

Tax Court of Canada



Cour canadienne de l'impôt

**TAX AVOIDANCE AND TAX EVASION IN CANADA**

**Prepared for the International Association of Tax Judges (IATJ 4th Assembly) –  
Amsterdam Conference**

**Prepared By: JUSTICE F.J. PIZZITELLI and SONA DHAWAN, Law Clerk at the  
Tax Court of Canada**

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## I. ISSUES

1. This memorandum has been prepared as background material for the Tax Panel on Tax Avoidance and Tax Evasion from a Canadian perspective and deals with the following questions:

- a. How do you distinguish between tax avoidance and tax evasion?
- b. What are the civil and criminal penalties for tax evasion?
- c. What are some of the abusive tax schemes and how has your Tax Collection Agency and Court dealt with such issues?
- d. How do you deal with individuals who fail to file a tax return?

## II. HOW DO YOU DISTINGUISH BETWEEN TAX AVOIDANCE AND TAX EVASION?

2. A tremendous amount of legal and accounting effort and talent are applied constantly in the effort to legally minimize the burden of taxation. The principle entitling a taxpayer to enter into transactions to legally minimize his taxes is known as the Westminster principle and is described in the seminal case of *Commissioners of Inland Revenue v. Duke of Westminster*<sup>1</sup>:

“Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.”

3. This principle was reiterated in *Canada Trustco Mortgage Co. v. Canada*<sup>2</sup> where the Supreme Court of Canada (“SCC”) held that:

“[61] A proper approach to the wording of the provisions of the *Income Tax Act* together with the relevant factual context of a given case achieve balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly. Parliament intends taxpayers to take full advantage of the provisions of the Act that confer tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.”

4. However, one must be mindful that such tax minimization efforts remain within the bounds of legitimate attempts at tax avoidance, and do not cross the line so as to

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<sup>1</sup> *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 at 19-20 (H.L.). [“Westminster principle”].

<sup>2</sup> *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 45[“Canada Trustco”].

become criminal tax evasion. The authors of *Canadian Income Tax Law* (3rd Edition)<sup>3</sup> characterize the distinction between avoidance and evasion this way:

“As opposed to tax "evasion ", which involves an illegal breach of specific statutory duties such as failing to file a return or deliberately concealing or falsifying reported information, these legal efforts to order one's affairs to minimize tax are labelled "tax avoidance ".”

5. The under-payment of taxes is distinguished from the criminal offence of tax evasion by the intent of the person whose actions are in question. This distinction is critical because the consequences of a successful prosecution for the criminal offense of tax evasion are far more severe than the consequences associated with a failed attempt at tax avoidance. This distinction is discussed in further detail below.

### **A. Definition of Tax Avoidance**

6. Tax avoidance falls into two categories: (i) tax mitigation, and (ii) abusive avoidance<sup>4</sup>. The line between the two is not always clear. Parliament and Courts have attempted to implement statutory measures and judicial doctrines to control and curtail tax avoidance, including introducing s.245 of the Income Tax Act (“ITA”)<sup>5</sup>, the General Anti-Avoidance Rule (“GAAR”). The GAAR attempts to draw a line between legitimate tax minimization and abusive tax avoidance.

7. Section 245(3) of the ITA defines an “avoidance transaction” as any transaction or series of transactions that gives rise to any tax benefit, unless the transaction may reasonably be considered to have been undertaken primarily for bona fide purposes other than obtaining the tax benefit.

#### **Avoidance transaction**

**245(3)** An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.

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<sup>3</sup> Duff, Alarie, Brooks, Philipps. “Canadian Income Tax Law” (3rd Edition). Lexis Nexis. 2009.

<sup>4</sup> Krishna, Vern, “The Fundamentals of Income Tax” (2009), Chapter 22 (“Krishna”).

<sup>5</sup> *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

8. The starting point in determining whether a transaction constitutes lawful tax mitigation or tax avoidance is to ascertain the purpose of the statutory provision used to implement the tax plan. In a GAAR analysis, the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision (*Canada Trustco*). Such an analysis requires a Court to consider the purpose of each provision relied on and whether that purpose was defeated by the transaction or series of transactions.

9. The SCC in *Canada Trustco* gave the following specific examples of abusive tax avoidance:

- a. When a taxpayer relies on specific provisions of the ITA in order to achieve an outcome that those provisions seek to avoid;
- b. When a transaction defeats the underlying rationale of the provisions that are relied upon; and
- c. When an arrangement circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions.

## **B. Definition of Tax Evasion**

10. As between tax avoidance and tax evasion, only the latter is a criminal offence. Tax evasion at its core involves an element of fraud perpetrated upon the treasury and typically carried out through some form of concealment or deceit with the intent to evade or defeat a tax or payment of the tax.<sup>6</sup>

11. Section 239 of the ITA makes it a criminal offence for any person, whether the taxpayer or any adviser or accomplice, to deliberately evade or to attempt or conspire to evade tax by wilful deceit in any of the following ways:

- a. making false or deceptive statements (or participating in, assenting or acquiescing thereto) in a required return, certificate, statement or answer;
- b. destroying, altering, mutilating or hiding books of account or records (or otherwise disposing of them);
- c. omitting to enter a material particular or making false or deceptive entries in books of account or records (or assenting or acquiescing thereto);

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<sup>6</sup> Innes, William (2010). "Tax Evasion" (pp. 1-10). Toronto: Carswell

- d. wilfully evading or attempting to evade compliance with the Act or payment of tax; and
- e. conspiracy to commit any of the above offences.

### **C. Distinguishing Between Avoidance and Evasion**

#### ***(i) Clear Taxability under the ITA***

12. A pre-condition to a finding of tax evasion is that the transaction must clearly be subject to tax. Otherwise, we are in the sphere of tax avoidance, and are simply debating whether the ITA applies as suggested by the taxpayer.

13. In *The Queen v. Redpath Industries Ltd. et al.*<sup>7</sup>, it was established there is no *actus reus*, and therefore no evasion of tax, absent clear taxability under the Act:

“A criminal court is not the forum to determine income taxability...In a tax evasion charge, it must appear prima facie from the evidence that the taxability is clear-cut, obvious, indisputable, unquestionable from lack of reporting, before entering the examination of...whether undisputable taxability...leads to the conclusion beyond a reasonable doubt that it was wilfully omitted by a taxpayer in his tax returns.” (Emphasis added)

#### ***(ii) Intent and Conduct***

14. Another defining feature of tax evasion is an intent to avoid the payment of taxes which are known to be owing. What distinguishes lawful, and even creative tax avoidance from criminal tax evasion is conduct accompanied with a culpable state of mind (*mens rea*).

15. In the leading case of *R v. Klundert*,<sup>8</sup> the court explained the distinction between tax evasion and tax avoidance as follows:

“Fault rests in the state of mind that accompanies the doing of the prohibited conduct. It is the culpable state of mind that distinguishes the legitimate tax planner from the dishonest tax evader. Both may engage in the same course of conduct that can aptly be described as a deliberate attempt to avoid payment of tax. The difference lies in their respective states of mind. Unlike the tax evader, the tax planner does not intend to avoid the payment of a tax that he or she knows is owed under the Act, but rather intends to avoid owing tax under the Act.”  
[Emphasis added]

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<sup>7</sup> *The Queen v. Redpath Industries Ltd. et al.*, 84 DTC 6349 (QCCS Crim Div.) at 6350-51.

<sup>8</sup> *R v. Klundert*, 2004 CanLII 21268 (ONCA) at para. 41.

16. The court in *Klundert* found that the fault component in s.239(1)(d) of the ITA is twofold:

- a. First, the accused must know that there is tax owing under the Act
- b. Second, the accused must intend to avoid or intend to attempt to avoid payment of that tax. An accused intends to avoid, or intends to attempt to avoid, payment of taxes owing under the Act where that is his purpose, or where he knows that his course of conduct is virtually certain to result in the avoiding of tax owing under the Act

### **III. WHAT ARE THE CIVIL AND CRIMINAL PENALTIES FOR TAX EVASION?**

#### **A. Civil Penalties for Tax Evasion**

##### ***(i) Repeated Failure to Report Amounts in a Return***

17. Where any person who files a return under s.150 of the ITA for a taxation year fails to report an amount required to be included in computing income, that person will be subject to a penalty under s.163(1) of the ITA of 10% of the amount (unless the person is subject to the greater penalty under s.163(2) of the ITA for acting knowingly or under circumstances amounting to gross negligence) if the person had previously failed in any return filed under s.150 of the ITA for any of the three preceding taxation years to report an amount required to be included in computing income. (See Appendix for s.163(1))

18. This penalty for repeated failures applies even where the failure to report items of income happened innocently and without intent to evade tax

19. The penalty under s.163(1) is one of strict liability unless the taxpayer can establish due diligence.

20. The Crown has the onus of making a *prima facie* case that the income was earned.<sup>9</sup>

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<sup>9</sup> *Raboud*, [2009] 5 C.T.C. 2356 (TCC)

***(ii) False Statements or Omissions***

21. Subsection 163(2) of the ITA authorizes the Minister to impose a penalty, *inter alia*, where a person has knowingly, or under circumstances amounting to gross negligence made, or has participated in, assented to or acquiesced in the making of a false statement or omission in a return (which includes a return, form, certificate, statement or answer) filed or made in respect of a taxation year for the purposes of the ITA. (See Appendix for s.163(2))

22. The penalty is the greater of \$100 and 50% of the amount of extra taxes applicable.

23. For s.163(2) to apply, there must be:

- a. a liability for tax;
- b. a false statement or omission in a return filed as required by or under the Act or a regulation;
- c. knowledge or gross negligence by the person in the making of a false statement or omission;
- d. an understatement of income for a year, as defined by s.163(2.1), that is reasonably attributable to the false statement or omission.<sup>10</sup>

24. The Minister must therefore prove each of the four above elements in order to successfully defend his assessments of penalties against the appellants.

**B. Criminal Penalties for Tax Evasion**

25. Depending upon the circumstances of a particular case, a successful prosecution for tax evasion or related offences can result in a record of criminal conviction, the imposition of fines and jail. The Crown may proceed by way of summary conviction or indictment in respect of the offences created by s.239(1) of the ITA. If the Attorney General proceeds by way of indictment, more severe penalties are imposed by s.239(2) of the ITA.

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<sup>10</sup> *Fortis v. M.N.R.*, [1986] 2 C.T.C. 2378 (T.C.C.)



26. The elements of tax evasion required for conviction are “jurisdiction, identification, the requisite conduct (*actus reus*) and the requisite mental element or intent (*mens rea*)”.<sup>11</sup> The exact amount of tax evaded is not an essential element of the offence, though it is relevant to sentencing<sup>12</sup>. The conduct the Crown must prove is “that the accused voluntarily performed an act or engaged in a course of conduct that avoided or attempted to avoid payment of tax owing under the Act”.<sup>13</sup>

27. The accused must be found guilty beyond a reasonable doubt. Only if tax liability is “clear-cut, obvious, indisputable and unquestionable” can the taxpayer be convicted.<sup>14</sup>

28. The onus on the Crown in tax evasions matters is based on the criminal onus of “beyond a reasonable doubt” whereas in civil liability penalties, the onus is the civil standard of “on a balance of probabilities”.

***(i) Summary Conviction***

29. The penalties for evasion on summary conviction include a fine of not less than 50%, but not more than 200%, of the amount of tax that was sought to be evaded. The Act also specifies penalties of both the fine and imprisonment for a term not exceeding 2 years.

***(ii) Prosecution on Indictment***

30. If the Attorney General elects to proceed by way of indictment, the accused charged with an offence described in s.239(1) of the ITA is liable upon conviction to imprisonment for a term not exceeding five years<sup>15</sup> in addition to a fine of not less than 100% and not more than 200% of the amount of the tax that was sought to be evaded.<sup>16</sup> This penalty is in addition to any penalty otherwise provided.

31. Where evidence is obtained that the CRA considers is sufficient to justify the preferring of a criminal charge, the case is handed over to the Department of Justice for

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<sup>11</sup> *Porisky*, 2012 CarswellBC 157 (BCSC), para. 10

<sup>12</sup> *Porisky*, para. 12

<sup>13</sup> *Porisky*, para. 13.

<sup>14</sup> *Redpath*, para. 15.

<sup>15</sup> para 239(2)(b)

<sup>16</sup> subpara 239(2)(a)(i)

prosecution. Prosecutions are conducted in the provincial court system under the criminal procedure stipulated by the *Criminal Code* and not in the Tax Court of Canada.

**(iii) Investigatory powers**

32. The Act provides officials of the CRA with investigatory powers. These powers are available to an investigator as well as to an auditor.

33. Section 231.1 of the ITA confers the authority to enter business premises without a warrant, and to enter a dwelling-house with a warrant, in order to inspect the books and records of a taxpayer. Section 231.2 of the ITA confers the authority to demand documents or information.

34. Where material has not been surrendered voluntarily or cannot be found, section 231.3 of the ITA empowers a judge to issue a search warrant authorizing the investigator to search premises for evidence and seize the evidence.

35. Where all these measures have apparently not yielded full information, section 231.4 of the ITA authorizes an “inquiry” to be held by a “hearing officer”, who is appointed by the Tax Court of Canada, and who has the power to compel the attendance of witnesses and the giving of testimony under oath.

**(iv) Fraud**

36. As an alternative to charges under s.239 of the ITA, the Crown sometimes lays charges of fraud under s.380 of the *Criminal Code*, with maximum sentence 14 years (minimum 2 years if the fraud exceeds \$1 million: 380(1.1)). This section makes it an offence to defraud the public or a person through "deceit, falsehood or other fraudulent means". The offence may be summary or indictable and when the subject matter of the fraud exceeds \$5,000 and the Crown proceeds by indictment, the maximum penalty is a term of jail that does not exceed fourteen years.

#### **IV. WHAT ARE SOME OF THE ABUSIVE TAX SCHEMES AND HOW HAS YOUR TAX COLLECTION AGENCY AND COURT DEALT WITH SUCH ISSUES?**

##### **A. GAAR Statistics**

37. As discussed in the previous section, the GAAR attempts to draw a line between legitimate tax minimization and abusive tax avoidance. The CRA established a GAAR Committee in November 1988 to apply the GAAR consistently and fairly. The GAAR Committee is composed of senior members of the CRA Rulings Directorate and representatives from the Department of Finance and Department of Justice.

38. At the Canadian Tax Foundation's 2012 annual conference, GAAR statistics were provided for a period stemming from the introduction of the rules in 1988 to 2012. During the period, 1,080 cases were referred to the GAAR Committee and the CRA applied GAAR in 822 of the cases. The following summary table was provided (in cases in which the GAAR was applied, the GAAR was the primary position in 45 per cent of the cases and was a secondary position in 55 per cent of the cases)<sup>17</sup>:

<i>Issue</i>	<i>GAAR</i>	<i>No GAAR</i>	<i>Total</i>	<i>%</i>
Foreign Tax Credit	15	3	18	2%
Income Splitting	14	3	17	2%
Partnership Issues	26	8	34	3%
Kiddie Tax	88	6	94	9%
Offshore Trusts	15	1	16	1%
Cross-Border Lease	11	0	11	1%
Part XIII Tax	3	9	12	1%
Kiwi Loan	14	0	14	1%
Losses, Stop Loss	10	5	15	1%
Charitable Donations	16	10	26	2%
Interest Deductibility	19	17	36	3%
Capital Gain	25	10	35	3%

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<sup>17</sup> Analysis/Commentary — Canada Tax Service—McCarthy Tétrault Analysis, 245 -- Tax Avoidance

Debt Parking	17	7	24	2%
Indirect Loan	28	3	31	3%
Debt Forgiveness	33	10	43	4%
Losses, Capital & Non-Capital	42	19	61	6%
Loss creation via stock dividend	91	0	91	8%
Part I.3 Tax	38	11	49	5%
Provincial GAAR	0	3	3	0%
Surplus Strips	194	32	226	21%
Tower Structure	6	3	9	1%
Treaty Exemption Claim	5	2	7	1%
Miscellaneous	112	96	208	19%
	822	258	1080	100%

**Note:** Statistics do not take into account 1,363 RRSP strip files, 78 Barbados spousal trust files, and over 300 files in which provincial GAARs were applied.

39. I will address a few of these transactions in further detail below.

## **B. Abusive Tax Schemes Addressed by the Courts and CRA**

### ***(i) Loss Creation Via Stock Dividend***

40. In 2012, the Federal Court of Canada (“FCA”) addressed three cases that involved the creation and recognition of artificial losses. In each case, the taxpayer incurred a loss as a result of a series of transactions that was said to have “shifted value” from one class of shares to another. In each case the FCA denied the resulting loss on the basis that the transactions resulted in a misuse or abuse of the provisions of the ITA relied upon by the taxpayer.

41. In *Triad Gestco Ltd.*<sup>18</sup>, the taxpayer carried out the “value shift” by transferring \$8 million of assets to a corporation for common shares. The corporation then paid a stock dividend to the taxpayer by issuing 80,000 preference shares (redeemable for \$8 million). The effect of the stock dividend was to reduce the value of the common shares

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<sup>18</sup> *Triad Gestco Ltd.*, 2012 FCA 258

to nil. The taxpayer sold its common shares the next day to a family trust and realized a capital loss of approximately \$8 million.

42. The FCA upheld the lower court's decision and stated, "[I]t is common ground that the loss generated by the taxpayer as a result of the value shift is a loss on paper only in the sense that no economic loss was suffered." The FCA found that the transaction involving the shifting of high inherent value of the common shares was moved to the preferred shares with a result that the common shares were left with a nominal value and a high cost. The FCA held that offsetting a capital gain with a paper loss resulted in a misuse and abuse of the relevant provisions.

43. The same panel of the FCA that heard *Triad Gestco* heard *1207192 Ontario Limited*<sup>19</sup> on the same day. In this case the taxpayer similarly realized a capital loss on the sale of common shares to a family trust. One distinguishing feature was that the lower court in *1207192* had determined that the principal motivation of the taxpayer in entering into the transactions was not to realize a capital loss but to achieve creditor protection. The Tax Court of Canada ("TCC") noted, however, that the transactions could have been structured differently so as not to generate the tax benefit and, as a result, concluded that there was an avoidance transaction. The FCA agreed with the TCC on all points including that the transaction was abusive.

44. In *Global Equity Fund Ltd.*<sup>20</sup>, the taxpayer carried on a securities trading business and reported the sale of the common shares to the trust as a business loss. The FCA held that "business losses must be grounded in some form of economic or business reality" and "if a business loss is to be used for taxation purposes ... there must, at the very least, be an air of economic or business reality associated with that loss." The FCA stated as follows:

"The Tax Court judge found that the transactions at issue in this case were 'vacuous' and 'highly artificial'. I agree. Like the proverbial rabbit out of the magician's hat, the loss which occurred as a result of these transactions was pulled out of thin air. These transactions are nothing more than a paper shuffle carried out with the purpose of creating an artificial business loss for the purpose of avoiding the payment of taxes otherwise owed on the profits resulting from the real-world business operations of Global. There is no air of economic or business

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<sup>19</sup> *1207192 Ontario Limited*, 2012 FCA 259 (Leave to appeal to SCC refused on March 28, 2013)

<sup>20</sup> *Global Equity Fund Ltd.*, 2012 FCA 272

reality associated with the loss, and consequently, I find that the transactions which created this artificial loss defeat the underlying rationale of sections 3, 4, 9 and 111 of the Act, to the extent that these provisions allow for the use of business losses for income taxation purposes.”

***(ii) Surplus Stripping***

45. One of the most longstanding and persistent sources of conflict between taxpayers and tax collectors is the practice commonly known as surplus stripping or dividend stripping. Surplus stripping is considered to occur when a shareholder takes a shortcut in accessing accumulated surplus of a corporation. This has generally meant choosing to realize the economic value of such surplus through a transaction characterized as a sale of shares that gives rise to a capital gain, rather than a distribution from the corporation that is taxed as a dividend.

46. Before the *Canada Trustco* decision, the courts addressed the issue of surplus stripping in *McNichol*<sup>21</sup> and *RMM*<sup>22</sup> and found that GARR applied to the transactions. However, in *Evans*<sup>23</sup>, one of the first GAAR cases after *Canada Trustco* found that GAAR did not apply to a series of surplus stripping transactions. In *Evans*, a high-bracket taxpayer (Mr Evans) owned all of the common shares of a qualified small business corporation (Opco). A new class of preferred shares (the high-low shares) was created, and these shares were paid to Mr Evans via a stock dividend. The high-low shares had a high redemption value and a nominal paid-up capital such that the “amount” of the stock dividend received by Mr Evans was nominal. Mr Evans then sold the high-low shares to a new partnership (P) in exchange for a five year promissory note (the Note) paying interest at the prescribed rate; the capital gains exemption was claimed on the sale. Mr Evans spouse was the general partner (with a 1 per cent interest) and his three minor children were limited partners (with an aggregate 99 percent interest) of P. Subsequent to the sale of the high-low shares to P, Opco paid dividends to P and paid amounts to P in respect of the redemption of the high-low shares; these amounts were used to pay principal and interest amounts due to Mr Evans in respect of the Note. The minor children were allocated dividend income from the partnership on which little or no tax was paid.

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<sup>21</sup> *McNichol v The Queen*, [1997] 2 C.T.C. 2088 (TCC)

<sup>22</sup> *RMM Canadian Enterprises Inc v The Queen*, [1998] 1 C.T.C. 2300 (TCC)

<sup>23</sup> *Evans v. R.*, [2006] 2 C.T.C. 2009 (TCC)

47. The Court noted that a specific anti-avoidance provision of the Act was not circumvented by the series of transactions in a manner that frustrated or defeated their object, spirit or purpose. Furthermore, the Court found that the transactions had economic substance (see para 35) and that primary purpose of the transactions was not tax motivated but rather was “to put the corporate funds in Dr Evans' hands” (para 22).

48. In *Desmarais*<sup>24</sup> and *MacKay*<sup>25</sup>, GAAR was found to apply. In *Desmarais*, as part of a series of transactions, the taxpayer transferred 9.8 per cent of the common shares of an operating company to a holding company such that the corporations would not be connected. At paragraph 23 of the decision, the Court stated:

“I have no hesitation in concluding that several of the transactions concluded by Mr Desmarais were primarily for non-tax purposes ... However, the transaction in which Mr Desmarais transferred only 41 of his shares of Comsercom, amounting to 9.78% of this company's shares, cannot be considered to have been concluded primarily for *bona fide* purposes, other than non-tax purposes. In my judgment, this transfer was completed primarily to make it possible to obtain a tax benefit, that of distributing to Mr Desmarais a sum of \$123,000 from Gestion free of tax. This finding is all the more necessary since Mr Desmarais' goal of combining all his shares in one basket was not achieved by this transaction ...”

49. In the recent decision in *MacDonald*<sup>26</sup>, the transactions were structured to realize capital gain instead of dividends from the sale of shares in the taxpayer's professional corporation (PC), which housed his medical practice, in order to offset capital losses incurred personally. The TCC had found that GARR did not apply, however, the FCA reversed the TCC decision on the basis that s.84(2) properly applied to the transactions. The FCA did not consider the GAAR argument.

50. Following this decision, it is clear that the debate over surplus stripping as an avoidance transaction continues.

### ***(iii) Consolidation of Profits and Losses in a Corporate Group***

51. A corporation may transfer property to a related corporation so that the transferee corporation can deduct its non-capital losses against the income generated from the property. Thus, related corporations can sometimes obtain the economic effect of

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<sup>24</sup> *Desmarais v. R.*, [2006] 3 C.T.C. 2304 (TCC)

<sup>25</sup> *MacKay v. R.*, [2008] 4 C.T.C. 161 (FCA; reversing the TCC)

<sup>26</sup> *MacDonald v. R.*, 2013 FCA 110 (FCA; reversing the TCC)

consolidated tax returns by transferring assets within the group in order to offset income from profitable assets against accumulated business losses.

52. The transfer of property between related corporations is not considered an “avoidance transaction” where all of the shares of the transferor and transferee corporations have been owned by the same taxpayer during the period in which the losses were incurred. The CRA considers such a transfer to be consistent with the scheme of the Act.

53. A transfer of property between related corporations may, however, be “abusive” where there has been a change of control by an arm's length person. If the transfer of property is undertaken to avoid a specific rule, such as a rule designed to preclude the deduction of losses after the acquisition of control of a corporation by an arm's length person, the transfer would constitute a misuse of the provisions of the Act and, therefore, be subject to GAAR.

***(iv) Conversion of Salary into Capital Gain***

54. Employees of a private corporation may wish to receive a portion of a salary or bonus as a capital gain to take advantage of the lower tax rate on capital gains. The employee can subscribe for the employer's preferred shares, redeemable at a premium that reflects the relevant portion of the employee's annual salary or bonus payment. Prior to the redemption of the preferred shares, a corporation related to the employer corporation can purchase the shares, thereby allowing the employee to receive a distribution of surplus as a capital gain.

55. In CRA's view, since the acquisition of the preferred shares is part of an arrangement designed to avoid tax that would otherwise have been paid had the income been received as a salary or bonus, the transactions would be considered to be “avoidance transactions.” Employers can avoid having the transaction labelled as “abusive” if they can show that the arrangement was primarily driven by non-tax considerations.

***(v) Avoidance of Part IV Tax on Taxable Dividends***

56. Part IV tax is a special tax intended to prevent tax deferral through the use of holding companies. If the payor and recipient corporations are not connected with each



other, the recipient is liable for the tax on taxable dividends it receives from the payor. The following example demonstrates how corporations can avoid Part IV taxation.

57. Assume that each of two private corporations owns less than 10% of the common shares of a payor corporation, required to pay a substantial taxable dividend which would otherwise be subject to Part IV tax, and that none of the corporations are related to each other. The payor corporation will not be entitled to a dividend refund on the payment of the dividend. To avoid the Part IV tax, each of the two corporations then transfers its shareholdings to a new holding corporation (“Newco”) in exchange for common shares of Newco. The parties elect under subsection 85(1) to execute the transfer on a tax-deferred basis. Following the transfer of the payor corporation's shares to Newco, it will be connected with the payor corporation. The dividend is then paid. Since the corporations are now connected to each other, the dividend can flow through Newco to the two private corporations without any Part IV tax liability. Newco then pays the same amount to the private corporations as a dividend, also free of Part IV tax. The primary purpose for the transfer of the shares is to avoid the Part IV tax which would otherwise be payable if the dividend was paid directly to the private corporations.<sup>27</sup>

58. The CRA has indicated that in these circumstances, the transfer of the shares to Newco would be an “avoidance transaction.”

***(vi) Indirect Transfer of Land Inventory***

59. Subsection 85(1) of the ITA allows a taxpayer to transfer property to a taxable Canadian corporation on a tax-deferred basis. An important exception to this rule is that a taxpayer is not permitted to transfer land inventory on a tax-deferred basis to a corporation. There is, however, no explicit prohibition against transferring land inventory on a tax-deferred basis to a Canadian partnership.

60. Taxpayers can transfer land inventory to a corporation on a tax-deferred basis using partnerships.

- a. First, the taxpayer can form a partnership with the prospective purchaser of the property and transfer the land to the partnership, electing under

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<sup>27</sup> Krishna, Chapter 22.

s.97(2) of the ITA to defer the gain on the transfer. The purchaser can contribute a nominal amount of cash for the partnership interest.

- b. Second, the vendor can transfer his partnership interest to the purchaser corporation in consideration for shares with a fair market value equal to the value of the partnership interest, and the parties may then elect under s.85(1) of the ITA in respect of the transfer.

61. On the acquisition by the purchaser corporation of the taxpayer's partnership interest, the partnership ceases to exist and s.98(5) of the ITA applies to deem the purchaser to have acquired the land at an amount equal to the taxpayer's cost amount for the land. Since the arrangement is a circumvention of the prohibition in s.85(1) of the ITA, it is the CRA's view that the GARR applies in these circumstances.<sup>28</sup>

***(vii) Indirect Disposition of Property Through a Partnership***

62. A taxpayer may indirectly dispose of a property through a partnership to defer recognition of any gains that may arise. The taxpayer and the prospective purchaser of the property can form a partnership. The taxpayer can then transfer the property into the partnership and elect under s.97(2) of the ITA to defer recognition of any gain which would otherwise arise. The purchaser may contribute cash into the partnership in an amount equal to the fair market value of the property. The taxpayer then withdraws all of the cash from the partnership and, because of such withdrawal, her share of the income and loss of the partnership is correspondingly reduced. The partnership continues to carry on business and the purchaser, in effect, acquires the property.

63. The CRA considers such an arrangement as an attempt to circumvent provisions which provide that the proceeds of disposition of property are to be accounted for at the time of their receipt.

64. In *OSFC*<sup>29</sup>, the FCA upheld the assessments under GARR involving the transfer of unrealized losses by a corporation to another corporation and a group of individuals through a partnership. The avoidance transaction was accomplished by transferring a loss from one corporation to another through the mechanism of s.18(13) of the ITA and the

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<sup>28</sup> Krishna, Chapter 22.

<sup>29</sup> *OSFC Holdings Ltd. v. R.*, [2001] 4 C.T.C. 82

partnership rules. The transaction was essentially between the corporations, with the insertion of a partnership in order to circumvent the relevant specific anti-avoidance rule.

65. The FCA held that the taxpayer's deduction contravened the scheme of the Act because having regard to the GARR, the transactions in question "violated the general policy of the ITA against transfer of losses from one corporation to another" through the mechanism of the partnership rules.

66. In 2005, the SCC addressed a similar issue in *Mathew*<sup>30</sup> involving the individuals who purchased a portion of the tax losses initially purchased by OSFC Holdings Limited. In *Mathew*, STC transferred unrealized losses to Partnership A in a notionally arm's-length transaction. Partnership A was merely a holding tank for the unrealized losses. STC intended to sell its interest in Partnership A from the outset. The SCC found that the abusive nature of the transaction was "confirmed by the vacuity and artificiality of the non-arm's length aspect of the initial relationship between Partnership A and Standard Trust Company".

***(viii) Conversion of Income Gains into Dividends***

67. A corporation that is resident in Canada and that owns depreciable property, may wish to circumvent the potential recapture of capital cost allowance as follows<sup>31</sup>:

- a. The taxpayer can sell the property to an arm's length taxable Canadian corporation in consideration for redeemable shares having a redemption amount equal to the fair market value of the property sold.
- b. The taxpayer and the purchaser can elect under s.85(1) of the ITA, in respect of the property, to defer recognition of the profit which would otherwise have been realized on a direct sale of the property.
- c. The shares have a paid-up capital equal to the amount elected so that, on their redemption, the amount received in excess of paid-up capital is characterized as a taxable dividend deductible under s.112(1) of the ITA.

68. The CRA has stated that it will apply GAAR to this type of transaction.

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<sup>30</sup> *Mathew (Kaulius) v. R.*, [2005] 5 C.T.C. 244

<sup>31</sup> Krishna, Chapter 22.

## **C. Legislative Tools for Combating Abusive Tax Planning**

### ***(i) Specific and General Anti-Avoidance Rules***

69. For greater clarity and to ensure the integrity and fairness of the tax system, Parliament has attempted to foresee undesirable situations and has introduced specific rules to prevent them from occurring; these are known as specific anti-avoidance rules.

70. The growing complexity of Canadian tax legislation means that it is difficult, if not impossible, for Parliament to use specific anti-avoidance measures to counter every situation that might arise from the use of the provisions of the legislation. As discussed above, courts have also used GAAR set out in section 245 of the ITA to put an end to tax planning that adheres to the letter of the law but not its spirit.

### ***(ii) New Measures To Combat Aggressive Tax Avoidance***

71. The following new Economic Action Plan 2013 measures are going to be implemented to build the CRA's capacity to combat international tax evasion and aggressive tax avoidance to ensure tax fairness for all Canadians<sup>32</sup>:

- a. Requiring financial institutions and others who currently report information on international electronic funds transfers greater than \$10,000 to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to also report those transactions to the CRA. Funding of \$15 million over five years will be provided to the CRA for this initiative.
- b. Extending the normal reassessment period by three years for a taxpayer who has failed to report income from a specified foreign property on their annual income tax return and failed to properly file the Foreign Income Verification Statement (Form T1135).
- c. Revising Form T1135 reporting to provide more detailed information including the names of specific foreign institutions and countries where offshore assets are located and the foreign income earned on those assets.
- d. Streamline the process for the CRA to obtain information concerning unnamed persons from third parties such as banks.

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<sup>32</sup> Economic Action Plan 2013 at pages 154-155 <<http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>>

- e. Levy new administrative monetary penalties and criminal offences to deter the use, possession, sale and development of electronic suppression of sales software that is designed to falsify records for the purpose of tax evasion.

72. In addition to the implementation of these new measures, an additional \$15 million over five years in reallocated CRA funds will be used to bring in new audit and compliance resources dedicated exclusively to international compliance issues and revenue collection identified as a result of measures outlined in Economic Action Plan 2013.<sup>33</sup>

***(iii) New Stop International Tax Evasion Program***

73. The Economic Action Plan 2013 also discusses the launch of the Stop International Tax Evasion Program aimed at reducing international tax evasion and avoidance. Under this program, the CRA will pay rewards to individuals with knowledge of major international tax non-compliance when they provide information to the CRA that leads to the collection of outstanding taxes due.<sup>34</sup>

74. The CRA will pay a reward to an individual only if the information results in total additional assessments exceeding \$100,000 in federal tax. This program will assist the CRA in targeting high-income taxpayers who attempt to evade or avoid tax using complex international legal arrangements. A reward will not be paid to an individual who has been convicted of tax evasion in connection with the non-compliance.

***(iv) Tax Treaties and Tax Information Exchange Agreements***

75. The Government continues to actively negotiate and conclude tax treaties to reduce tax barriers to international trade and investment, combat tax evasion and avoidance, strengthen Canada's bilateral economic relationships, and create enhanced opportunities for Canadian businesses abroad. Since Economic Action Plan 2012 and as of March 1, 2013<sup>35</sup>:

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<sup>33</sup> <http://www.cra-arc.gc.ca/nwsrm/rlss/2013/m05/nr130508-eng.html>

<sup>34</sup> Economic Action Plan 2013 <<http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>>

<sup>35</sup> Economic Action Plan 2013 at pages 155-156 <<http://www.budget.gc.ca/2013/doc/plan/budget2013-eng.pdf>>

- a. A new tax treaty with Colombia has come into force.
- b. A protocol to update the tax treaty with Singapore has come into force.
- c. New tax treaties with Hong Kong, New Zealand, Poland and Serbia have been signed.
- d. A protocol to update the tax treaty with Luxembourg has been signed.
- e. An agreement concerning the exchange of information provisions of the Canada-Switzerland Tax Treaty has been signed.
- f. Tax information exchange agreements (TIEAs) with Aruba, Costa Rica and Saint Lucia have come into force.
- g. TIEAs with Liechtenstein and Uruguay have been signed.

76. Canada now has 90 tax treaties in force, 11 tax treaties and protocols signed but not yet in force, and 8 tax treaties under negotiation.

77. The Government is also engaged in negotiations with the U.S. for an agreement to enhance information exchange under the Canada-United States Tax Treaty. The agreement would include information exchange provisions in support of the United States Foreign Account Tax Compliance Act provisions. Under the agreement, information exchange would be improved on a reciprocal basis to facilitate tax compliance in both countries. The agreement would reflect a commitment by Canada and the United States to work with other partners on adapting the terms of the agreement to a common model for automatic exchange of information.

## **V. HOW DO YOU DEAL WITH INDIVIDUALS WHO FAIL TO FILE A TAX RETURN?**

78. The Canadian income tax system essentially relies on self-assessment and voluntary compliance. Under s.150(1) of the ITA, a taxpayer shall voluntarily file a return for each taxation year with the Minister, without notice or demand for the return.

### **Filing returns of income — general rule**

**150. (1)** Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,

79. Failure to file a return or to respond to a demand for a return within the time limits can trigger various penalties, interest charges and even criminal prosecution.

80. A taxpayer can be liable for both civil and criminal penalties for failure to file a return, but only if the civil penalty is assessed *before* the complaint giving rise to the criminal penalty is laid.<sup>36</sup>

#### **A. Civil Penalties**

81. There is a two tier penalty for failure to file.

##### ***(i) First Offence***

82. On the first offence, the late-filing penalty under 162(1) of the ITA is based on the tax unpaid as of the return due date (April 30 or June 15 for individuals)

83. The penalty is equal to the aggregate of:

- a. 5% of the tax that was unpaid at the time when the return should have been filed
- b. 1% of the unpaid tax for each complete month (not exceeding a total of 12 months) between the date on which the return should have been filed and the date on which it was actually filed. (see 162(1) of the ITA below)

84. The maximum late-filing penalty is 17% of the amount of tax unpaid at the time the return should have been filed.

##### ***(ii) Subsequent Offences***

85. On a second or subsequent offence, the penalty is equal to the sum of the 10% of the unpaid tax plus 2% of the unpaid tax per month (not exceeding 20 months).

86. The penalty applies if the taxpayer, at the time of the subsequent failure to file a return, was previously assessed a penalty for failure to file within the preceding 3-year period.

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<sup>36</sup> Section 238(3).

***(ii) Due Diligence***

87. The penalty can be cancelled if there was due diligence.<sup>37</sup>

88. The due diligence defence allows a taxpayer to avoid a civil penalty if it can be shown that either:

- a. the person had a reasonable but mistaken belief about a state of facts which, if it had existed, would have made the act or omission innocent; or
- b. the person took all reasonable precautions to prevent the circumstance in which the penalty applies.<sup>38</sup>

**B. Criminal Sanctions**

89. Failure to file an income tax return is also a criminal offence that carries a minimum fine of \$1,000 up to a maximum fine of \$25,000.

90. The Act also states that a taxpayer who has failed to file a return is liable on summary conviction for both the fine and imprisonment of a term not exceeding 12 months.

91. Failing to file under s.238 of the ITA is a “strict liability” offence requiring only proof of the act, and has a “due diligence” defence.

**VI. APPENDIX**

**INCOME TAX ACT**

**Failure to file return of income**

**162. (1)** Every person who fails to file a return of income for a taxation year as and when required by [subsection 150\(1\)](#) is liable to a penalty equal to the total of

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<sup>37</sup> See *Consolidated Canadian Contractors*, [1998] G.S.T.C. 91 (FCA) and *École Polytechnique*, [2004] G.S.T.C. 102 (FCA), under the GST.

<sup>38</sup> The law on due diligence generally, and its application in the tax context, is summarized in *Corp. de l'École Polytechnique v. Canada*, [2004] A.C.F. no 563, 2004 FCA 127 at paras. 27-45. This paragraph summarizes the content of those paragraphs. *Corp. de l'École Polytechnique* has so far been cited in 6 Tax Court of Canada cases and one Federal Court of Appeal case in 2012 alone.



- (a) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and
- (b) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which the return was required to be filed to the date on which the return was filed.

### **Repeated failure to file**

#### **162(2)** Every person

- (a) who fails to file a return of income for a taxation year as and when required by [subsection 150\(1\)](#),
- (b) to whom a demand for a return for the year has been sent under [subsection 150\(2\)](#), and
- (c) by whom, before the time of failure, a penalty was payable under this subsection or [subsection 162\(1\)](#) in respect of a return of income for any of the 3 preceding taxation years

is liable to a penalty equal to the total of

- (d) an amount equal to 10% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and
- (e) the product obtained when 2% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 20, from the date on which the return was required to be filed to the date on which the return was filed.

### **Repeated failures**

#### **163. (1)** Every person who

- (a) fails to report an amount required to be included in computing the person's income in a return filed under [section 150](#) for a taxation year, and
- (b) had failed to report an amount required to be so included in any return filed under [section 150](#) for any of the three preceding taxation years

is liable to a penalty equal to 10% of the amount described in [paragraph 163\(1\)\(a\)](#), except where the person is liable to a penalty under [subsection 163\(2\)](#) in respect of that amount.

### **False statements or omissions**

**163(2)** Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

- (a) the amount, if any, by which
    - (i) the amount, if any, by which
      - (A) the tax for the year that would be payable by the person under this Act exceeds
      - (B) the amounts that would be deemed by [subsections 120\(2\)](#) and [\(2.2\)](#) to have been paid on account of the person's tax for the year
- if the person's taxable income for the year were computed by adding to the taxable income reported by the person in the person's

return for the year that portion of the person's understatement of income for the year that is reasonably attributable to the false statement or omission and if the person's tax payable for the year were computed by subtracting from the deductions from the tax otherwise payable by the person for the year such portion of any such deduction as may reasonably be attributable to the false statement or omission

exceeds

(ii) the amount, if any, by which

(A) the tax for the year that would have been payable by the person under this Act

exceeds

(B) the amounts that would be deemed by [subsections 120\(2\) and \(2.2\)](#) to have been paid on account of the person's tax for the year

had the person's tax payable for the year been assessed on the basis of the information provided in the person's return for the year,

(b) [Repealed, 1994, c. 7, Sch. VII, [s. 17\(1\)](#)]

(c) the total of all amounts each of which is the amount, if any, by which

(i) the amount that would be deemed by [subsection 122.61\(1\)](#) to be an overpayment on account of the person's liability under this Part for the year that arose during a particular month or, where that person is a cohabiting spouse or common-law partner (within the meaning assigned by [section 122.6](#)) of an individual at the end of the year and at the beginning of the particular month, of that individual's liability under this Part for the year that arose during the particular month, as the case may be, if that total were calculated by reference to the information provided

exceeds

(ii) the amount that is deemed by [subsection 122.61\(1\)](#) to be an overpayment on account of the liability of that person or that individual, as the case may be, under this Part for the year that arose during the particular month,

(c.1) the amount, if any, by which

(i) the total of all amounts each of which is an amount that would be deemed by [section 122.5](#) to be paid by that person during a month specified for the year or, where that person is a qualified relation of an individual for the year (within the meaning assigned by [subsection 122.5\(1\)](#)), by that individual, as the case may be, if that total were calculated by reference to the information provided in the prescribed form filed for the year under [section 122.5](#)

exceeds

(ii) the total of all amounts each of which is an amount that is deemed under [section 122.5](#) to be paid by that person or that qualified relation during a month specified for the year,

(c.2) the amount, if any, by which

(i) the amount that would be deemed under [subsection 122.51\(2\)](#) to be paid on account of the person's tax payable under this Part for the year if the amount were calculated by reference to the information provided in the return

exceeds

- (ii) the amount that is deemed under [subsection 122.51\(2\)](#) to be paid on account of the person's tax payable under this Part for the year,
- (c.3) the amount, if any, by which
  - (i) the total of all amounts each of which is an amount that would be deemed by [subsection 122.7\(2\)](#) or [\(3\)](#) to be a payment on account of the person's tax payable under this Part or another person's tax payable under this Part for the year if those amounts were calculated by reference to the information provided in the return exceeds
  - (ii) the total of all amounts each of which is an amount that is deemed by [subsection 122.7\(2\)](#) or [\(3\)](#) to be a payment on account of the person's tax payable under this Part and, where applicable, the other person's tax payable under this Part for the year,
- (d) the amount, if any, by which
  - (i) the amount that would be deemed by [subsection 127.1\(1\)](#) to be paid for the year by the person if that amount were calculated by reference to the information provided in the return or form filed for the year pursuant to that subsection exceeds
  - (ii) the amount that is deemed by that subsection to be paid for the year by the person,
- (e) the amount, if any, by which
  - (i) the amount that would be deemed by [subsection 127.41\(3\)](#) to have been paid for the year by the person if that amount were calculated by reference to the person's claim for the year under that subsection exceeds
  - (ii) the maximum amount that the person is entitled to claim for the year under [subsection 127.41\(3\)](#),
- (f) the amount, if any, by which
  - (i) the amount that would be deemed by [subsection 125.4\(3\)](#) to have been paid for the year by the person if that amount were calculated by reference to the information provided in the return filed for the year pursuant to that subsection exceeds
  - (ii) the amount that is deemed by that subsection to be paid for the year by the person and
- (g) the amount, if any, by which
  - (i) the amount that would be deemed by [subsection 125.5\(3\)](#) to have been paid for the year by the person if that amount were calculated by reference to the information provided in the return filed for the year pursuant to that subsection exceeds
  - (ii) the amount that is deemed by that subsection to be paid for the year by the person.

### **Offences and punishment**

**238. (1)** Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with subsection 116(3), 127(3.1) or 127(3.2), 147.1(7) or 153(1), any of [sections 230](#) to [232](#) or a regulation made under [subsection 147.1\(18\)](#) or with an order made under [subsection 238\(2\)](#) is guilty of an

offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (a) a fine of not less than \$1,000 and not more than \$25,000; or
- (b) both the fine described in [paragraph 238\(1\)\(a\)](#) and imprisonment for a term not exceeding 12 months.

### **Other offences and punishment**

**239. (1)** Every person who has

- (a) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,
- (b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,
- (c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,
- (d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or
- (e) conspired with any person to commit an offence described in [paragraphs 239\(1\)\(a\) to 239\(1\)\(d\)](#),

is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

- (f) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or
- (g) both the fine described in [paragraph 239\(1\)\(f\)](#) and imprisonment for a term not exceeding 2 years.

### **Prosecution on indictment**

**239(2)** Every person who is charged with an offence described in [subsection 239\(1\)](#) or [239\(1.1\)](#) may, at the election of the Attorney General of Canada, be prosecuted on indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to

- (a) a fine of not less than 100% and not more than 200% of
  - (i) where the offence is described in [subsection 239\(1\)](#), the amount of the tax that was sought to be evaded, and
  - (ii) where the offence is described in [subsection 239\(1.1\)](#), the amount by which the amount of the refund or credit obtained or claimed exceeds the amount, if any, of the refund or credit to which the person or other person, as the case may be, is entitled; and
- (b) imprisonment for a term not exceeding 5 years.

### **Inspections**

**231.1 (1)** An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

- (a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

- (b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act, and for those purposes the authorized person may
- (c) subject to [subsection 231.1\(2\)](#), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and
- (d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

### **Requirement to provide documents or information**

**231.2 (1)** Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
- (b) any document.

### **Search warrant**

**231.3 (1)** A judge may, on ex parte application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

### **Inquiry**

**231.4 (1)** The Minister may, for any purpose related to the administration or enforcement of this Act, authorize any person, whether or not the person is an officer of the Canada Revenue Agency, to make such inquiry as the person may deem necessary with reference to anything relating to the administration or enforcement of this Act.

## **CRIMINAL CODE**

### **Fraud**

**380. (1)** Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a

testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or  
(b) is guilty  
    (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or  
    (ii) of an offence punishable on summary conviction,  
where the value of the subject-matter of the offence does not exceed five thousand dollars.

**Minimum punishment**

**380(1.1)** When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.