



## **DECEMBER 2009**

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### **NOTICE TO READER**

The following commentary has been prepared by Parker Garber & Chesney, LLP based on information available to the public on the date of publishing.

Readers are cautioned that this commentary is informational only and that any issues specific to the reader's needs be addressed with the appropriate tax professional.

The reader is cautioned that this document is not meant to provide advice specific to the reader's particular situation and that advice cannot be given in such a manner.

## **PERSONAL**

### **NEW INSURANCE RULES ANNOUNCED**

On November 24 CRA announced new rules related to the taxation of insurance policies in the situation where the operating company is the policyholder (paying the premiums) and the holding company or an individual is the beneficiary. In this situation, beginning in 2011 for existing policies and in 2010 for new policies CRA will assess a shareholder benefit on the beneficiary. Those with corporate-owned insurance in this situation should consider making the appropriate changes as soon as possible.

### **FOREIGN PROPERTY ESTATE ISSUES**

Many Canadians hold property in foreign jurisdictions. Most of us know people who own a vacation property in Florida or Arizona. In addition there are many that own property in the Caribbean and a growing number in Europe, particularly in Spain France and Italy.

There are potential problems when an individual dies with a foreign property that is not dealt with through a separate will under the jurisdiction where the property is situated. A foreign court may have problems accepting the jurisdiction of a Canadian will while a local will would ensure that it is in accordance with local law.

An additional benefit to a foreign will for foreign property is that the property would then not fall into Canadian probate and could also protect Canadian assets from foreign tax claims.

## **IN THE COURTS**

### **THE LAW IS THE LAW (UNLESS WE CHANGE IT)**

In another example of winning the battle and losing the war there is the recent case of *Proctor & Gamble Inc v Ontario* which was a follow-up to a previous Ontario court decision in favour of Proctor & Gamble in November of 2007. The issue was the retail sales tax on returnable containers and the taxpayer was able to make their case that wooden pallets were not to be included in the classification and therefore not subject to PST.

As a result, the Ontario Legislature passed a regulation making the wooden pallets returnable containers under the act. However, the legislation was made retroactive to May, 2007, six months before Proctor & Gamble's court victory, rendering the decision moot and requiring the taxpayer to pay the PST.



While Canadian courts have ruled that retroactive legislation is acceptable, except in criminal law, we find it to be an abuse by the legislature and would hope that they would use it very sparingly until such time as the Supreme Court reverses previous findings and considers the injustice and constitutional ambiguity of allowing such legislation.

### **TAX-FREE CAPITAL DIVIDENDS**

In the recent Tax Court decision in *Innovative Installation Inc v The Queen* the court supported the taxpayer's contention that the proceeds of a life insurance policy paid to a third party are still eligible to be included in the capital dividend account.

In this case a key-person life insurance policy was assigned to the bank as security for a bank loan. When the individual died the bulk of the proceeds were paid by the insurer to the bank to retire the loan and the residue was paid to the corporate policy owner. The corporation included the full value of the proceeds (the amount received directly plus the amount paid to the bank) in its capital dividend account and then paid out a capital dividend. CRA assessed the corporation the Part III penalty tax on the portion of the proceeds paid to the bank on the basis that the amount was not "received" by the corporation.

Fortunately the Tax Court saw this transaction for what it was and sided with the taxpayer.

### **DIVORCE AND CORPORATIONS DON'T MIX**

Family courts have succeeded in piercing the corporate veil in situations where a supporting spouse has tried to avoid paying support payments by using corporate structures protect funds. The court ordered (and the Court of Appeal upheld) that since the corporations were under the control of the delinquent spouse and, although a separate legal entity, were "completely dominated and controlled and being used as a shield for fraudulent or improper conduct" the court had the authority to enforce collection procedures against the corporations.

### **WHEN A CAPITAL GAIN IS NOT A CAPITAL GAIN**

Generally every taxpayer, other than a professional trader, would treat the gain or loss from trading in public securities as capital gains and losses. However the law does differentiate based upon the intention of the purchaser at the time. If the primary intention was to sell the shares at a profit then the gain can be considered ordinary income and not eligible for capital gain treatment.

CRA does not usually apply this test because they would not want taxpayers to claim losses to be ordinary and applied against other income rather than as capital losses claimable only against capital gains. In *Hawa v. The Queen*, the taxpayer had executed a substantial number of trades that resulted in losses that



he reported as ordinary rather than capital. The court ruled that volume of his activity and his stated intention to sell for a profit, no matter how unsuccessful, were supportive of his position and ruled in the taxpayer's favour.

In defence of a position that gains would be treated as capital gains rather than ordinary income a taxpayer should file an election pursuant to subsection 39(4) of the Income Tax Act (form T123) indicating to CRA that the capital transactions will be treated as such. However, all capital gains in years not statute-barred would be reassessed by CRA as ordinary income and this is a one-time irreversible election.

