YIN RAPPORTEUR REPORT

FOREIGN AFFILIATE INCOME RECHARACTERIZATION RULES

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary

Presented on May 16, 2023

Speakers: Samantha D'Andrea, EY LLP, Montreal
Jeremy Ho, McCarthy Tétrault LLP, Vancouver

Moderator: Bonnie Wilde, Stikeman Elliott LLP, Calgary

YIN Rapporteur: James Konopka, Dentons Canada LLP, Edmonton

The panelists provided a primer on the foreign affiliate income recharacterization rules.

FAPI & Income from Property

The discussion began with an overview of foreign accrual property income ("FAPI") and the types of income from property captured under the FAPI rules. The panel reviewed the concept of an "investment business" and an important exception to this classification based on business types and the number of full time employees.

Recharacterization of Income from Property to ABI (ITA s 95(2)(a))

After setting out foundational concepts, the panel considered two rules that will recharacterize income and their effect on FAPI.

The first recharacterization rule deems certain income from property to be active business income ("ABI"). Under the "mothership" provision, ITA s 95(2)(a)(i), the panel reviewed key concepts and demonstrated the application of the mothership provision using practical examples.

Next the panel considered a similar deeming rule under ITA s 95(2)(a)(ii)(B), for income or losses from property that are deductible by the foreign affiliate payor in its earnings or loss from an active business. The panel provided examples of foreign affiliate structures with royalty and interest income.

This portion of the presentation was concluded with a review of ITA s 95(2)(a)(ii)(D), which recharacterizes interest income from amounts loaned by a foreign affiliate to a second foreign affiliate to acquire shares of a third foreign affiliate. The speakers explained the conditions of application and provided an example.

Recharacterization of Services Income as FAPI (ITA s 95(2)(b))

The panel reviewed another set of recharacterization rules under ITA s 95(2)(b), which are intended to prevent Canadian base erosion caused by payments to foreign affiliates for related party services to Canadian entities or FAPI generating foreign affiliates. This provision includes a number of rules which have the effect of recharacterizing services income as deemed inactive business income, and therefore included in FAPI.

The panel addressed the rules applicable where the services of a foreign affiliate result in a deduction to Canadian business income or FAPI, and where a foreign affiliate provides services that are performed by certain entities. These rules were explained with examples demonstrating the mischief that the provisions are intended to prevent.

The panel rounded out this discussion with reference to the August 9, 2022 draft legislation that would, among other things, amend ITA s 95(2)(b)(i) and enact new ITA s 95(3.03). The speakers reviewed Department of Finance comfort letters addressing certain scenarios that may arise from the current wording of the legislation, which the proposed amendments are intended to resolve. The panel provided examples of how the proposed amendments will apply.

YIN RAPPORTEUR REPORT

RECENT TRANSACTIONS

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary

Presented on May 16, 2023

Speakers: Marshall Haughey, Bennett Jones LLP, Calgary
Kim Maguire, Osler, Hoskin & Harcourt LLP, Vancouver
Alex Pankratz, Baker McKenzie, Toronto
Gwen Watson, Torys LLP, Toronto

Moderator: Brett Anderson, McCarthy Tétrault LLP, Calgary

YIN Rapporteur: Sébastien Durand, EY Canada, Montréal

Throughout the panel, the speakers analyzed the various tax considerations pertaining to typical transactions of two stages of the business life cycle, each involving a non-resident.

Stage 1: Non-resident investment — In this first stage, an early-stage Canadian corporation secures funding from a non-resident private equity fund. The panel discussed the different tax considerations and risks to consider when proceeding with 1) convertible debt or 2) convertible preferred shares. For the convertible debt, the main considerations included the deductibility of interest, thin capitalization rules, Part XIII withholding tax, EIFEL rules, transfer pricing, CCPC status and hybrid mismatch arrangement rules. For the convertible shares, the main considerations included Part XIII withholding tax, Part IV.1 and VI.1 tax, and CPCC status.

Stage 2: Exit Transaction—At this later stage in the life of the business, the company's shareholders include the non-resident fund, Canadians that continue to hold the vast majority of the common shares and a significant number of Canadian employees holding stock options. The panel analyzed the tax consideration of an exit in the form of a sale to

a Canadian purchaser with cash on closing plus a “classic” earnout. The main consideration discussed in detail was the Part XIII withholding tax on the earnout payment(s) received by the non-resident vendor including a review of CRA’s cost-recovery method administrative positions and how they should apply in a cross-border context. Then, the panel looked at two alternatives to a “classic” earnout, including a reverse earnout and the purchaser issuing special earnout shares, and their tax consideration. Finally, section 116 considerations were discussed as well as the impact of such earnout to option holders.

EIFEL

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary
Presented on May 16, 2023

Speakers: Marc André Gaudreau Duval, Davies Ward Phillips & Vineberg LLP, Montreal
John Farquhar, Felesky Flynn LLP, Calgary
Marianne Thompson, PwC Canada, Toronto
Sabrina Wong, KPMG Law LLP, Toronto

Moderator: Jim Samuel, KPMG LLP, Calgary

YIN Rapporteur: Dami Ajibade, KPMG LLP, Calgary

This panel provided an overview of the November 2022 draft legislation ("**revised draft legislation**") governing the proposed excessive interest and financing expenses limitation ("**EIFEL**") rules, including its objectives, the challenge section 216 filers may face due to the implementation of the proposed rules as currently drafted, and some of the key definitions. The panel emphasized that modelling will be required to determine the impact of the proposed EIFEL rules on taxpayers and illustrated, with several examples, practical issues to watch out for in applying the proposed rules, such as:

1. **Exempt IFE:** The revised draft of the EIFEL rules introduced a carve out for IFE incurred in relation to certain Canadian public-private partnership infrastructure projects ("**PPP project**") to exempt them from the EIFEL rules provided certain conditions are satisfied. In a situation where the entity financing a PPP project is other than the entity that entered into the agreement to design, build, maintain and operate the real or immovable property, the interest incurred by the finance entity

may not be exempt IFE as the finance entity does not design, build, maintain and operate the PPP project. Likewise, where the PPP project is financed by a third party, but the third party has a direct or indirect equity interest in the borrower, the interest incurred may not qualify as exempt IFE.

2. **Foreign affiliates:** The panel provided an explanation and examples of how the revised draft legislation is proposed to apply in respect of IFE/IFR in controlled foreign affiliates ("**CFAs**") and emphasized that no excluded interest election is available at the CFA level or between a Canadian taxpayer and its CFA. In addition, where the taxpayer has a denial under subsection 18.2(2), it is expected, based on the current draft of the rules, that the same EIFEL percentage should be applied to the IFE incurred by a CFA in computing its foreign accrual property income ("**FAPI**") or loss. The panel highlighted that there may be some complexities in determining the participating percentage in CFAs where there are multiple classes of shares and in situations where the CFA has FAPL which may be a new issue for taxpayers to consider. The panel noted that it is anticipated there will be significant changes in the final legislation to how the EIFEL rules apply to CFAs.
3. **Partnerships:** The panel illustrated the complexity of the EIFEL rules with respect to partnerships with an example where Canco owns an interest in a limited partnership which owns a CFA. In this situation, it appears proposed clause 95(2)(f.11)(ii)(D) would not apply to restrict, or deny, any IFE that is included in computing the CFA's FAPI vis-à-vis the partnership because the partnership is not a taxpayer for purposes of the proposed EIFEL rules. Rather, any "excess" RAIFE of the CFA would be separately determined at the partner (Canco) level and, depending upon the facts, could potentially result in an income inclusion to the partner under proposed paragraph 12(1)(l.2)), even where the partner does not have IFE. There is also the added administrative and compliance burden where the limited partnership is not

wholly owned. In addition, it was emphasized that the taxpayer's ACB in the limited partnership is not increased by paragraph 12(1)(l.2) income inclusion.

4. **Pre-regime election:** The panel summarized the steps required in computing the pre-regime excess capacity and the requirements for allocating group net excess capacity. The rules as currently drafted requires a joint election to be made by the taxpayer and all eligible group entities to be able to access excess capacity (if any) in the pre-regime period. The panel illustrated the elective pre-regime excess capacity rules with an example how the pre-regime group net excess capacity is computed and allocated. The panel also highlighted an example where it may be beneficial to elect into the group ratio, even if group ratio excess capacity cannot be carried forward, as it can be beneficial in lowering amounts of excess interest in a pre-regime year. A helpful table was provided on the proposed EIFEL continuity rules as it applies to certain reorganization events.
5. **Group ratio:** The panel highlighted practical issues to be mindful of when considering making a group ratio election. For example, the rules as currently drafted provide that if the allocated group ratio amount ("**AGRA**") is over allocated by even $1, the AGRA is deemed to be nil. The panel illustrated an example of how a specified non-member lending to a group can in some cases reduce the amount of capacity available under a group ratio election when compared to the fixed ratio.
6. **Non-capital losses:** The panel noted that, generally, in determining the adjusted taxable income ("**ATI**") of a taxpayer, the addback for non-capital losses deducted is decreased to the extent that the losses were sourced from operational activities as opposed to IFE, capital cost allowances, or other amounts described in variable B of the definition of ATI. The panel also highlighted that utilizing non-capital losses from multiple years requires multiple calculations of the addback under variable B(h) of the definition of ATI as the calculation is required to be performed for each loss year. The utilization of non-capital losses carried back or carried forward could also result

in the recalculation of other amounts that rely on ATI, such as excess capacity and absorbed capacity, and so the impact should be considered across taxation years.

YIN RAPPORTEUR REPORT

TAX DIRECTORS' ROUNDTABLE

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary

Presented on May 16, 2023

Speakers:	Shannon Henry, TELUS, Calgary Neil Marcovitz, British Columbia Investment Management Corporation, Vancouver Leslie O'Leary, Enbridge Inc., Calgary Tanya Yeast, Pembina Pipeline Corporation, Calgary
Moderator:	Doug Powrie, Tax Lawyer, Vancouver
YIN Rapporteur:	**Stevo Liouitch, Gildan Activewear Inc., Montreal**

The panel discussion focused on several topics of interest, including:

1. **The tax function's role within the organization**: The panelists discussed current challenges in their respective tax departments, which include keeping up with the constant flow of domestic and international tax developments and modelling the impact on the business, understanding the complexities of business operations, and managing increased scrutiny from tax authorities. The panelists also addressed how the tax function and associated expectations have evolved over time. Generally, the tax function has shifted from being a compliance-centered function to being a strategic and proactive business partner.
2. **The role of tax advisors:** The panelists discussed the role that tax advisors have in their organization and how they decide on which advisors to engage for specific projects. Generally, there is an inclination to have tax planning work performed internally as the tax department possesses the knowledge of the business operations

and provides employees with the opportunity to learn and to develop technical skills. Therefore, the role of tax advisors is to review and validate the conclusion. Otherwise, for cases involving complex reorganizations and M&A, tax advisors have more responsibilities. As for choosing a tax advisor for a project, the choice will depend on the specific expertise needed and the jurisdictions involved.

3. **Legislative developments:** The panelists discussed their approach to keeping up with legislative developments, which is particularly challenging due to high volume of new legislation, the complexity of the legislation and the uncertainty of their application. These approaches include holding periodic technical meetings and appointing subject matter experts.
4. **Automation of the tax function:** The automation of the tax function has been a popular topic at tax conferences for many years and today's panel provided insight into the current status of the automation of the tax function within their respective departments. Tax provisioning, Pillar Two calculations, indirect tax compliance and property tax compliance are some of the processes that have been automated by certain departments with the help of automation service providers.
5. **Human resource management:** The panelists addressed the competitive labor market and discussed their strategies to find and retain talented employees. While competitive compensation and benefits are important, it is often not sufficient on its own. Providing learning and development opportunities, creating a positive work environment, and offering work flexibility are important for attracting new employees and retaining existing ones.
6. **Government relations:** Panelists expressed the importance of maintaining channels of communication with governmental bodies and regulatory authorities to shape public policy that may impact their respective organizations and industries. The panelists also addressed the importance of ongoing and regular communication with the CRA.

CURRENT CASES

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary

Presented on May 16, 2023

Speakers: Heather DiGregorio, Burnet, Duckworth & Palmer LLP, Calgary
Dan Jankovic, Blake, Cassels & Graydon LLP, Calgary
Michael Lubetsky, Davies Ward Phillips & Vineberg LLP, Toronto
Martha MacDonald, Torys LLP, Toronto

Moderator: Julie D'Avignon, Stikeman Elliott LLP, Calgary

YIN Rapporteur: Trent Blanchette, Felesky Flynn LLP, Calgary

The panel discussed a selection of recently released tax cases which are of particular relevance in the Canadian and international tax context.

The panel began with a summary of *3792391 Canada Inc. v. R.*, 2023 TCC 37, which serves as a reminder that there is no due diligence defence to Part XIII withholding tax obligations, but there is a limited due diligence defence to penalties for a failure to withhold under Part XIII.

The panel discussed *Levett v. Canada*, 2022 FCA 117, where the Federal Court of Appeal considered whether the CRA had pursued all reasonable domestic means available before requesting information from a foreign tax administration pursuant to a tax treaty.

The panel summarized *Deegan v. Canada*, 2022 FCA 158, where the Federal Court of Appeal was reluctant to interfere with FATCA-required disclosures on the grounds that

they were unconstitutional, and considered whether the reasoning also could apply to similar disclosures involving other countries.

The panel discussed *Iris Technologies Inc. v. R.*, 2022 FCA 101 and *Canada v. Dow Chemical Canada ULC*, 2022 FCA 70, the appeals of which will be heard together at the Supreme Court of Canada in the near future, and the possible impacts on the jurisdiction of the Tax Court of Canada.

The panel concluded with a discussion of additional cases of interest, including:

- *Bittner v. United States*, a US Supreme Court decision regarding FBAR compliance, which is of particular relevance to US taxpayers living or doing business abroad;
- *Emergis v. R.*, 2023 FCA 78, a Federal Court of Appeal decision concerning a subsection 20(12) deduction for US withholding tax in the context of a tower structure, where the Court's approach to statutory interpretation could be instructive in other contexts; and
- *Boliden Mineral AB v. FQM Kevitsa Sweden Holdings AB*, 2023 ONCA 105, an Ontario Court of Appeal decision involving tax warranty and tax indemnification clauses, which are relevant in the tax planning and tax dispute contexts.

CANADIAN INTERNATIONAL TAX DEVELOPMENTS

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary
Presented on May 17, 2023

Speakers: Nik Diksic, EY Law LLP, Montreal
Mark Dumalski, Deloitte LLP, Ottawa
Jennifer Hanna, Borden Ladner Gervais LLP, Calgary

Moderator: Olivier Labelle, Deloitte LLP, Calgary

YIN Rapporteur: Jennie Han, Burnet, Duckworth & Palmer LLP, Calgary

The panel discussed recent international tax developments, including on Pillar Two tax reforms and changes to the GAAR and the taxation of CCPCs.

Legislative Updates

In August 2022, Finance released draft legislation related to CCPCs and substantive CCPCs. These proposals amend the relevant tax factor for CCPCs and substantive CCPCs from 4 to 1.9, the likely result of which will be net FAPI inclusions for a number previously excluded taxpayers, since the minimum foreign tax rate needed to fully shelter FAPI would be 52.63%. The proposed changes also subject deemed "substantive CCPCs" to higher tax rates on investment income, while maintaining *non*-CCPC treatment for various tax benefits available to CCPCs.

The panel also discussed proposed changes to s. 85.1(4) and s. 87(8.3), which address gaps allowing taxpayers to avoid tax on sales of foreign affiliate shares that qualify as excluded property. The proposed rules are, however, broad, applying regardless of whether shares were excluded property at the time of the original merger or exchange,

and potentially deny rollover treatment for legitimate foreign exchanges and mergers. This portion of the panel closed with an outline of proposed draft legislation to Part XIII withholding tax rules applying to partnerships and a review of proposed changes to s. 15(2.3) and s. 90(8)(b) that would narrow upstream loan exceptions in respect of shareholder loans and loans made in the ordinary course of an ordinary lending business.

Pillar Two – Recent Developments

The panel focused primarily on two recent developments relating to Pillar 2—the December 20, 2022 release of the Safe Harbour and Penalty Relief document and the consultation documents on the GloBE Information Return and tax certainty measures, as well as the February 2, 2023 release of additional guidance from the Inclusive Framework.

The Safe Harbour and Penalty Relief document includes three main components:

1. Transitional CbCR Safe Harbor (**TCSH**), to generally apply for the first three years. Three alternative tests—the *de minimus* test, Simplified ETR test, and Routine profits test—applied on a jurisdictional basis, and any one of the three tests can be applied for each jurisdiction. Once the TCSH is not applied to a jurisdiction for a fiscal year to which the GloBE Rules apply, it cannot be applied for a subsequent fiscal year. No requirement to apply the same test consistently from year to year.
2. The framework for development of Permanent Simplified Calculation Safe Harbor.
3. Common understanding on the Transitional Penalty Relief Regime (contingent on being enacted in local law).

The panel also discussed the consultation on the GloBE Information Return, which generated numerous stakeholder comments, including in particular requests for more

simplification and the removal of entity-level information from the Information Return. Tax certainty measures designed to prevent and resolve disputes were also discussed, with many stakeholders pushing for a robust peer review process and mandatory arbitration. The panel closed this discussion with an outline of issues addressed in the February 2, 2023 administrative guidance, including in particular the framework for the QDMTTs. With respect to the latter, the recent guidance provides that a QDMTT must not systemically produce lower tax liability outcomes than under the GloBE Rules (but can produce greater tax liability), and establishes an ordering rule to allow a QDMTT to apply in priority to CFC taxes.

The GAAR

The panel closed with a discussion of the Budget proposals to amend the GAAR, which it noted were less radical than many feared given some of the proposals included in the August 2022 Consultation Paper (including the stated intention of introducing an "economic substance" rule, without any clarification as to what such a rule might entail). The scheduling of a second consultation period, to end May 31, 2023, suggests, but does not guarantee, that the proposals might have prospective, rather than retrospective, application.

The Panel discussed the proposals in the context of several significant cases: *Lehigh Cement* (FCA), *Alta Energy* (SCC), *Loblaw Financial* (TCC), *MIL Investments* (FCA), and *Univar Holding* (FCA).

The preamble to the GAAR expressly allows taxpayers to obtain benefits contemplated by the *Act*, strikes a balance between certainty and fairness, and applies the GAAR irrespective of whether a tax strategy is "foreseen".

In reviewing the cases above, the panel highlighted the following possible implications of the GAAR proposals, including:

- whether GAAR could apply where there is a "legislative gap" but no prohibition of the impugned transaction (*Lehigh Cement*).
- Increasing attention to "sophisticated taxpayers" and the fairness of being able to secure tax benefits others cannot (*Alta Energy*).
- "Foreseeability" of tax strategy (*Alta Energy*) and the possibility that GAAR might apply even where the tax benefit is unintended.
- The consequence of lowering the "avoidance transaction" threshold from "primary purpose" to "one of the main purposes" (*Loblaw*).
- Whether the provision stating that a lack of economic substance "tends to" indicate misuse or abuse creates a rebuttable presumption or shifts the burden of proof to the taxpayer (*MIL* and *Univar*).

In closing, the panel noted the deterrent function of the penalty regime, as there is currently little to no downside for taxpayers who undertake extremely aggressive transactions. The risk of such a penalty regime may be a chilling of tax planning generally.

Questions

Jennifer Hanna responded to a question from the audience about how to advise client on the proposed FAPI Rules to note that unless the rules are changed to *not* effectively impose a 53% tax rate, companies will, at a minimum, have think seriously about restructuring in situations they did not previously have to.

YIN RAPPORTEUR REPORT

US TAX DEVELOPMENTS

2023 IFA Canada International Tax Conference | YIN Rapporteur Summary
Presented on May 17, 2023

Speakers: Becca Chappell, Venable LLP, San Francisco
Mark Coleman, EY LLP, Calgary
Hilary Lefko, Norton Rose Fulbright US LLP, Washington

Moderator: Chris Montes, Felesky Flynn LLP, Calgary

YIN Rapporteur: Taylor Page, McCarthy Tétrault, Calgary

The panel focused on recent developments in tax legislation in the United States ("**US**"), including tax credits for the energy and manufacturing sectors, the share buyback excise tax, and the corporate alternative minimum tax.

Energy and Manufacturing Tax Credits

The panel described a number of new tax credit opportunities available in the US under the Inflation Reduction Act (2022) ("**IRA**"), including production and investment tax credits for renewable energy projects; production and investment tax credits for clean electricity projects; manufacturing tax credits for the domestic manufacture of clean energy components and critical minerals; tax credits for advanced energy projects; tax credits for the domestic production of clean transportation fuels and hydrogen; and tax credits for certain qualified clean vehicles. The IRA also offers certain bonus tax credits, including credits for small-scale solar and wind facilities on Indigenous land and in other low-income communities, and certain added credits where domestic content targets are attained or where certain projects are located in designated "energy communities".

The panel then discussed the ability in the US market to monetize these tax credits by selling them to third parties for cash, which is particularly useful for developers who generally cannot use the tax credits themselves because developers typically lack tax capacity. This is particularly beneficial to the originating taxpayer, who may sell off their credits but retain the ability to claim depreciation on the assets used in the project. The panel contrasted this with similar tax credits in Canada, which are not marketable and therefore do not present the same economic opportunity for taxpayers originating these types of projects. The panel then considered the potential complexity for Canadian multinational parent companies with US subsidiaries that may avail themselves of these credits, and how these benefits may be dulled with the introduction of Pillar 2 where the credits generated may increase reportable taxable income. The panel considered the potential downside for a Canadian multinational corporation to be ineligible for the safe harbour reporting under Pillar 2 due to the clean energy credits and the requirement to apply Pillar 2's jurisdictional top-up tax under the regular method. However, the substance-based income exclusion may be applicable to reduce top up tax exposure as these clean energy tax credits encourage the acquisition of tangible assets and creation of jobs.

Share Buyback Excise Tax

The panel discussed the new share buyback excise tax introduced in the IRA, which imposes a tax of 1% on the fair market value of any stock of a "covered corporation" which is "repurchased" (a redemption or a transaction economically similar to a redemption) by such corporation during the taxation year, effective for stock repurchases occurring after December 31, 2022. The panel noted that this regime can extend to the acquisition of the stock of a covered corporation by a "specified affiliate", which includes a US affiliate corporation that acquires the stock of a non-US publicly traded corporation. These rules will apply if the US affiliate corporation "funds" the repurchase of non-US corporation stock, and such funding is undertaken for the primary purpose of avoiding this excise tax. These rules may therefore capture certain Canadian publicly-traded corporations with US subsidiaries.

The panel considered certain traps that Canadian parent companies could trigger when repatriating cash to Canada from a US subsidiary, including by way of upstream loan, repayment of a downstream loan, intercompany payments for services or licenses, all of which could be viewed as the US subsidiary "funding" a non-US corporation.

Corporate Alternative Minimum Tax

The panel reviewed the new Corporate Alternative Minimum Tax (“**CAMT**”), which is imposed on an “applicable corporation” on the excess of (i) 15% of its adjusted financial statement income for the year, over (ii) its regular US federal corporate tax liability, and is applicable on income for tax years beginning after December 31, 2022. The panel discussed certain thresholds that must be met for the CAMT to apply, including a book net income threshold of $1 billion per year on a group consolidated basis, and where the ultimate parent is not a US resident, the average income of the US group and all effectively connected income of the worldwide group must meet or exceed $100 million.

The panel clarified that the CAMT may apply to the US subsidiaries of a Canadian parent entity, although the same income thresholds must be met; therefore, where the US operations of a Canadian multinational organization do not exceed these amounts, the CAMT will not be a material concern. The panel then drew comparisons between the US CAMT and the OECD’s minimum tax proposed under Pillar 2, noting the US CAMT poses higher income threshold amounts (as compared to $750 million EUR under Pillar 2). The panel concluded by commenting on the complexity to Canadian multinational organizations, which may have US subsidiaries subject to the US CAMT as well as other non-US subsidiaries further downstream which may be subject to the Pillar 2 minimum tax.

YIN RAPPORTEUR REPORT

REPORTING/DISCLOSURE REQUIREMENTS

IFA Canada Tax Conference 2023 | YIN Rapporteur Summary

Presented on May 17, 2023

Speakers: Mike Coburn, Fasken, Vancouver
Waël Tfaily, EY Canada, Montréal
Marie-Emmanuelle Vaillancourt, Davies Ward Phillips & Vineberg LLP, Montréal
Joanne Vandale, Osler, Hoskin & Harcourt LLP, Calgary

Moderator: Kim Wood, PwC Canada, Calgary

YIN Rapporteur: Kaitlin Gray, Osler, Hoskin & Harcourt LLP, Calgary

The scope of transactions and operations that are subject to disclosure requirements will significantly increase in the near future. Failure to comply with the new requirements risks severe consequences. This panel focused on practical implications relating to the legislative amendments to expand the existing “reportable transaction” rules and introduce new reporting obligations in respect of “notifiable transactions” and “reportable uncertain tax treatments”.

History and policy considerations – The panel briefly discussed the history and policy considerations of the mandatory disclosure rules, both domestic and international. This included discussion of alignment with BEPS Action 12, drawing on the experiences of countries that already have such rules.

The panel also discussed the tension between the facts within the taxpayer’s knowledge and the CRA’s ability to access those relevant facts, and more generally the government’s continuing efforts to improve tax transparency.

The panel covered the three categories of disclosure, including the most recent set of changes to the rules found in Bill C-47:

1. The expansion of the existing reportable transaction rules in section 237.3, which is generally intended to result in a higher level of reporting than under the existing rules; the amended rules will be triggered by the presence of any one of three hallmarks relating to contingent fees, confidential protection and contractual protection where there is an "avoidance transaction" (defined as a transaction where one of the main purposes is to obtain a tax benefit).
2. The new notifiable transaction rules in section 237.4, which will be triggered by a transaction or series being "substantially similar" to those designated as a notifiable transaction on a list published by the government; and
3. The new reportable uncertain tax treatments rules in section 237.5, which will be triggered by financial statement recognition by certain corporations.

The panelists noted a number of positive changes in Bill C-47, including:

- The carve-out for indemnities and insurance in M&A transactions from the reportable transaction rules (and the statement in the explanatory notes that this is meant to carve out standard representations and warranties).
- Removing the joint and several liability provision for reportable and notifiable transactions.
- Changes to the provisions concerning solicitor-client privilege.
- Extending the deadline for certain reporting obligations from 45 days to 90 days.

The panellists also shared insights into Québec's experience with the mandatory disclosure rules.

Observations and Analysis – The panel engaged in an in-depth discussion of particular aspects of the rules. The potential for further legislative amendments, as well

as the need for CRA administrative guidance, was noted as being key to navigating the new reporting obligations.

The panel highlighted the statements in the explanatory notes that the rules are not intended to impact ordinary commercial transactions or to introduce an undue compliance burden. They also discussed the possibility of voluntary disclosure in connection with the proposed amendments to the general anti-avoidance rule ("GAAR") to introduce a penalty for transactions subject to the GAAR equal to 25% of the amount of the tax benefit unless the transaction has been disclosed under the reportable transaction rules. The panel discussed the serious implications of the potential retroactive effect of the new rules, given their application to series of transactions (with reference to learnings from the experience in Québec).

Panellists described the anticipated process for reporting by taxpayers and advisors/promoters. Questions of solicitor-client privilege are expected to be highly relevant and of significant concern to parties facing potential disclosure obligations.

The panel set out the anticipated impact of the new rules on CRA audits, including giving taxpayers the opportunity to control the narrative and the potential for decreased reassessments after the statute-barred period where transactions have been disclosed.

The panel discussed the new reportable uncertain tax treatments rules in section 237.5, with a particular focus on transfer pricing.

Practical Implications – The panel provided specific and practical advice on the application of the new rules in several specific contexts: transfer pricing issues, CRA audits, financial statements, due diligence, and file documentation. The panel noted that implementing the rules will require communication and coordination among advisors and within each organization and answered questions from the audience, including with respect to relief where an employee files an information return for

certain transactions, each employee is deemed to have made that filing (this relief only applies to employees or partners of advisors/promoters).