renee, 1-613-957-2138), CRA notes that Paragraph 6(6)(a) **excludes** from income an allowance for **board and lodging** at a “**special worksite**”. (See IT91R4)

“these special worksite issues”

CRA notes that a “special worksite” may be **any place** in the world, including a large metropolitan city such as Toronto, New York, or New Delhi. (Jaffar vs. M.N.R., 2002 DTC 3853)

If it meets the conditions in Subsection 6(6) of the Act, the **allowance** will be **non-taxable** and does **not** have to be reported on the employee’s **T4 Slip**, provided it is reasonable, based on the cost of board and lodging in the **surrounding area**. The allowance is **non-taxable** if it is reasonable **regardless** of the amount **actually spent** by the individual. An employee is **not required** to maintain receipts in respect of the amount actually spent on board and lodging for purposes of Subsection 6(6).

Also, in a December 9, 2008 *External Technical Interpretation* (2008-0291081E5, Sigouin, Renee, 1-613-957-2138), CRA notes that free or subsidized **transportation** between the employee’s principal place of **residence** and the **special worksite** is **non-taxable**.

BUSINESS/PROPERTY INCOME

330(4)

Consider

THE LIPSON DECISION - DEBT RESTRUCTURING IS ALIVE AND WELL

On January 6, 2009, *the Supreme Court of Canada* (Lipson et al vs HMQ, 2009 SCC 1) provided significant **commentary** on the **acceptability** of **debt restructuring** even though they **found**, in a 4 to 3 decision, that this series of transactions using the **attribution** rules **contravened** the **General Anti-Avoidance Rule** in Subsection 245(2).

In this case, the series began with Mrs. Lipson **borrowing money** to purchase, on a **rollover basis**, **shares** from her husband in the family corporation. Mr. Lipson then purchased a family residence with the funds and obtained a mortgage, the proceeds of which were used to pay off the share loan.

“debt restructuring is alive and well”

Mr. Lipson then **deducted** the **interest expense** using the **attribution rules** in Subsection 73(1) and Section 74.1. The **SCC** noted that the series did **not** become **problematic** until the **attribution rules** were

used in this way.

The **tax benefit** of the **interest deduction** resulting from the **refinancing of the shares** is **not abusive** in isolation but, the ensuing tax benefit of the **attribution** of Mrs. Lipson's interest deduction to Mr. Lipson **is**. (Paragraph 48)

The borrowing for the shares and the purchase of the home with equity was "**unimpeachable**." The transaction only became **problematic** when the parties used the attribution rules to **transfer the interest expense** to the husband. (Paragraph 41)



Two dissenting judges also noted that the **debt restructuring** in a previous **SCC** case (**Singleton vs HMQ, 2001 SSC61**) illustrates the proposition that there is **nothing abusive** in principle for a taxpayer to **rearrange** his/her capital in a **tax efficient manner**. CRA is **not** asking the Court to revisit Singleton. CRA does not claim that GAAR would have applied in the Singleton case. CRA acknowledges, "it is common ground that the interest was deductible" in the Singleton case. The **only question** is whether the deduction becomes "abusive" when the **attribution rules** are used in this way. This appears to be where the majority and the minority disagreed.

NON-COMPETITION AGREEMENT VIOLATION RECEIPTS

In a December 29, 2008 French **Federal Court of Appeal** case (**RCI Environment Inc. vs. H.M.Q, Dossier: A-35-08**), the Court concluded that the **\$12 million received** by the taxpayer following the settlement of a dispute regarding the violation of non-competition agreements is an "**eligible capital amount**".

"eligible capital amounts"

SCIENTIFIC RESEARCH AND EXPERIMENTAL DEVELOPMENT (SR&ED)

Some **new SR&ED developments** include:

December 30, 2008 - Some new releases in CRA's **SR&ED** Small Business Action Plan include **Guides RC4467, 4472, T4088** and a **CD-ROM**.

"these new SR & ED developments"

The SR&ED **home page** provides an **overview** of the filing requirements, a section for potential and first-time claimants, a web version of a new SR&ED Claim **Form T661** and a **sample** of a **completed Claim Form** and a "**Complete Claim Checklist**".

Also an **online eligibility self-assessment tool** has been released.

On December 19, 2008 CRA noted that persons claiming the SR&ED on Form T661 have the **option** of using the **previous version** of **Form T661(07)** for tax years **ending in 2008** or earlier. After this time,

taxpayers must use the **new version** of **Form T661**.

Commercial tax preparation software includes the current version of Form T661, not the previous version.

Therefore, CRA notes that to file a previous version of **Form T661** for tax years ending in 2008 or prior, the claimant can use a **previous version** of the commercial tax preparation software, can file a paper copy of Form T661, or file the new Form T661 and attach the previously required free-flowing project description.

Also, for tax years ending in 2008 or prior, claimants who conducted more than twenty projects may choose to provide project information for only the twenty largest projects (in dollar value) regardless of the version of **Form T661** that they use. However, during a CRA review, descriptions for remaining projects may be requested.

For version (08) of **Form T661**, project information can be provided by completing a **separate Part 2** for the projects being claimed and providing the textual descriptions.

Editor's Comment

It is important **not to wait** until the last moment to file the SR&ED Claim (the 18th month) as deficiencies in the Claim may result in an **outright CRA denial** of the application at worst. Filing the Claim, say, **in the 15th month**, will give time to CRA to review and, if necessary, **request adjustments before the 18th month** deadline.

CAPITAL GAINS AND LOSSES

330(5)

Consider

REPLACEMENT PROPERTY

In an October 27, 2008 **Internal Technical Interpretation** (2008-028834117, Rafuse, Charles, 1-613-247-9237), CRA notes that where **one quarter** of **farmland** close to an urban area is **sold and replaced** by **three quarters** of farmland in more remote areas, the three quarters of farmland may be considered to be a "**replacement property**" for the one quarter, if there is a correlation or a **causal relationship** between the disposition and the acquisition. (See **ITTN No. 25** and CRA Document 2003-0006993) The fact that a property is purchased under a **business expansion** would not, in and of itself, mean that the property could not be considered a replacement property for purposes of the **capital gain deferral** in Subsection 44(1). (See CRA **Form T1030** and **IT259R4**)



"these replacement property rules"

Also, in an October 14, 2008 **External Technical Interpretation** (2008-

0277991E5, Atkinson, James, 1-519-457-4832), CRA reviewed the "**replacement property rules**" in Subsection 44(1) where **160 acres** were sold and replaced by a **337 acre** parcel.

With respect to the form of the **election** under Subsection 44(1), where the disposition and the replacement takes place in the **same year**, a taxpayer's calculation (in the income tax return for that year) of the capital gain by virtue of Subsection 44(1) will be considered to **constitute an election**. If the property is not replaced until a **subsequent year**, the **election** should take the form of a **letter attached** to the income tax return for the year the replacement property is acquired.

CRA notes that if the **election** is not made on time, they may accept a **late or amended election** under Subsection 220(3.2) and Regulation 600, depending on the circumstances. (See Information Circular 07-1, Taxpayer Relief)

MUTUAL FUNDS - ACB

330(6)

Consider

INCOME TRUSTS & CLOSED-END FUNDS – ACB CALCULATOR

Calculating **capital gains** for tax purposes on **income trusts**, closed-end funds, exchange-traded funds (**ETFs**) and **split shares** can be quite challenging. A very large percentage of these investments pay **monthly distributions** that include an amount that is a tax-deferred return of capital (**ROC**). Each of these **ROC** amounts **reduces** the adjusted cost base (**ACB**) of the investment and must be accumulated to arrive at the accurate **ACB** used to calculate the capital gain or loss upon disposition.



"these ACB issues"

How do you know if the distributions your client received have an **ROC** component? Check the **T3 slips** to see if there is an amount reported in **Box 42**. Unfortunately this is only a starting point. Investment dealers report the numbers in **batches** and thus the amount you see on the **T3** may represent the **ROC** for **multiple trusts and funds** that your client may hold. In addition, it is unlikely that all of the securities covered by the T3 were sold. Lastly, the accompanying report provided with the T3 is only for the current taxation year, and is of limited use if the position was held for a number of years.

Getting the **historical ROC data** for investments that have been held for a number of years can be **challenging**. It is not unusual for a position to have originated from one or more predecessor companies. In addition to

the tax data concerning the distributions, you also need to know the details of whatever mergers, consolidations or splits have taken place over the years.

It is also important to recognize certain **non-cash distributions** that actually **add** to the **ACB** of an investment. These are fairly widely used, yet are not well understood by many tax-preparers. In order for trusts to remain non-taxable, they must distribute earned income by year-end. While most trusts pay their distributions in cash, a trust may elect to declare a **distribution in additional units**, and then complete a concurrent unit consolidation so that the number of units outstanding does not change. Thus there is no impact on the net asset value of the fund or trust, there is no dilution, and the trust remains non-taxable. The investor has a tax liability to the extent of the unit distribution paid, but **receives no cash** or any additional units. We call these **phantom distributions** and since they **increase** the **ACB**, they decrease the capital gain liability or increase the capital loss upon disposition. Obviously, for this reason they are extremely important, but the reality is that they are difficult to spot.

If 2007 was the year of the takeover for income trusts, with nearly 50 trusts being acquired for cash, then **2008** was the year for **consolidation** in the closed-end fund sector. These types of reorganizations further complicate an already challenging sector. Given the severity of the market decline in the second half of 2008, there will be **many ACB calculations** that will need to be performed.

Thanks to **Mike Wooding** of **ACB Tracking Inc.** for these comments.

Editor's Comment

Options available to calculate the **ACB** include:

Review the history on the trust or fund website, if available, and do the calculation **yourself**.

Ask the **broker** to do the calculation.

Use an income trust/fund **ACB third party calculator** such as that provided by **ACB Tracking Inc.**

If you would like to evaluate this service, and have not already done so, ACB Tracking will provide **five** calculations **free** of charge. Simply email info@acbtracking.ca with the following information – name, name of firm, address, telephone number, email address and codeword "Video Tax".

PENSION INCOME SPLITTING

330(7)

Consider

PENSION INCOME SPLITTING

Personal tax season is approaching again. 2007 was the first year of the new **pension income splitting rules** introduced in conjunction with the changes to the income trust rules. Where the couple has **eligible pension income**, this provides the ability to move significant income from one spouse to the other to **better split** their income. As the **election** is filed annually, the couple can **change** the amounts to get the best tax result **every year**. Where income can be shifted from a high income spouse to a low income spouse, the benefits are obvious. However, we have encountered a number of less obvious benefits in practice.



“pension splitting”

Old Age Security (OAS) Clawback

Often, one spouse has income so high that all of their **OAS is clawed back**. That spouse is typically in the highest personal tax rate. If the other spouse can transfer pension income which is attracting clawback, the **benefit** of such a transfer **may exceed** the top personal **tax rate** once the **clawback** has been factored in.

“the effective tax rate including clawback is likely higher than the top personal rate”

For example, assume a couple who live in British Columbia. Mrs. has income far in excess of \$200,000 and pays top rate tax of 43.70%. Mr.'s income is more modest – he has \$90,000 of income, and pays 38.29% tax. If Mr. can transfer, say, \$10,000 of pension income, Mrs. would pay another \$4,370 of tax. Mr. would reduce his clawback by \$1,500, and save tax of \$3,255 on the \$8,500 net reduction to his income (\$10,000 of pension transferred less \$1,500 of clawback reduction), or \$4,755. That's a \$385 benefit for the couple.

Instalments

If the transfer of pension income, and the related tax withholdings, can reduce the transferor's 2008 taxes (after source deductions) to **under \$3,000**, he or she can avoid paying instalments in 2009.

Pension Credit

The transferee is receiving pension income. If the transferee is at least age 65, or the transferred income is from a traditional pension plan (not, for example, an RRSP or a RRIF), this income is eligible for the **pension credit**. If one spouse has no pension income eligible for the pension credit, transferring \$2,000 may allow them to take advantage of the full federal pension credit. The benefits of the credit may make a transfer

between spouses of equal income, or even a transfer to a higher income spouse, worth considering.

For example, in Ontario, the provincial pension credit applies on up to \$1,201 of pension income, at a rate of 6.05%, while the Federal credit is 15% of up to \$2,000. If the lower income spouse is taxable at, say, 31.15% (income between \$37,886 and \$63,428) and the husband is taxable at the highest Ontario rate of 46.41%, we would not typically consider electing to move income from the lower income spouse to the higher income spouse. However, a transfer of \$1,201 would:

"multiplying the Pension Credit"

- Reduce the low income spouse's tax by \$374,
- Increase the high income spouse's tax by \$557 and allow a pension credit worth \$253, for a net cost of \$304.

While a \$70 benefit isn't huge, this is a risk-free tax savings. Moving more income to take advantage of the remaining Federal pension credit would be slightly detrimental, so they would not wish to take that step.

Identifying The Benefits

Several tax preparation programs last year incorporated an "**optimizer**" to estimate the best choice for **pension splitting elections**. For example, both TaxPrep and ProFile included such estimators in their 2007 personal tax software. Running the optimizer to see whether an opportunity exists takes limited time.

"letting your computer do the work!"

What Income Qualifies?

"Eligible pension income", the same type of income that qualifies for the pension credit, qualifies for transfer in this manner. This includes the traditional monthly pension benefits received by any taxpayer, regardless of his/her age. If the recipient is over age 65, it also includes:

- Annuities paid from Registered Retirement Savings Plans,
- Payments from Registered Retirement Income Funds,
- Annuities under Deferred Profit Sharing Plans, and
- The interest component of certain annuities.

How Do We Make a Transfer?

The legislation permits the spouses to file a **joint election (Form T1032)** under which they designate the amount of pension income to be transferred from the pension recipient to the spouse in any amount up to half the pension income. This maximum is reduced if the couple were not married throughout the tax year. This might be the case because one spouse passed away during the year.

Other Issues

The **T1032 election form** also provides for a proportionate transfer of

taxes withheld in respect of the pension income, so the end result should not be a huge refund for the transferor and a large balance payable by the transferee.

Only **one election** can be filed each year. As a result, an individual somehow having two spouses (perhaps a legally married, but estranged, spouse and a common-law partner) can only split pension income with one of them.

Where a marriage commenced or ended in the year, or where one spouse passed away, the maximum split will be **pro rated** for months of marriage in the year.

As part of the election, both parties become jointly and severally liable for taxes arising as a consequence of the pension income transfer.

This is a **written election**, which must be signed by both parties and filed with paper filed returns. This means the spouses need to be available to sign the election before the April 30 (June 15 for the self-employed) filing deadline. The CRA Guide for 2007 returns indicated that, if the spouses file their returns electronically, they need not submit the election, but should retain it in case CRA asks to see it.

"getting the election signed"

Thanks to **Hugh Neilson**, B.Comm, C.A., TEP of Veres Picton & Co., for this information.

CORPORATE TAX

330(8)

Consider

DETERMINATION OF CCPC STATUS

In a March 18, 2008 **Internal Technical Interpretation** (2007-025359117, [Mathieu, Francois](#)), CRA made a 16-page analysis of the factors in determining whether a corporation is a **Canadian-Controlled Private Corporation (CCPC)**.



"these CCPC issues"

In one case, a public corporation controlled the **Board of Directors**. CRA concluded that the corporation was **not a CCPC** for purposes of obtaining a refundable investment tax credit. The analysis reviewed "de jure" and "de facto" control and recent Court cases including *Silicon Graphics Ltd. vs. H.M.Q.* (2002 DTC 7112 (FCA)) and *Sedona Networks* (2007 FCA 169).

CAPITAL LOSSES - CAPITAL DIVIDEND ACCOUNT

If a **corporation** had two share investments, one with an **underlying capital loss** of \$100, and the other with an **underlying capital gain** of

"this type of CDA planning"

\$100, if the winner was sold for a \$100 capital gain (\$50 taxable capital gain), this would trigger a **capital dividend account (CDA)** of \$50 which, assuming that there had been no other capital gains or losses previously, could be **paid out tax-free** to the shareholder. If, subsequently, the **capital loss** was **triggered**, the allowable capital loss would be \$50 and taxable income in the year would be nil. However, the **CDA** for the year would start at \$50, then be reduced to nil with the CDA dividend and then the capital loss would trigger a “negative like” **CDA**, even though the Income Tax Act does not recognize a negative CDA. This negative \$50 does not affect the **CDA** that was paid out previously.

Therefore, **corporations** with **mixed winner and loser investments** could consider selling the winners and paying out the CDA before selling the losers.

(See Subsection 89(1) – definition of “capital dividend account;” Subsection 83(2); Regulation 2101; Interpretation Bulletin [IT66R6](#) and [Form T2054](#))

CAPITAL LOSSES AND REFUNDABLE DIVIDEND TAX ON HAND

If, for example, a corporation had a **capital gain in 2007** of \$200 (taxable capital gain of \$100), the federal and provincial tax would approximate \$46.67 (varies depending on the provincial rate). However, there would be a \$26.67 refundable dividend tax on hand (**RDTOH**). If the company paid an **\$80 taxable dividend**, the \$26.67 refund would occur and the tax would be reduced from \$46.67 by the \$26.67 to a net of \$20.00.

However, if in 2008 the corporation had a \$200 capital loss (\$100 allowable capital loss) and no other capital gains in the year, this would be considered a **net capital loss** of \$100 and, if carried back to 2007, would reduce the taxable income in 2007 to nil. Therefore, the **RDTOH** in 2007 would also be nil. (Subparagraph 129(3)(a)(ii))

Therefore, the corporation would, theoretically, have to pay back the **RDTOH** of \$26.67 and the initial tax would be back up to \$46.67. However, the **net capital loss carryback** would reduce the taxable income to zero resulting in a **net tax of nil**. The **net effect** is that the **initial tax of \$20.00** would be refunded. Therefore, the **overall** income tax payable for **2006 and 2007** would be **nil** in both years. However, there may be an **interest component** with respect to the 2007 **dividend refund**.

This was discussed in a detailed CRA French Technical Interpretation ([2001-0100755](#)). The **English summary** notes that where a **loss carried back** reduces **taxable income to nil**, the corporation would lose the dividend refund for the year to which the loss was applied because the RDTOH at the end of the year would be reduced to nil. The Technical

Interpretation notes that the taxpayer would have to **pay interest** on any cancelled dividend refund. (Subsections 129(2.2) and 152(1))

Thanks to **Ida Chen** of Clarence Byrd Inc. for comments with respect to this matter.

CHARITIES

330(9)

Consider

CHARITIES - HELPFUL HINTS

In the CRA **Registered Charities Newsletter** (No. 31 - Winter 2008), CRA provided **helpful hints** including:



"these helpful hints"

1. If a charity has made an error on the **Form T3010**, it should complete **Form T1240**, Registered Charity Adjustment Request.
2. A charity should advise the **Charities Directorate** of CRA by letter of **changes** to directors, trustees or other authorized representatives.
3. Charities may **avoid delays** in CRA's processing of their Form T3010 by:
 - (i) Mailing the original copy of the T3010 to the Charities Directorate, Canada Revenue Agency, Ottawa, Ontario, K1A 0L5. Do not fax additional copies of your return. Sending fax copies in addition to the original mailed version results in hours of repeat work verifying these duplicate returns to ensure that there have been no adjustments made to the one that was keyed.
 - (ii) Mailing your financial statements with your return.
 - (iii) When requesting adjustments to your information, ensure that you refer to the specific line numbers on the return.

CRA also notes that new Form T3010B(09), Registered Charities Information Return, will be issued in 2009.

CHARITIES CHECKLIST

In a December 3, 2008 Release, CRA provided a **checklist** for charities including determining the **small supplier** status, applying for **public service body rebates**, and maintaining adequate **books and records**.

CHARITY LISTING

See the **CRA website** (www.cra.gc.ca) and search "**charities listings**" and click on - "Charities and giving - search the charities listing" for

information on:

1. searching the 80,000 Canadian charities,
2. revoked charities,
3. suspensions,
4. newly registered charities,
5. annulments, and
6. charities who have been assessed a penalty.

ESTATE PLANNING

330(10)

Consider

LOAN/GIFT TO CHILD

A parent may make a **non-interest bearing loan** to an adult child, for example, to assist the child in acquiring a **personal asset** such as a residence or car. There is no income earned on these personal assets and, therefore, the attribution rules in Subsection 56(4.1) are not relevant.



"a loan/gift"

If the loan is not paid at the time of the parent's death, the Will could forgive that part of the loan. The "debt forgiveness" rules in the Income Tax Act do not apply to a bequest or inheritance.

Also, a **gift** to an **adult child** does **not** trigger the **attribution rules** in Subsection 56(4.1).

DEATH - QUALIFIED SMALL BUSINESS CORPORATION (QSBC)

Paragraph 110.6(14)(g) of the Income Tax Act extends the definition of "**qualified small business corporation share**" to include shares which were **qualified** at any time in the **twelve-months preceding** the taxpayer's **death**.

"this twelve-month rule"

For example, even though at the time of Mr. A's death not **"all or substantially all"** of the assets of the company are used in an active business, the shares may still be QSBC shares if they were eligible **at any time** in the **twelve months preceding** the taxpayer's death.

RRSP - CREDITOR PROTECTION

An article in the December 17, 2008 Globe and Mail (a Special Information Series No. 14) provides information about the **July, 2008** changes that protect **non-insurance RRSPs** from **creditors**. Previously,

"these new RRSP/bankruptcy rules"

creditor protection on RRSP or RRIF money was only extended to insurance-based contracts.

The 2008 legislation protects RRSPs from creditors in a bankruptcy, with the exception of contributions made in the *twelve months prior*. However, because *provincial legislation* takes precedence, the limits of protection still vary from province to province.

REGISTERED DISABILITY SAVINGS PLAN (RDSP)

See CRA [Guide 4460](#) for details and examples on the *RDSP* including:

1. An RDSP is a *long-term savings plan* intended to help parents and others save for the *long-term* financial security of a person who is eligible for the *Disability Tax Credit*. ([Form T2201](#))
2. *Contributions* to an RDSP are *not tax deductible* and are *non-taxable* when withdrawn, and can be made until the end of the year in which the beneficiary turns *59 years* of age.
3. The *Canada Disability Savings Grant* (maximum *\$70,000*), *Bond* (maximum *\$20,000*), and *investment income* earned in the Plan are included in the *beneficiary's income* when paid out of the RDSP.
4. A person may be a *beneficiary* of an RDSP if eligible for the disability tax credit, has a valid Social Insurance Number, is a resident of Canada, and is under the age of 60.
5. There is *no annual limit* on amounts that can be contributed to an RDSP. However, the overall lifetime limit is *\$200,000*.
6. Only certain *payments* can be made out of an RDSP:
 - (i) payments to the *beneficiary* referred to as a Disability Assistance Payments (*DAP*);
 - (ii) payments to the *beneficiary's Estate* following the death of the beneficiary; and
 - (iii) *repayment of Grants and Bonds* to the government.
7. Details on the types of *payments* that can be made *to the beneficiary* are in the Guide, plus examples.
8. If any of the following *triggering events* occur, *all Grants and Bonds* paid into the Plan during the preceding *ten years* must be *repaid*:
 - (i) the RDSP is *terminated*,
 - (ii) the Plan is *deregistered*,
 - (iii) a *payment* is made from the RDSP,
 - (iv) the beneficiary *ceases to be eligible* for the *disability amount*, or
 - (v) the beneficiary *dies*.

"this RDSP information"

9. The **RDSP** must be **terminated** if the beneficiary **no longer** has a severe and prolonged **impairment** or **dies**. See **Appendix A** for information on the Disability Savings Grant and Bond.

Other **general information** on **RDSPs** include:

1. **Contributions** to an RDSP are **not required** to receive a Canada Disability Savings **Bond**.
2. Up to **age 18** of the **RDSP beneficiary**, it is the **family income** of the beneficiary's parents or guardian which is used in determining the **grant** payout. Beyond the age of 18, it is the **beneficiary's own family income** that is relevant.
3. For a list of financial institutions offering RDSPs, see www.hrsdc.gc.ca/eng/disability_issues/disability_savings/update_financial.shtml.

To date, only the **Bank of Montreal** is offering RDSPs.

FARMING

330(11)

Consider

TRANSFER OF FARM PROPERTY TO A CHILD

In a November 10, 2008 **Internal Technical Interpretation** (2008-029405117, Rafuse, Charles, 613-247-9237), CRA reviewed a situation where **land was farmed** by **Mr. X** who **retired**, leased the farmland to **third parties** and then **died** and bequeathed the property to **his spouse** who continued to **lease** it to third parties. The **spouse** is now considering **rolling over** the property to her children who would **immediately sell** it to a third party with the intention of **multiplying** the capital gain exemption.



CRA noted that, even though the spouse who farmed the property was deceased, **Subsection 73(3)** still permits the rollover to children. However, **Subsection 69(11)** could **prevent the rollover** if one of the **main purposes** is to multiply the capital gains deductions. **Subsection 69(11)** may deny the rollover where the recipient child disposes of the property within **three years** from the date of the first disposition.

"the Subsection 69(11) problem"

PROCEEDS FROM EASEMENT ON LAND

In a December 17, 2008 **External Technical Interpretation** (2008-0296741E5, Rafuse, Charles, 1-613-247-9237), CRA notes that generally the granting of an **Easement**, or a public right of way, is considered a **disposition** of property and, a reasonable portion of the **adjusted cost**

"these easement issues"

base of the whole property attributable to the part disposed of is required to be **allocated** to the disposition pursuant to Section 43 of the Income Tax Act. This could result in a **taxable capital gain**.

However, as set out in Interpretation Bulletin [IT264R](#), **CRA will accept** an amount equal to the **proceeds** from such a disposition as being the **reasonable** portion of the **adjusted cost base** of the whole property provided that the **property expropriated** is **not** more than **20%** of the area of the total property and the **compensation received** is **not** more than **20%** of the adjusted cost base of the property.

PAYMENTS TO ALLOW ACCESS TO PROPERTY

In a November 19, 2008 **Tax Court** of Canada case ([Singh vs. H.M.Q., 2007-748\(IT\)1](#)), the taxpayer owned a parcel of land in which three operating oil wells existed and the taxpayer received \$24,750 from the NCE Petrofund Corp (NCE) as NCE wanted to replace the existing pipeline on the land. Therefore, NCE needed a right to access the property to replace the pipeline. No **additional land** was **taken** by NCE.

*“consent to enter property
- taxable”*

The payment was for a Work Space Agreement. **No part** of the payment was for **damage** to the property. The payment was simply to get **consent to enter** the property.

The Court found that the **\$24,750** should be included in the **Appellant’s income** as it was simply an amount received to allow NCE to have **access to the property**.

DROUGHT ASSISTANCE

In a December 19, 2008 **Release** (Agriculture and Agri-Food Canada), the Government provided the areas eligible for a **one-year deferral** on the sale of **breeding livestock** in parts of Northern British Columbia, Northern Alberta and Saskatchewan due to **drought conditions**. (Section 7305 of the Income Tax Regulations and Section 80.3 of the Income Tax Act)

“this drought assistance”

PARTNERSHIP WIND-UP

In a December 19, 2008 **Tax Court** of Canada case (Stefanson Farms Ltd. (Stefanson Ltd.) vs. H.M.Q., 2004-2159(IT)G), **Stefanson Ltd.** acquired the 99% partnership interest that Mr. S had in the farm partnership for \$418,406 on **January 1, 1998**. On **January 3, 1998**, **Stefanson Ltd.** acquired the 1% interest in the family partnership that Mrs. S had. Therefore, the partnership was wound-up.

“the partnership incorporation”

Stefanson Ltd. took the position that the \$227,245 of inventory, which had previously been written off by the partnership, was acquired at fair market value because Subsection 98(5) does not apply. Therefore, Stefanson Ltd. deducted the \$227,245 of inventory on its return. (Presumably the partnership would have included the \$227,245 in income

on the disposition to *Stefanson Ltd.*)

Taxpayer Loses

The Court found that *Subsection 98(5)* did *apply*. Therefore, the inventory was acquired, and disposed of, at a cost of *nil* and there was *no deduction* to Stefanson Ltd.

Editor's Comment

This is *good news* for other taxpayers that have used this *approach* to *transfer* partnership gains to a *corporation*.

For example, if Mr. and Mrs. A are *50/50 partners* in a *farm partnership* with assets, say, of:

	<i>Value</i>	<i>Tax Cost</i>
Inventory	\$1,500,000	Nil
Land	\$1,500,000	Nil
Buildings and Equipment	\$1,500,000	Nil
	\$4,500,000	Nil

Mr. A could *rollover* his partnership interest to *NEWCO* on, say, January 4, 2008 under *Section 85* at elected proceeds of \$750,000 (tax-free using the *capital gain exemption*). On, say, January 10, 2008 *Mrs. A* could do likewise. Therefore, from January 4 to January 10, *NEWCO* and *Mrs. A* are *partners* in the partnership.

Therefore, on January 11, 2008, after the *Subsection 98(5) wind-up*, *NEWCO's* tax balance sheet would be:

<i>Assets</i>	<i>Value</i>	<i>Tax Cost</i>
Inventory	\$1,500,000	Nil
Land	\$1,500,000	\$1,500,000*
Buildings and Equipment	\$1,500,000	Nil
	\$4,500,000	\$1,500,000

Liabilities and Equity

Promissory Notes payable to Mr. A	\$ 750,000
Promissory Notes payable to Mrs. A	\$ 750,000
Shares and contributed surplus - Mr. and Mrs. A	\$3,000,000
	\$4,500,000

This *reorganization* relies on the application of *Subsection 98(5)*.

* (ACB bump under Paragraph 98(5)(c))

CORPORATE REORGANIZATION

330(12)

Consider

GOODWILL VALUATION

In a December 22, 2008 *External Technical Interpretation* (2008-0299651E5, MacGillivray, Jackson, 1-613-957-2053), CRA provided a list of Tax Court of Canada cases that considered the fair market **value of goodwill** including Marcon (2008 TCC 116); Saab (2005 DTC 1042); Elliott (1999 (4 CTC) 2402); and Les Placements (96 DTC 1062).



"these goodwill valuation cases"

A *Federal Court of Appeal* case (H.M.Q. vs. Demco Management Ltd., 1986 (1 CTC 92)) and an *Exchequer Court* case (Butler et. al vs. Minister of National Revenue, 67 DTC 5019) were also mentioned.

OWNER-MANAGER REMUNERATION

330(13)

Consider

SHAREHOLDER VS. EMPLOYEE STATUS

In a December 16, 2008 *External Technical Interpretation* (2008-0270201E5, de Lang-Lenters, Saskia), CRA notes that where a **shareholder** receives a **loan** from his/her corporation, the amount of the loan is included in computing the shareholder's income under **Subsection 15(2)** unless one of the exceptions in Subsection 15(2.4) applies.

With respect to a "**home purchase loan**" in Paragraph 15(2.4)(b), to qualify the **home purchase loan** must be made because of the person's **employment**, and **not shareholding** status.

"these home purchase loan issues"

Generally a benefit will be considered to be conferred **qua employee** if it is **reasonable** to conclude that a benefit is part of a **reasonable employee remuneration package**. Even where the shareholder is the **only employee**, CRA will generally consider a loan to be received by virtue of **employment** where a shareholder-employee can show that **employees with similar duties and responsibilities** to another employer of similar size, but who are not shareholders of that other employer-corporation, receive **loans of similar amounts** under **similar conditions**.

If the facts support that a "**home purchase loan**" is conferred **qua employee**, the loan will not be required to be included in the shareholder's income because of the exception in **Subsection 15(2.4)**.

However, Subsection 80.4(1) may deem the individual to have received an interest **benefit** at the prescribed rate if interest is not charged.

If the loan is **qua shareholder**, the loan must be included in the shareholder's **income** for the year under Subsection 15(2).

WEB TIPS

330(14)

Consider

Blackle.com - ENVIRONMENTALLY FRIENDLY SEARCH ENGINE

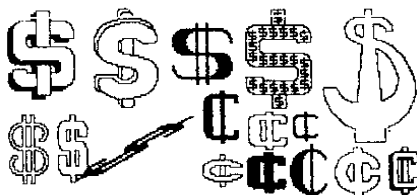
Based on the premise that a **black screen** uses less electricity to display than a bright one, the goal is to provide **Google custom search capabilities** at a **lower environmental cost**.

"this search engine"

Thank you to **Anna Reyes** of **Grant Thornton** in Edmonton, Alberta for this suggestion.

TAX FREE SAVINGS ACCOUNT (TFSA) CALCULATOR

To demonstrate the **estimated savings** that may be generated from saving through a **TFSA**, show clients the "**Tax Free Savings Account Calculator**". This calculator can be found at www.budget.gc.ca/2008/mm/calc_e.html.



"this TFSA calculator"

This calculator asks for the estimated income, expected contribution, and rate of return levels. The calculator will **estimate the after-tax dollar result** by investing through the **TFSA** as compared to traditional methods.

"to submit a web tip, send it to joe@videotax.com"

GST/HST

330(15)

TAXI AND LIMOUSINE DRIVERS

CRA's **Guide RC4125** provides GST/HST information for self-employed **taxi or limousine drivers**.

"Guide RC4125"

PUBLIC SERVICE BODY REBATES

CRA 19-page **Guide RC4034** provides information on rebates of GST/HST to **public service bodies** including **Form GST66**.

"Guide RC4034"

CHARITIES

23-Page [Guide RC4082](#) provides GST/HST information for *charities*.

"Guide RC4082"

CANCELLATION OR WAIVER OF PENALTIES AND/OR INTEREST

In January, 2009, CRA released *GST/HST Memoranda Series 16.3* which discusses *cancellation or waiver of penalties and/or interest*.

"Memoranda 16.3"

The Release discusses the *ten-year* rolling window for *taxpayer* relief requests, what are extraordinary circumstances, the inability to pay or financial hardship, factors to be considered when waiving or cancelling penalties and/or interest, refund interest, wash transactions, and the due diligence defence.

DID YOU KNOW...

330(16)

Consider

RECORDS OF IMPORTERS

In a September 4, 2008 *Canada Border Services Agency Memorandum D17-1-21*, information was provided concerning the records that must be maintained by *importers*. The Release discusses imaged and microfilm records, electronic data process records, and having records available for inspection and delivery.

"these Memorandums"

IMPORTATION OF VEHICLES

On December 3, 2008, CRA introduced 36-page *Memorandum D19-12-1* which provides information on *the importation of a vehicle*.

PERSONAL TAX UPDATE COURSES

See www.videotax.com for information on *Personal Tax Update Courses* and *videos*.

"these courses/videos"

The preceding information is for educational purposes only. As it is impossible to include all situations, circumstances and exceptions in a seminar such as this, a further review should be done by a qualified professional.

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APPENDIX A

Disability Savings Grant and Bond

Canada Disability Savings Grant

A Canada Disability Savings Grant is a supplement that the Government of Canada contributes to a Registered Disability Savings Plan (RDSP). Depending on the beneficiary's family income and contribution level, the Government may grant up to \$3 for every \$1 in contributions received by an RDSP in a year, to a maximum of \$3,500. The lifetime grant limit is \$70,000. A Canada Disability Savings Grant can be paid into an RDSP on a contribution made to the beneficiary's RDSP by December 31 of the year the beneficiary turns 49 years old.

Beneficiary's family income	Grant	Maximum
\$75,769* or less		
on the first \$500	\$3 for every \$1 contributed	\$1,500
on the next \$1,000	\$2 for every \$1 contributed	\$2,000
More than \$75,769*		
on the first \$1,000	\$1 for every \$1 contributed	\$1,000

*The beneficiary family income thresholds are indexed each year to inflation. The income thresholds shown are for 2008.

Canada Disability Savings Bond

A Canada Disability Savings Bond is paid by the Government of Canada directly into a registered disability savings plan. Depending on the beneficiary's family income, the Government of Canada may contribute up to \$1,000 each year. The lifetime bond limit is \$20,000. A Canada Disability Savings Bond can be paid into an RDSP until the year in which the beneficiary turns 49 years old.

Beneficiary's family income	Bond
\$21,287* or less (or if the holder is a public institution)	\$1,000
Between \$21,287* and \$37,885*	Part of the \$1,000 based on the formula in the <i>Canada Disability Savings Act</i>
More than \$37,885*	No bond is paid

*The beneficiary family income thresholds are indexed each year to inflation. The income thresholds shown are for 2008.