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CLASSIFICATION OF THE CANADIAN TFSA FOR US TAX PURPOSES[1]

— *Max Reed, White & Case LLP*[2]

The tax-free savings account ("TFSA") is one of Canadians' favourite financial products. Similar to the US Roth IRA, the TFSA is a savings vehicle that allows Canadians to earn tax-free investment income. The parameters of TFSAs, which were first introduced in Canada's 2008 federal Budget, are outlined primarily in section 146.2 of the *Income Tax Act*.[3] As with other common Canadian financial products, the TFSA causes issues for the estimated one million US persons in Canada who must report it on their US tax returns. Most agree that the TFSA does not shelter investment income from US tax.[4] Unlike the registered retirement savings plan ("RRSP"), for which the IRS[5] has released Notice 2003-75 classifying it as a reportable foreign trust under *Internal Revenue Code* ("IRC") § 6048,[6] there is no official guidance on the TFSA. Richard Pound wrote to the IRS to seek clarification of a number of points, including the proper reporting procedures for TFSAs. He received no reply. Other advisers report that the IRS is unwilling to issue a Private Letter Ruling resolving the issue.

Absent official IRS guidance, uncertainty as to how to report the TFSA prevails. Different advisers take different positions. The common consensus is that the TFSA is a foreign trust for US tax purposes and thus necessitates the filing of Form 3520, Annual Return To Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, and Form 3520-A, Annual Information Return of Foreign Trust with a US Owner.[7] For taxpayers, the classification of the TFSA as a foreign trust adds expense and complication to their already complex US tax filing requirements. With the recent implementation of the *Foreign Account Tax Compliance Act*, increased attention will be paid to US tax compliance issues. Here, I explore the US tax classification of the tax-free savings account. I conclude that the TFSA may not be an entity separate from its owner for US federal tax purposes and, thus, no additional reporting is necessary. Alternatively, if a TFSA is subject to the entity classification regime, it may be treated as a disregarded entity for US tax purposes, which would necessitate the filing of Form 8858.

The TFSA is different than an RRSP

The conventional wisdom that the TFSA is a foreign trust is based on an analogy to the IRS's tax treatment of the Canadian RRSP. The foundation of this analogy is IRS Notice 2003-75, in which the IRS stated that taxpayers could use a simpler procedure instead of filing Form 3250 and/or Form 3520-A to report their RRSPs and registered retirement income funds ("RRIFs"). Interestingly, Notice 2003-75 does not provide legal explanation for this classification. Prior IRS notices on the same subject, Notice 2003-25[8] and Notice 2003-57,[9] repeat the assumption, but also lack explanation. It may be, therefore, that the IRS's old position that an RRSP/RRIF necessitates filing Form 3250 and/or Form 3520-A is untenable.[10] Regardless, one cannot simply assume that a short IRS notice about a

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different financial product automatically applies to the TFSA. The RRSP and TFSA are created under different statutory and contractual arrangements. The TFSA functions a lot more like a normal bank account, and less like a trust, than the RRSP does. Withdrawals from and contributions to TFSAs are almost instantaneous in comparison with the financial institution's interference when withdrawals are made from an RRSP. Tax withholding is required on RRSP withdrawals — but not so for those from TFSAs. Financial institutions issue receipts for most RRSP transactions and do not do so for those related to TFSAs. The analysis of the TFSA needs to be built from the ground up.

The TFSA is not subject to the entity classification regime

Entity classification under the IRC is determined under *Treasury Regulations* § 301.7701-1–301.7701-4. There are a number of steps to the process. As a preliminary matter, to be subject to the entity classification regime at all, the entity must be separate from its owners.[11] Such a determination is a matter of "federal tax law" and local law does not enter into it. Certain contractual arrangements under which the participants carry on a trade, business, financial operation, or venture and divide the resulting profits give rise to an entity for US federal tax purposes.[12] A TFSA is a contractual arrangement between two parties. But a holder of a TFSA does not divide the returns that accrue inside it ("profits" in the language of the *Treasury Regulations*) with the sponsoring financial institution. Such an arrangement would be deeply unattractive.

The IRS has issued Revenue Rulings, which explore whether an entity is separate from its owners. In Revenue Ruling 2004-86, the IRS notes, "Generally, when participants in a venture form a state law entity and avail themselves of the benefits of that entity for a valid business purpose, such as investment or profit, and not for tax avoidance, the entity will be recognized for federal tax purposes". TFSAs do not have a business purpose — their only purpose is to minimize Canadian tax. Later in Revenue Ruling 2004-86, the IRS identifies the following reasons why the Delaware Statutory Trust is an entity separate from its owners. As can be seen, the TFSA does not meet all of the stated criteria.

- *Under local law, the entity is recognized as separate from its owners*. It is unclear whether under Canadian law a TFSA is recognized as separate from its owners.
- *Creditors of the owners of the entity may not assert claims directly against the property held by the entity*. Nothing inherent to the TFSA protects property inside it from creditor claims.
- *The entity may sue or be sued and is subject to attachment and execution as if it were a corporation*. The TFSA may not sue or be sued. Only the financial institution sponsoring it or its holder may be sued.
- *The entity's beneficial owners have the same limitation of liability as shareholders in a corporation*. The TFSA provides no limitation of liability to its holder. If an investment held in a TFSA gives rise to a cause of action, the fact that the investment was held inside a TFSA would not, by itself, protect the TFSA's owner from personal liability for that cause of action.
- *The entity can merge or consolidate with or into other entities*. While property can be transferred from one TFSA to another, it is unclear whether a TFSA can be merged or consolidated with another TFSA. A TFSA certainly cannot be merged with a different type of entity.[13]

Case law supports this view. In *ASA Investerings Partnership v. CIR*,[14] the DC Circuit held that "the absence of a non-tax business purpose is fatal" to the classification of an entity for US federal tax purposes. The TFSA lacks a non-tax business purposes. As such, it should not be considered an entity for US tax purposes. Absent classification as a separate entity, there is no need to report it on a special form.

If the TFSA is subject to the entity classification regime, it is not a trust

Once an entity is determined to be separate from its owner, it is subject to the entity classification regime unless a special regime in the Code or Regulations applies.[15] TFSAs are not addressed by the Code or Regulations. Next, it must be determined whether an entity is a trust.[16] A TFSA does not meet the definition of a trust for US tax purposes. "Foreign trust" is defined in IRC § 7701(a)(31)(B) as any trust that is not domestic. But the concept of a trust is not defined in the IRC. Instead, that definition is found in the *Treasury Regulations*. Treasury Regulation § 301.7701-4(a) defines a trust as an arrangement in which the trustee "take[s] title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts".[17]

Banks do not, at least for tax purposes, take title to property that is deposited into TFSAs. Tax responsibility for the property remains with the individual. Indeed, a statutory pre-condition to the qualification of a TFSA set out under paragraph 146.2(2)(e) of the *Income Tax Act* is that at the direction of the customer, the financial institution "shall transfer all or any part of the property held in connection with the arrangement (or an amount equal to its value) to another TFSA of the holder". Put differently, in order for an account to qualify as a TFSA under the *Income Tax Act*, the customer must be given the right to transfer his or her property to another TFSA, potentially at another financial institution. Such a right assumes that the customer retains title to the property. It strains credulity to believe that the Canadian government would have created a right for a customer to transfer property that belongs to one financial institution to another financial institution.

The obviousness of this point can be illustrated with a simple example. Let's say that Althea, a US citizen in Canada, has a brokerage account with RBC Direct Investing and owns 50 shares of Apple Inc. in her TFSA. Althea exercises all of the rights of those shares, including voting and attending shareholders' meetings, and receives dividends from those shares. Althea then sells her Apple shares on the NASDAQ. She logs into the RBC Direct Investing website and clicks "Sell". Moments later, the shares are sold for whatever the market price happens to be — making Althea a profit of $500. Recall that for US tax purposes the TFSA does not shelter the capital gains of US citizens. Althea now has a $500 capital gain to report on her next Form 1040 (the standard US reporting form). If RBC Direct Investing had indeed taken title to those shares, the gain would not belong to Althea. It might be suggested that under various trust attribution rules the gain is attributed to Althea. But this is not how anyone understands (or reports) the tax consequences of this simple transaction. A review of RBC Direct Investing's TFSA agreement confirms this. RBC Direct Investing "administers" and "holds" the property but does not take title to it.[18]

Revenue Rulings support this "non-trust" view

Even if under this example, RBC Direct Investing did take title to the shares held in the TFSA, the TFSA would still not meet the definition of a trust for US tax purposes. Treasury Regulation § 301.7701-4(a) has been the subject of a few Revenue Rulings that clarify its application. Revenue Rulings are public administrative rulings issued by the IRS that clarify the IRS's own position on certain matters. They can be relied upon by taxpayers. In Revenue Ruling 2013-14, the IRS opined that a Mexican Land Trust ("MLT") arrangement was not considered a trust under Treasury Regulation § 301.7701-4(a). The Mexican Federal Constitution prohibits non-Mexican persons from directly owning real property in certain parts of Mexico. In order to get around this, US persons use an MLT. Under this arrangement, a Mexican bank owns the real property directly as a fiduciary of the US person and is paid for its services. But because the US person retains the ability to manage and control the real property, as well as to direct the bank to transfer title, the relationship is not a "trust" as set out in Treasury Regulation § 301.7701-4(a).

The same result was reached in Revenue Ruling 92-105,[19] which concerned land trusts in Illinois but was applicable to other states as well. In that ruling, the IRS stated that the definition in Treasury Regulation § 301.7701-4(a) is not met (and thus there is no obligation to file Forms 3520 and/or 3520-A) where

> (1) the trustee has title to real property, (2) the beneficiary (or a designee of the beneficiary) has the exclusive right to direct or control the trustee in dealing with the title to the property, and (3) the beneficiary has the exclusive control of the management of the property, the exclusive right to the earnings and proceeds from the property, and the obligation to pay any taxes and liabilities relating to the property.[20]

Applying this definition to the very common set of facts above, it is easy to see why the IRS itself, not to mention a reviewing court, would not classify a TFSA as a trust. Even if RBC Direct Investing takes title to the Apple Inc. shares that Althea owns in a TFSA, Althea maintains control and management of those shares and has exclusive control over them; it is her sole obligation to pay any taxes owed on them.

Reviewing court would support this "non-trust" interpretation

If this issue were to ever reach the litigation stage, it is hard to imagine a court concluding that a TFSA is a trust. There is a common sense distinction between a trust and a TFSA. Trusts are complex instruments set up by well-advised taxpayers to achieve certain tax-planning or other goals. Because of their potential for abuse, trusts require complex reporting requirements. A TFSA, on the other hand, is a common consumer financial product set up by

the Government of Canada and administered by mainstream Canadian financial institutions to provide a limited amount of Canadian tax relief to millions of Canadians. No one disputes the fact that the TFSA offers no US tax benefits. Consequently, it has no potential to deprive the US Treasury of Revenue. Certainly, a TFSA will be reported as a foreign bank account on a taxpayer's Report of Foreign Bank and Financial Accounts or Form 8938 if required. But it is difficult to see a court concluding that the TFSA is a foreign trust.

Classification of the TFSA under the entity classification rules

The TFSA is arguably not a trust. To arrive at its proper classification, further questions must be asked.

(1) *How many members does the entity have?* If an entity is not a trust under Treasury Regulation § 301.7701-4 or subject to special classification under the Code, then its classification is determined by reference to the number of members it has. If it has two or more members, it is either a partnership or a corporation.[21] If the entity has only one member, then it is either an association or an entity that is disregarded from its owner.[22] Although "member" is not defined in the Regulations, it is generally treated as synonymous with "owner". The TFSA has one member — jointly held TFSAs are not allowed. Thus, it is either a corporation or an entity disregarded from its owner for US tax purposes.

(2) *Does the entity meet one of the definitions of a corporation?* There are seven different definitions of "corporation" that an entity may meet.[23] If it meets any one of those, it is automatically treated as a corporation. A TFSA does not meet any of these definitions of corporation.[24]

(3) *Is the entity foreign or domestic?* An entity is classified as foreign if it is not domestic.[25] Domestic entities are those organized under the laws of the United States.[26] A TFSA is organized under the laws of Canada and as such is a foreign entity.

(4) *Is the entity an "eligible entity"?* If an entity does not meet one of the set definitions of corporation, then it is an "eligible entity" and may elect to be classified as an association or entity disregarded from its owner for US tax purposes.[27] The holder of a TFSA may file an election to be classified as a corporation or a disregarded entity for US tax purposes.

(5) *What is the default classification of the entity?* All foreign eligible entities with only one member may file a Form 8832 to elect to be classified as an association or as a disregarded entity. Absent this election, each "foreign eligible entity" has a default classification as a partnership or a corporation for US tax purposes. A foreign eligible entity with one member is, by default, either (1) an association if that one member has limited liability; or (2) disregarded as an entity from its member if that member has limited liability. A member is not considered to have limited liability if he or she is personally liable for any of the debts of the organization even if he or she is indemnified for those debts.[28] The owner of a TFSA does not have limited liability. If you own an investment inside your TFSA, and somehow that investment leads to a cause of action against you, the fact that the investment is held by the TFSA will not insulate you personally from the liability generated by that cause of action. Thus, a TFSA may, by default, be classified as a foreign disregarded entity for tax purposes.

A US person who has an interest in a foreign disregarded entity must file Form 8858 every year.

The way forward

While the precise classification of a TFSA is not certain, there are two possibilities for its classification — neither of which is as a foreign trust. First, a TFSA is not an entity separate from its owner and, thus, the entity classification rules do not apply. If this is correct, then no special reporting of the TFSA is required. Alternatively, if the entity classification rules do apply, the default classification of a TFSA is as a disregarded entity for US tax purposes. If this is correct, then all those who have an interest in a TFSA must file a Form 8858 every year. If, despite the above analysis, the IRS insists on having Canadians report their TFSAs on a special form, it should, as it did with the RRSP, use its authority under IRC § 6001 and design a user-friendly TFSA reporting form.

In the interim, what are US citizens in Canada and their tax advisers to do? Certainly, the safest option is to file Form 8858 every year. But this adds cost and complexity to preparing a US tax return. Further, delinquent filers entering the offshore voluntary disclosure program or the original or the new streamlined procedure may encounter automatically

generated IRS penalties for failing to file in previous years. In our book *A Tax Guide for US Citizens in Canada*, we suggest that taxpayers write to the IRS to describe what a TFSA is and request confirmation on how it is to be reported. To date, the IRS has not replied. Nevertheless, we believe that this disclosure is simpler than a full Form 8858 and makes the taxpayer compliant with the IRS's obligations. Whatever strategy is used, at some point, be it through litigation or diplomatic pressure, the IRS hopefully will take a position and clarify the issue once and for all.

Notes:

[1] This article is intended to give general information on the developments covered, not to serve as legal advice related to individual situations or as a legal opinion. Each TFSA is different and may have a different US tax classification. Consult counsel for legal advice specific to your situation. The opinions expressed in this article are my own and do not represent the views of my employer.

[2] Max Reed is a lawyer admitted to the bars of both New York and Ontario. He practises US tax law at White & Case LLP. With Richard Pound, he is the author of *A Tax Guide for US Citizens in Canada*. Prior to joining White & Case, he clerked for Justices Karen Sharlow and Gilles Letourneau of the Federal Court of Appeal. He can be reached at maxreed@gmail.com.

[3] R.S.C., 1985, c. 1.

[4] Some argue that income inside a TFSA is entitled tax deferral under Article XVIII(7) of the *Canada-US Income Tax Convention* (2007). This may be an aggressive position given the lack of guidance in this area. See Kevyn Nightingale and David Turchen, "The US Implications of a Tax-Free Savings Account", *Tax Topics*, No. 2146, April 25, 2013.

[5] References herein to the IRS are to the US Internal Revenue Service.

[6] Section references herein are to the US Internal Revenue Code of 1986, as amended, or to the US *Treasury Regulations* thereunder.

[7] See, for instance, Dawn Haley, "The Drawbacks of TFSAs and RESPs to US Citizens", *Canadian Tax Focus*, Volume 3, Number 1, February 2013.

[8] 2003-18 I.R.B. 855.

[9] 2003-34 I.R.B. 397.

[10] As discussed below, it is unclear whether the financial institution actually "takes title" of property put into an RRSP. This question is beyond the scope of this article and is purely academic because the IRS has issued Form 8891 for the simplified reporting of RRSP accounts.

[11] *Treasury Regulations* § 301.7701-1(a).

[12] *Treasury Regulations* § 301.7701-1(a)(2).

[13] Revenue Ruling 2004-86.

[14] 201 F. 3d 505 (DC Circuit 2000). See also *Boca Investerings Partnership v. United States*, 314 F.3d 625, 631 (D.C. Cir. 2003), and *Saba Partnership v. C.I.R.*, 273 F.3d 1135, 1141 (D.C. Cir. 2001).

[15] *Treasury Regulations* § 301.7701-1(b).

[16] *Treasury Regulations* § 301.7701-2(a).

[17] The full definition is as follows in Treasury Regulation § 301.7701-4(a): "In general, the term 'trust' as used in the Internal Revenue Code refers to an arrangement created either by a will or by an *inter vivos* declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. Usually the beneficiaries of such a trust do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. However, the beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust under the Internal Revenue Code if it was created for the purpose of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them. Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit."

[18] RBC Direct Investing Inc., "Tax Free Savings Account Trust Agreement", *RBC Direct Investing*, April 2014, online at http://www.rbcdirectinvesting.com/pdf/tfsa_trust_agreement.pdf.

[19] 1992-2 CB 204.

[20] *Ibid.*

[21] *Treasury Regulations* § 301.7701-2(a).

[22] *Ibid.*

[23] Specifically, an entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) is an "eligible entity that may select its classification".

[24] The TFSA does not meet any of the following definitions: (1) Treasury Regulation § 301.7701-2(b)(1) — it is not a business entity organized under a federal or state statute that is referred to as incorporated; (2) Treasury Regulation § 301.7701-2(b)(3) — it is not a business entity organized under a state statute that refers to the entity as a "joint stock-company or joint-stock association"; (3) Treasury Regulation § 301.7701-2(b)(4) — it is not an insurance company; (4) Treasury Regulation § 301.7701-2(b)(5) — it is not a State-chartered entity that conducts banking activities; (5) Treasury Regulation § 301.7701-2(b)(6) — it is not wholly owned by a foreign government; (6) Treasury Regulation § 301.7701-2(b)(7) — it is not taxable as a corporation under a specific section of the IRC; and (7) Treasury Regulation § 301.7701-2(b)(8) — it is not on the *per se* corporations list.

[25] IRC § 7701(a)(5).

[26] IRC § 7701(a)(4).

[27] *Treasury Regulations* § 301.7701-3(a).

[28] The full definition is here: "For purposes of paragraph (b)(2)(i) of this section, a member of a foreign eligible entity has limited liability if the member has no personal liability for the debts of or claims against the entity by reason of being a member. This determination is based solely on the statute or law pursuant to which the entity is organized, except that if the underlying statute or law allows the entity to specify in its organizational documents whether the members will have limited liability, the organizational documents may also be relevant. For purposes of this section, a member has personal liability if the creditors of the entity may seek satisfaction of all or any portion of the debts or claims against the entity from the member as such. A member has personal liability for purposes of this paragraph even if the member makes an agreement under which another person (whether or not a member of the entity) assumes such liability or agrees to indemnify that member for any such liability."

DEPARTMENT OF FINANCE COMFORT LETTER

In a Comfort Letter dated June 10, 2014, the Department of Finance (the "Department") responded to communication regarding the year-end rule for partnerships found in paragraph 249.1(1)(*c*) of the *Income Tax Act* (the "Act"). The rule — which is subject to the subsection 249.1(9) provision allowing partnerships to elect to have a "multi-tier fiscal period alignment"— provides that a partnership (no members of which are individuals or professional corporations) that is a member of another partnership, or that has a member that is a partnership, must have a year end of December 31 if a corporation has a significant interest in any of the partnerships.

The Department had been contacted with regard to a partnership group, of which each partnership had aligned its fiscal period to a day other than December 31, that was concerned that the creation of two wholly owned partnerships would cause the expanded group subsequently to have a December 31 fiscal period. In response, the Department indicated it was prepared to recommend that the Act be amended to allow multi-tiered corporate partnership structures to retain their aligned non-calendar year fiscal periods in instances where one or more wholly owned partnerships are created and added to a partnership structure after March 2014.

RECENT CASES

Late-filing penalties did not apply to taxpayer as he exercised due diligence

The taxpayer did not dispute that he failed to report $439,890 in income related to a pension payment. He did, however, dispute a penalty imposed under subsection 163(1) of the *Income Tax Act*, which was 20% applied onto the unreported amount of income for an Alberta resident. At issue was whether the taxpayer could avoid the penalty if he could demonstrate that he exercised due diligence in the relevant years.

The taxpayer's appeal was allowed for 2009. Given the harsh and potentially disproportionate results of this penalty, and absent an express limitation, the taxpayer had a due diligence defence available to him to explain the omission. In the absence of evidence that the taxpayer did not file his tax returns after receiving a notice of reassessment in 2007, the Minister did not meet her burden.

¶48,832, *Galachiuk*, 2014 DTC 1153

Taxpayer not entitled to deduct losses allegedly resulting from loss of client base

The taxpayer was a financial counsellor with a brokerage firm. When he changed employment with various brokerage firms, his clients would follow him. In June 2010, he ceased working for his current firm, could not find further employment, lost his client base, and could not retain his licence with the provincial regulatory authorities. In computing his income for 2010, therefore, he sought to deduct $14,000 in lost income resulting from the loss of his clients and $14 million as a capital loss resulting from the loss of his client base. The Minister disallowed all loss deductions claimed, and the taxpayer appealed to the Tax Court of Canada.

The taxpayer's appeal was dismissed. The $14,000 was not deductible since paragraph 18(1)(*a*) of the *Income Tax Act* only permits the deduction of expenses incurred to earn income, and the taxpayer did not incur an actual expenditure of $14,000 during 2010. Nor was the $14 million deductible as a capital loss since the taxpayer did not own his client base and it was not an asset in respect of which he had made a disposition. The Minister's assessment was affirmed accordingly.

¶48,834, *Martin*, 2014 DTC 1155

Fees paid to private instructors not eligible for tuition credit

The taxpayer was appealing a 2011 reassessment that dismissed his claim for $8,095 in tuition credits for fees paid to private instructors who provided piano lessons for his two daughters. The taxpayer had claimed $10,000 as tuition or education amounts transferred to him by his children, of which $1,095 was allowed for tuition fees for music classes and examination fees paid to the Royal Conservatory of Music ("RCM"). A credit for tuition fees can be claimed if a student is enrolled in an educational institution providing courses at a post-secondary level. The Ministry of Education in Alberta grants a Grade 12 high school credit upon successful completion of the RCM Grade 8 piano examinations, a level both of the taxpayer's daughters had achieved. The taxpayer argued that the piano instructors should be considered an educational institution, as they provided the same educational experience as an institution, basing that argument on *Tarkowski v. The Queen* (2007 DTC 1555).

The appeal was dismissed. The respondent did not dispute whether the taxpayer's daughters were taking courses at a post-secondary level, but did dispute the amount of fees paid and argued that private teachers do not qualify as an educational institution. There was no documentary evidence to support the taxpayer's claim that he paid $8,095 to the instructors, although the respondent produced receipts totalling $3,117 paid for piano lessons. The taxpayer failed to produce any receipts for fees actually paid in 2011. In *Tarkowski*, the Court found that a school of music qualified as an educational institution, but that case is not binding as it was held under the informal procedure. A case more on point for the taxpayer's situation was *Kam v. The Queen* (2013 DTC 1218), in which the Court held that the tuition credit was not available for fees paid to private instructors, because they cannot be considered an educational institution. Parliament's intent in enacting the tuition fee credit was to make post-secondary education more affordable. While the legislation is to be interpreted broadly, it does not apply to fees paid to private instructors in their homes.

¶48,835, *Van Helden*, 2014 DTC 1156

Corporate taxpayer's action for damages against accounting firm following latter's preparation of aggressive tax avoidance plan dismissed

The defendant accounting firm had been the corporate plaintiff TBPL's external auditor for some 20 years. In 2001, the defendant recommended to TBPL an aggressive tax plan for a corporate reorganization to avoid the payment of taxes (the "Finco Plan"). In adopting the Finco Plan, TBPL agreed to pay the defendant a one-time fixed fee plus a contingent annual fee equal to 20% of the taxes saved under the Finco Plan (the "Contingent Fee"). Relying on the general anti-avoidance rule, the CRA subsequently reassessed TBPL and a corporation incorporated as part of the Finco Plan ("2903") for additional taxes, interest, and penalties. TBPL discharged the defendant and engaged other accountants and a firm of tax lawyers to resist the Minister's reassessments (the "Reassessments"), but subsequently settled with the CRA in October 2008. TBPL, 2903, and other plaintiffs then sued the defendants in the Supreme Court of British Columbia to recover, as damages: (a) the additional taxes, interest, and penalties resulting from the Reassessments; (b) the fees paid to the defendant; and (c) the cost of the accounting and legal services incurred in reaching the settlement with the CRA.

The plaintiff's action was dismissed. The defendant fully informed TBPL of all of the risks associated with implementing the Finco Plan, including the risk that the Finco Plan would be looked upon with disfavour by the taxing authorities and could result in unfavourable assessments. Although the defendant's relationship with TBPL was a fiduciary one, the defendant had no fiduciary or contractual obligation to assist the plaintiffs to resist the Reassessments. In addition, the Rules of Professional Conduct applicable to the defendant did not preclude it from taking the Contingent Fee, and there was no conflict of interest involved with that fee. Furthermore the plaintiffs suffered no actionable loss in any event, inasmuch as they made a prudent settlement with the taxing authorities, preserving at least some of the benefits of the Finco Plan.

¶48,836, *Taiga Building Products Ltd.*, 2014 DTC 5082

Minister's decision to reverse acceptance of voluntary disclosure application was invalid

The Minister appealed a Federal Court order dismissing the Minister's appeal of two applications for judicial review related to a dispute under the *Income Tax Act*. The Minister took the position that it was plain and obvious that the entire dispute would fall within the exclusive jurisdiction of the Tax Court of Canada. The underlying dispute was related to the transfer price of rock salt. The taxpayer had made a voluntary disclosure to the Minister and later entered into an agreement with the Minister about its income tax liability for 2004 to 2006 under the Canada-US tax treaty. The Minister later informed the taxpayer that she was not bound by the agreement and that the reassessments based on a different transfer price would stand.

The Minister's appeal was dismissed. Based on the record, there was no basis for interfering with the lower court's decision. While the Court cannot invalidate a tax assessment, it may grant a declaration based on administrative law principles that the Minister acted unreasonably.

¶48,837, *Sifto Canada Corp.*, 2014 DTC 5083

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For Wolters Kluwer Limited

Tara Isard, Senior Manager, Content
Tax & Accounting Canada
(416) 224-2224 ext. 6408
email: Tara.Isard@wolterskluwer.com

Natasha Menon, Senior Research Product Manager
Tax & Accounting Canada
(416) 224-2224 ext. 6360
email: Natasha.Menon@wolterskluwer.com

Wolters Kluwer Limited
300-90 Sheppard Avenue East
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