

## **Reporting Aggressive Tax Planning**

### **Application to Westward Insurance Planning**

On August 27<sup>th</sup> 2010, the Department of Finance released draft legislation that includes reporting requirements for transactions that qualify as “aggressive tax planning” (“ATP”).<sup>1</sup> The main objective of the ATP reporting regime is to identify to the Canada Revenue Agency (“CRA”) certain types of potentially abusive tax avoidance transactions that are not currently subject to any specific information reporting requirements under the *Income Tax Act*.

A transaction is a reportable ATP transaction if it is an avoidance transaction<sup>2</sup>, or part of a series of transactions that includes an avoidance transaction, **and** any two of the three “reportable transaction”<sup>3</sup> hallmarks come into existence at any time in respect of the avoidance transaction or series of transactions.

The three hallmarks are defined as follows:

#### **Fees for Tax Benefits**

The Fees for Tax Benefits hallmark applies if *“an advisor or a promoter ... has or had an entitlement, ... either absolutely or contingently, to a fee that to any extent is based on the amount of a tax benefit ..., is contingent upon the obtaining of a tax benefit..., or is attributable to the number of persons who participate in the avoidance transaction or ... who have been provided access to advice or an opinion given by the advisor or promoter regarding the tax consequences from the avoidance transaction ...”*

#### **Confidential Protection**

The Confidential Protection hallmark applies if *“an advisor or promoter ... has or had confidential protection in respect of the avoidance transaction or series.”*

Confidential Protection means *“anything that prohibits the disclosure to any person or to the Minister of the details or structure of the transaction ... but for greater certainty, the disclaiming or restricting of an advisor’s liability shall not be considered confidential protection if it does not prohibit the disclosure of the details or structure of the transaction or series.”*

#### **Contractual Protection**

The Contractual Protection hallmark applies if *“either the person [who enters into or benefits from the transaction] ..., has or had contractual protection in respect of the avoidance transaction or series... or the advisor or promoter ... has or had contractual protection in respect of the avoidance transaction or series...”*

Contractual Protection means *“(a) any form of insurance (other than standard professional liability insurance)... that ... absolutely or contingently protects a person against a failure of the transaction or series to achieve any tax benefit from the transaction or series, or pays for or reimburses any expense, fee, tax, interest, penalty or similar amount that may be incurred by a person in the course of a dispute in respect of a tax benefit from the transaction or series, and (b) any form of undertaking provided by a promoter... that provides, either ... absolutely or contingently, assistance ... to a person in the course of a dispute in respect of a tax benefit from the transaction or series.”*

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<sup>1</sup> These reporting requirements were first introduced in the March 4, 2010 Federal Budget.

<sup>2</sup> As defined in section 245 for the purpose of the general anti-avoidance rule.

<sup>3</sup> See the definition of “reportable transaction” and related definitions in new subsection 237.3(1).

## Our Take

In most cases, the transactions related to the delivery and maintenance of life insurance structures for our Clients are conducted primarily for *bona fide* reasons other than to obtain a tax benefit. As such, they are not avoidance transactions and the ATP reporting requirements will, by definition, not apply, regardless of whether any of the hallmarks apply.<sup>4</sup>

An avoidance transaction is defined by reference to its purpose and the burden is on the taxpayer to refute a CRA determination that a transaction's purpose qualifies it is an avoidance transaction.<sup>5</sup> Relying on the absence of an avoidance transaction to avoid ATP reporting involves tax uncertainty because proving the purpose after the fact may be difficult for the taxpayer. Avoiding the ATP reporting requirements with greater certainty can be accomplished by establishing that at least two of the three ATP reporting hallmarks do not apply.

We have analyzed our involvement in the transactions related to implementing and maintaining our Clients' life insurance structures, and we conclude that our involvement:

1. **Does not include Fees for Tax Benefits:** none of our remuneration is based on the amount of, or contingent upon the obtaining of, a tax benefit that may arise from our Clients' life insurance structures, or is attributable to the number of persons who participate in transactions involving life insurance structures for our Clients.
2. **Does not include Confidential Protection:** there is nothing prohibiting the disclosure to any person or the Minister of the details or structure of any transactions involving our Clients' life insurance structures; and
3. **Does not include Contractual Protection:** there is no insurance that protects our Clients against a failure to obtain a tax benefit arising from their life insurance structures, or that pays or reimburses an expense incurred by a Client in the course of a dispute over a tax benefit, nor do we make any undertaking that provides assistance in respect of a dispute concerning a tax benefit related to our Clients' life insurance structures.

Some tax practitioners are of the view that the hallmarks are worded so broadly that they will apply to many routine professional engagements, especially the Fees for Tax Benefits hallmark. Only time will tell how liberally CRA applies the hallmarks.

In any event, we do not require or provide any Confidential Protection or Contractual Protection with respect to our Clients' life insurance structures. Since at least two of three hallmarks do not apply, our involvement in our Clients' life insurance structures should not trigger ATP reporting requirements.

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<sup>4</sup> See Explanatory Notes, Department of Finance, September 2010, p.209 confirming that an avoidance transaction is a pre-requisite.

<sup>5</sup> See subsection 245(1) and the principles laid down by the Supreme Court of Canada in its *Canada Trustco* decision applying the general anti-avoidance rule.