



New Tax Mandatory Disclosure Rules: What Businesses and Their Lawyers Need to Know

OBA November 30, 2023

Categories of Mandatory Disclosure Rules

1. ***“Reportable Transactions” – Amendment to rules that “lower” the thresholds for when reporting is required. Came into effect on June 22, 2023.***
2. ***“Notifiable Transactions” - New regime where CRA has the authority to designate, with the concurrence of Finance, a transaction as a “notifiable transaction”. Designated November 1, 2023.***
3. ***“Uncertain Tax Treatment” - New regime applicable to certain corporations (>C\$50M assets, audited F/S, file Cdn tax return). Effective for all tax years beginning after 2022.***
4. ***“Enhanced Trust Reporting Rules”*** applicable to certain trusts

On the Horizon: “Voluntary” GAAR Reporting

Reportable/Notifiable Transactions – Who must disclose?

- The following persons must make disclosure:
 - a. every person for whom a tax benefit results or is expected to result from the “tax treatment” of the reportable/notifiable transaction, series or other such transactions that are part of the series.
 - b. every person who has entered into, for the benefit of a person described in paragraph (a), a reportable/notifiable transaction;
 - c. every advisor or promoter (or NAL person) in respect of
 - a. a reportable transaction (or series) who is or was entitled to a **contingent fee** or a **fee** in respect of a **contractual protection**;
 - b. a notifiable transaction
- Filing of by one person does not satisfy the filing obligations of others

Reportable/Notifiable Transactions – When are you an “advisor”?

- **You are an “advisor” if you provide, directly or indirectly in any manner, any assistance or advice** with respect to creating, developing, planning, organizing or implementing the notifiable transaction, to another person (including any person who enters into the notifiable transaction for the benefit of another person)
- More than one person may be an advisor in respect of a particular notifiable transaction or series of transactions

What is a Reportable Transaction?

- An avoidance transaction **and one of the three hallmarks** are met.
- **Avoidance transaction:** a transaction or series one of the main purposes of which is to obtain a tax benefit.
- **Hallmark #1 (Contingent Fee):** An advisor or promoter has an entitlement to a fee that is based on or contingent upon a tax benefit that results from (or fails to result from) the avoidance transaction, or the number of persons that participate in or have been offered to participate in the avoidance transaction.
- **Hallmark #2 (Confidential Protection):** An advisor or promoter obtains or obtained confidential protection in respect of a tax treatment in relation to an avoidance transaction.
- **Hallmark #3 (Contractual Protection):** A person, advisor or promoter has or had contractual protection in respect of the avoidance transaction or series.

Reportable Transaction – Avoidance Transaction

- **Avoidance Transaction:** a transaction (or series of transactions of which the transaction is a part) if it can reasonably be considered that one of the main purposes is to obtain a tax benefit
 - This means that none of the purposes of the transaction or series can be to obtain a tax benefit
 - Having a genuine commercial purpose (i.e., creditor proofing) as a “main” or “primary” purpose will be an avoidance transaction if one of the purposes is to also obtain a tax benefit
 - Series concept is also broad – the start of the series relevant to when the 90-day period for the reporting deadline starts

Reportable Transaction – Contingent Fee (Hallmark #1)

- **Contingent Fee:** a fee (other than a fee in relation to SR&ED claims) that is based on
 - the amount of a tax benefit
 - achieving a tax benefit; or
 - the number of people taking part in the transaction
- **Fees** are any consideration paid to a taxpayer, advisor, promoter relating to a transaction (or series) for: advice, opinion, creating, developing, implementing, promoting, selling, preparing documents in support of, providing contractual protection

Reportable Transaction – Contingent Fee (Hallmark #1)

- Latest guidance from CRA clarifies what is not a “contingent fee” for purposes of MDR, including
 - **standard fees to a financial institution**, for establishment and ongoing admin of ordinary financial accounts broadly offered in a normal commercial or investment context in which parties deal with each other at arm’s length
 - **fee for the preparation of an annual income tax return** that results in a taxpayer obtaining a refund of tax, including entitlement to personal tax credits, such as the disability tax credit or refundable tax credits, the Canada child benefit, the GST/HST credit or the Canada workers benefit
 - **fees based on the numbers of preparations of and filings** of income tax elections in respect of a transaction or series of transactions
 - **fees based solely on value of services** provided in respect of a transaction or series and **determined without reference to tax results** (for ex. based on level of training and experience, time expended, degree of risk and responsibility, priority and importance of work to the client, and value of work)
 - **Contingent litigation fees** related to tax disputes for completed transactions are acceptable if not related to implementing a transaction or series

Reportable Transaction – Confidential Protection (Hallmark #2)

- “**confidential protection**” is anything that prohibits disclosure to any person or to the CRA of the details or structure of the transaction or series
- Hallmark met if **advisor or promoter** (or NAL person) **obtains or obtained** a “confidential protection” in respect of the *tax treatment* of the avoidance transaction (or series) which is given by a person
 - to whom the advisor has provided assistance/advice relating to the avoidance transaction under the terms of an engagement letter; **or**
 - to whom a promoter has promoted, sold the scheme, made representations to or from whom certain consideration is received.

Reportable Transaction – Confidential Protection (Hallmark #2)

Following are acceptable (and will not trigger reporting):

- Disclaiming or restricting an advisor's liability, so long as it does not prohibit disclosure of details of the structure
- Protection of trade secrets that do not relate to tax
- Standard confidentiality agreements that do not require tax advice to be confidential
- Standard commercial confidentiality provisions in standard client agreements or documentation, which do not contemplate a specific identified tax benefit or tax treatment

Reportable Transaction – Contractual Protection (Hallmark #3)

“**contractual protection**” is any form of insurance or other protection, or indemnity, compensation or a guarantee, including, an indemnity that

- immediately or in the future and either absolutely or contingently,
 - protects a person against the failure of the transaction/series to achieve tax benefits, or
 - pays/reimburses fees, expenses, taxes , interest, penalties in the course of dispute of the tax benefit.

Provided to

- The taxpayer that entered into the avoidance transaction,
- Another person who entered into the avoidance transaction for the benefit of the taxpayer,
- An advisor or promoter in respect of an avoidance transaction
- A NAL person to the above

There are some exclusions...

Reportable Transaction – Contractual Protection (Hallmark #3)

Following is not a “contractual protection”:

- **Limitation of liability in professional engagement letter** if purpose is to generally limit accountant’s liability for negligence (i.e., it is related to professional indemnity insurance)
- **Standard professional liability insurance**
- **Insurance or other protection that is integral to an agreement between arm’s length persons for the sale of a business** where it is reasonable to consider that the insurance or protection is **(i)** intended to **ensure that the purchase price takes into account any liabilities** of the business immediately prior to the sale, and **(ii)** is obtained **primarily for purposes other than to achieve any tax benefit** from the transaction or series

Reportable Transaction – Contractual Protection (Hallmark #3)

Latest guidance from CRA clarifies what is not “contractual protection” for purposes of MDR, including

- **Standard reps, warranties and guaranties between a vendor and a purchaser** that are generally obtained in ordinary commercial M&A context to protect a purchaser from pre-sale liabilities include:
 - Pre-closing tax indemnities or amount of tax attributes
 - Bump covenants and indemnity for additional tax payable for breach these covenants
 - Insurance to address risks with absence of section 116 clearance certificates for TCP dispositions
 - Indemnities relating to safe income calculations where pre-sale inter-corporate dividends paid to extract safe income
 - Indemnities or covenants to a purchaser and/or target in respect of penalties tax on excessive dividend designations and other adverse tax consequences arising from dividends paid as part of a pre-closing reorganization
- Exception does **NOT** extend to insurance or protections covering specified identified tax risks (e.g., tax liability insurance re: avoidance transactions)

Reportable Transaction – Contractual Protection (Hallmark #3)

CRA Guidance Exceptions Continued...

- Standard commercial indemnities **in standard client agreements or documentation**, which do not contemplate a specific identified tax benefit or tax treatment
- **Tax return insurance** provided that coverage (i) does not contemplate a particular transaction or series; (ii) would not adequately cover significant costs in respect of aggressive tax planning, (iii) does not protect for a disputed position in respect of aggressive tax planning and (iv) subject to a maximum amount that is immaterial compared with expenses incurred for audit of aggressive planning.
- **Re-insurance** if original policy fits the exemption
- **Price-adjustment clauses** that are not tax-driven (e.g., working capital adjustment clauses)

Reportable Transaction – Contractual Protection (Hallmark #3)

CRA Guidance Exceptions Continued...

- **Contingent fee litigation** arrangement in relation to an appeal of tax assessment by a lawyer in respect of a tax benefit (extends to professional assistance provided to a taxpayer in audit and after issuance of assessments)
- Standard reps and indemnities with respect **to withholding tax obligations** in an arm's length situation
- Partnership agreement standard clauses that say the **partnership will provide reasonable assistance** to resolve audit, provided purpose is not in respect of a particular avoidance transaction or series
- Certain indemnities in mutual fund merger context

“The contractual protection hallmark will not apply in a normal commercial or investment context in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly, and does not extend contractual protection for a tax treatment in respect of an avoidance transaction”

Notifiable Transaction

- Minister of National Revenue with concurrence of Finance can designate “notifiable transactions”
- Will include transactions that CRA has found to be abusive and those of interest (to determine if abusive)
- Reporting required for transactions that are designated and those that are “substantially similar” (includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy)
 - Substantially similar must be broadly construed in favour of disclosure
- **Notifiable Transactions designated effective November 1, 2023:**
 - NT-2023-01. Straddle loss creation transactions using a partnership
 - NT-2023-02. Avoidance of deemed disposal of trust property
 - NT-2023-03. Manipulation of bankrupt status to reduce a forgiven amount in respect of a commercial obligation
 - NT-2023-04. Reliance on purpose tests in section 256.1 to avoid a deemed acquisition of control
 - NT-2023-05. Back-to-back arrangements

Tax Reporting Consequences & Practice

The Stakes: potential for penalties, reassessment period remains open,
modified GAAR application

CRA's administrative guidance as an evolving document



The Stakes – Penalties

➤ Penalties

➤ For the taxpayer:

- ❖ \$2,000/week to a maximum amount equal to the greater of \$100,000 and 25% of the tax benefit, if a corporation with a carrying value of assets \geq \$50M
- ❖ \$500/week to a maximum amount equal to the greater of \$25,000 and 25% of the tax benefit, for all other taxpayers

➤ For advisors and promoters:

▪ The total of:

- ❖ 100% of the fees charged in respect of the reportable transaction,
- ❖ \$10,000, and
- ❖ \$1,000 per day failure continues, up to \$100,000

➤ Penalties can be assessed at any time (i.e., no time limit)

The Stakes – Reassessment Period Remains Open

- Extension of normal reassessment period
 - Normal reassessment period for the taxation year in which the transaction or series occurs does not commence until disclosure is made.
 - Applies for taxation years beginning after 2022 (vs. on Royal Assent)

The Stakes – Modified GAAR

- If disclosure has not been made by a person in respect of a reportable transaction (or a series of transactions that includes the reportable transaction), and a person is liable to a penalty in respect of the reportable transaction (or series that includes the reportable transaction), and the penalty or interest on the penalty has not been paid – then in applying the GAAR – the GAAR is applied without the abuse analysis
- You could call this go straight to GAAR as usually the abuse analysis is the critical issue fought in a GAAR case

CRA Guidance

- The CRA released Guidance on the MDR rules in July of 2023 which was updated twice. Most recently on November 2, 2023
- Originally the Guidance tracked comments provided by the Department of Finance in its technical notes accompanying the draft legislation which became the current MDR rules
- As the Guidance has been updated – it appears to have drifted into “administrative concessions”

CRA Guidance – Part 2

- The comments provided by the CRA which reflects the Department of Finance Technical Notes would constitute extrinsic evidence and may factor into a Textual, Contextual and Purposive Analysis of the MDR regime should a filing position come into dispute
- Where the Guidance constitutes “administrative concessions” CRA is not currently prohibited from assessing contrary to its previously taken positions (aka no estoppel in this context)

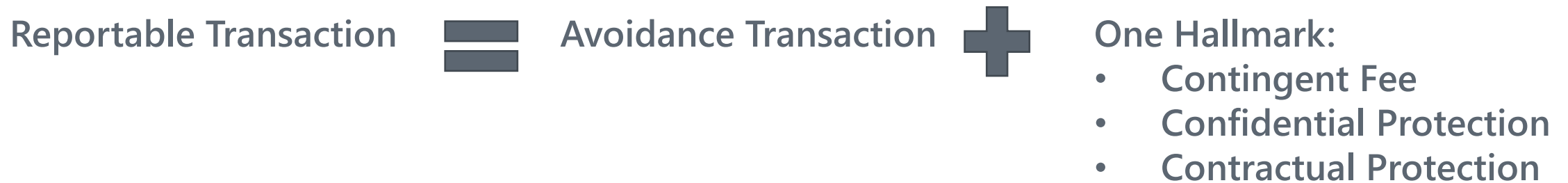
CRA Guidance – Part 3

- The Guidance states that “The CRA’s approach to the application of these rules will develop over time based on our experience in dealing with specific factual circumstances”
- The applicability of “due diligence defences” may hinge on what the Guidance was at the time the transaction(s) triggered a reporting obligation
- Carefully check to see if CRA’s comments in the guidance clearly meet the scenario in your transaction (comments often vague and/or caveated)

Recognizing When Reporting Obligation May Exist?



What is a Reportable Transaction?



CRA: “no legislative reporting obligation under the reportable transaction regime for a transaction or series where none of the three generic hallmarks are present even though it can reasonably be concluded that one of the main purposes of entering into the transaction or series of transactions is to obtain a tax benefit.....For instance, without limiting the foregoing, this could include transactions such ***as estate freezes, debt restructuring, loss consolidation arrangements, shareholder loan repayments, purification transactions, claiming of the capital gain exemption, divisive reorganizations and foreign exchange swaps.***”

Examples in an M&A Context

- Acquisition and para. 88(1)(d) “bump” with private or public company acquirer
- Single issue or specific indemnities provided by vendor to purchaser
- Single issue or specific tax risk mitigated by insurance purchased from insurer
- Indemnity from vendor to purchaser for broader range of pre-sale transactions than the safe income dividend example in the CRA Guidance (e.g., pre-sale dispositions giving rise to income and CDA, pre-sale dividends, related Part III and GRIP/LRIP issues)
- Para. 111(4)(e) planning initiated by vendor – no protection
- Para. 111(4)(e) planning initiated by vendor – protection (indemnities) given by the vendor for tax attributes at closing
- Same facts as above except initiated by purchaser with purchaser giving protection to vendor for CDA

Examples in an M&A Context

- Seller undertakes avoidance transaction to eliminate a tax exposure at closing that would otherwise be included in indebtedness and provides protection
- Same as above except seller obtains insurance for the benefit of seller and purchaser
- Sale of shares of company with substantial losses to strategic purchaser – purchase price subject to adjustment through reverse earn-out based on the use of losses by the purchaser

Examples in Labour & Employment Context

- Structuring a settlement & certain allocations
 - Are parties arm's length, acting prudently, knowingly, willingly?
 - Is it reasonable to consider that one of the main purposes of the transaction is to obtain a tax benefit for the client?
 - Is there an indemnity?
- Retiring Allowance (unsure that a termination payment is a retiring allowance)
 - Are parties arm's length, acting prudently, knowingly, willingly?
 - Is it reasonable to consider that one of the main purposes of the transaction is to obtain a tax benefit?
 - Is there an indemnity?
- Independent Contractor vs Employee
 - Are parties arm's length, acting prudently, knowingly, willingly?
 - Is it reasonable to consider that one of the main purposes of the transaction is to obtain a tax benefit?
 - Contractual Protection Hallmark – has the IC provided an indemnity?

Other Examples

Trust Context

- Arm's length trustee indemnified / protected against tax risks in trust

Corporate Finance Context

- Gross-up provision for withholding in debt instrument – protection only if change of law or administrative practice
- Same as above but gross up protection in relation to current interpretive risk (e.g., participating debt interest)

Bankruptcy & Insolvency Context

- Structuring the forgiveness of debt to qualify as a seizure or acquisition of property (including receivables)
- Restructuring intercorporate debt pursuant to avoid debt forgiveness in exchange for the creditor forgoing a capital loss on the debt of a subsidiary
- Notifiable Transaction?

Notifiable Transaction

- Minister of National Revenue with concurrence of Finance can designate “notifiable transactions”
- Will include transactions that CRA has found to be abusive and those of interest (to determine if abusive)
- Reporting required for transactions that are designated and those that are “substantially similar” (includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy)
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I. Notifiable Transaction: Straddle Loss Creation Using Partnerships

Straddle Transaction – taxpayer enters into two opposite positions (typically derivative) that are expected to generate equal offsetting gains and losses. Shortly before the end of the tax year, the loss leg is closed out. The loss is applied to shelter income in that year. Shortly after the beginning of the new year the gain leg is closed out. Taxpayer has achieved a deferral of income in year 1 without real economic exposure. Taxpayer might repeat the process to achieve a longer deferral.

Anti-avoidance rules were introduced in 2017 to combat these rules. CRA has detected variations of these transactions involving partnership seeking to avoid the application of the specific anti-avoidance rules.

II. Notifiable Transaction: Avoidance of Deemed Disposal of Trust Property

Most trusts are subject to a deemed disposition rule on their 21st anniversary – if the trust holds property on its 21st anniversary the trust is deemed to have disposed of such property at its prevailing fair market value (thereby triggering accrued and unrealized gains). The deemed disposition is ordinarily averted by causing the trust to distribute all of its properties to its beneficiaries; a trust can distribute property to a Canadian resident beneficiary on a tax-deferred basis. However, a distribution of property to a non-resident will be taxable.

Taxpayers have been engaging in transactions to effectively extend the 21-year deemed disposition rule or to otherwise distribute property of the trust in a manner where the property is indirectly held by a non-resident (e.g. a Canadian holding company that is owned by the non-resident).

III. Notifiable Transaction: Manipulating Bankrupt Status to Avoid Debt Forgiveness

The settlement or extinguishment of a commercial debt obligation for less than its principal amount or issue amount generally triggers a debt forgiveness. A debt forgiveness grinds tax attributes in a particular order and can result in an income inclusion. However, the debt forgiveness rules do not apply in respect of a particular debt if the debtor is a bankrupt at the time of settlement or extinguishment.

Some debtors are entering into arrangements where they are *temporarily* assigned into bankruptcy prior to settling or extinguishing a commercial debt obligation to avoid the consequences of the debt forgiveness rules.

IV. Notifiable Transaction: Relying on a “Purpose” Test to Avoid an Acquisition of Control

The *Income Tax Act* (Canada) contains rules designed to constrain the trading of tax attributes (e.g. losses, credits, resource expenditures, etc.,) among arm’s length persons. Attributes of a corporation will generally expire or be subject to use limitations (e.g. “streaming”) where the corporation has been subject to an acquisition of legal control. In 2013, rules were added to deem there to be an acquisition of legal control when a person (or group of persons) acquires shares of the corporation that have more than 75% of the fair market value of all the shares of the corporation, if it is reasonable to conclude that one of the main reasons that legal control was not acquired is to avoid the above-noted attribute trading restrictions.

The Department of Finance and CRA would like disclosure where the above noted purpose test (e.g. one of the main reasons) is relied upon in order to avoid a deemed acquisition of control

V. Notifiable Transaction: Back-to-Back Arrangements – Thin-Cap & Withholding Tax

A taxpayer is not permitted to deduct interest expense on debt owing to certain non-residents (Specified NR1) (e.g. those that, alone or together with non-arm's length persons, own 25% or more of the shares of the Canadian debtor by votes or value, or do not deal at arm's length with a person having such ownership interests) to the extent that the quantum of such debt exceeds 1.5 times the Canadian debtor's qualifying "equity amount" ("thin-capitalization rule")

A 25% withholding tax applies in respect of certain passive income payments (interest, rents, royalties and similar) paid to non-residents (Ordinary NR1), subject to relief under an applicable tax treaty.

Canadian debtors/payers along with Specified NR1 or Ordinary NR1 (as applicable) are entering into arrangements with arm's length non-resident persons (NR2) in an effort to avoid the application of the thin-capitalization rule or to reduce or avoid the withholding tax applicable on passive income payments

Form RC 312

- Same form used for Reportable and Notifiable Transactions
- [RC312 Reportable Transaction and Notifiable Transaction Information Return \(2023 and later tax years\) - Canada.ca](#)

Form RC312

Part 4 – Reportable transaction

If you are disclosing a reportable transaction that is also a notifiable transaction in respect of the same tax benefit, fill out Part 3.

Briefly describe the reportable transaction (for example, loss transaction) (if you need more space, attach additional sheets):

Date the reportable transaction is required to be disclosed (see instructions on page 7 for filing deadline)

Year	Month	Day

Tick the hallmarks that apply to this reportable transaction (see definition of reportable transaction on page 8):

- Fee, including contingency fees
- Confidential protection
- Contractual protection

Advisor and promoter identification

Tick the boxes that apply to this reportable transaction:

Advisor: Provide the names of the advisors connected with the reportable transaction who have access to the information requested in this part (see **note 3**):

Promoter: Provide the names of the promoters involved (see **note 4**):

Promotional material is available

Form RC312

Part 4 – Reportable transaction (continued)

For the following questions, it is expected from advisors that do not have access to all the information requested in the following questions to obtain only the information already known and/or easily available to them.

Tax benefit, actual or estimated, obtained or being sought

Nature of the tax benefit (for example, capital gain)

Do you anticipate recurring tax benefits? Yes No

Indicate in which tax years the tax benefit (based on the tax treatment) is expected to be used

Year	Year	Year	Year

Details of the transactions

Identify and describe the reportable transaction or series of transactions in sufficient detail for the Minister of National Revenue to be able to understand the tax structure of all the transactions. In addition, describe the expected, claimed or purported tax treatment of all potential benefits expected to result from the transaction or series of transactions. Include any additional steps that are anticipated to occur. You may include any reference to any material used to determine the tax treatment of the transaction or series of transactions (technical interpretation, ruling, court decision, folio, interpretation bulletin, or other government document).

Examples of documentation that may be attached:

- a step-by-step description of the disclosed transaction or series of transactions
- promotional documents
- a copy of the organizational chart of all parties involved immediately before and after the transaction or series of transactions

You may:

- attach existing documents and/or
- describe the details of the transactions in the following space (if you need more space, attach additional sheets)

Form RC312

Legislative provisions applied

Provide references to the following: The Act, Income Tax Regulations (Reg), Income Tax Application Rules (ITAR), Tax Treaty (Treaty) or Other legislation (Other) (for example, 85(1) of the Act).

The Act	Reg	ITAR	Treaty legislative provisions	Treaty country code	Other

Determining Whether an Obligation Exists and Understanding the Obligations on the Lawyer Side

The Reportable Transaction as it applies to Lawyers



Example – Capital Gains Strip

- You are retained by your client to undertake a transaction to do a surplus stripping transaction to extract funds from a corporation at capital gains rates rather than dividend rates
- Your retainer letter provides that your fee will equal 10% of the difference between the rate that would have been realized as dividend and the rate realized on extracting funds as a capital gain

Example – is there an “Avoidance Transaction”

- Avoidance transaction = it can reasonably be concluded that one of the main purposes of entering into the transaction or series of transactions is to obtain a tax benefit
- **tax benefit** is very broad and includes “a reduction, avoidance or deferral of tax or other amount payable under” the ITA

Is there a Hallmark?

- Check the definitions in section 237.3
- Relevant hallmark in this case “contingency fee”
- In this case the tying of the fee of the lawyer to a tax benefit will trigger the “contingency hallmark”
- Check to see if the Guidance comments – in this case there is no administrative guidance that would get you out

Who has to report?

- The following individuals must make disclosure:
 - a. every person for whom a tax benefit results or is expected to result from the “tax treatment” of the reportable/notifiable transaction, series or other such transactions that are part of the series
 - b. every person who has entered into, for the benefit of a person described in paragraph (a), a reportable/notifiable transaction;
 - c. every advisor or promoter (or NAL person) in respect of
 - a. a reportable transaction (or series) who is or was entitled to a **contingent fee** or a **fee** in respect of a **contractual protection**;
- Filing of by one person does not satisfy the filing obligations of others

Do you as the lawyer have to report?

- Are you an advisor or promoter?
- **You are an “advisor” if you provide to another person any contractual protection in respect of the transaction (or series), or any assistance or advice with respect to creating or developing, planning, organizing or implementing the avoidance transaction or series**
- You are a promoter if you meet the definition in 237.3(1) – you may also be a promoter in this circumstance

Do you as the lawyer have to report? (2)

- There is a reportable transaction because there is an “avoidance transaction” and a hallmark in respect of the “avoidance transaction”
- The next question is were you as an advisor and/or promoter entitled to contingent fee or a fee in respect of a contractual protection
- In this case the answer is yes. You took a fee that was a “contingent fee”

Do you as the lawyer have to report? (3)

- Does the statutory carveout apply?
- No reporting is required if the information is subject to “solicitor-client privilege”
- SCP takes its meaning from the common law
- This rule applies to all information that is subject to SCP
- SCP can include information in the client’s files however the existence of a transaction is not normally itself subject to SCP

Do you as the lawyer have to report? (4)

- Duty of Confidentiality? Professional Obligations?
- Constitutional Challenge
- There is an ongoing constitutional challenge which aims to protect lawyers from having to disclose
- Injunction

Reportable Transactions – Exceptions Relevant to Law Firms

- Persons doing clerical or secretarial services with respect to a transaction are excepted
- For **reportable transactions**, for a partnership or employer who receives a fee as an advisor or promoter in respect of an avoidance transaction and discloses a reportable transaction as required, its partners or employees (including in-house tax advisors) would generally not also need to make a disclosure

Deadline for Reporting

- **Filing Deadlines:** Information returns for reportable transactions and notifiable transactions must be filed within 90 days of the earlier of the day:
 - ❑ the taxpayer (or person who entered into the transaction for the benefit of the taxpayer) *becomes contractually obligated to enter into the transaction*, and
 - ❑ the taxpayer (or person who entered into the transaction for the benefit of the taxpayer) *enters into the transaction*
- **For advisors and promoters, no later than the earliest day described above.**

Due Diligence Defense?

- A person required to file an information return in respect of a reportable transaction is not liable to a penalty if the person has exercised the degree of care, diligence and skill to prevent a failure to file that a reasonably prudent person would have exercised in comparable circumstances
- This is the same wording as is used in a due-diligence to a director's liability assessment
- Relevant case on this point is Peoples Department Store v. Wise (which has been applied in Tax Cases for directors' liability)
- In effect an "objective standard"

Steps for working through uncertain cases (1)

1. Examine each step in a transaction
2. Determine if there is an avoidance transaction. Any transaction that has a tax benefit (defined in 245(1)) even an inconsequential one deserves scrutiny. Remember the series concept pulls in a broader net of transactions than you might think
3. Identify if there is any one of the three hallmarks in respect of the avoidance transaction. In order to do this you need to familiarize yourself with the definitions in section 237.3 and get a handle on the concepts - especially the three hallmarks
4. Consult the definitions in the ITA to see if what you are doing triggers a hallmark
5. If a transaction might fall into a relevant hallmark consult the CRA guidance and see if the CRA has opined on the point

Steps for working through uncertain cases (2)

6. When relying on the Guidance consider if you are clearly within the situation identified as much of the Guidance is vague
7. Consider if a reportable transaction is present who has to report (advisors, promoters, the taxpayer, etc... (see the legislation for other applicable persons)
8. Consider what the deadline for reporting is
9. In borderline situations consider reporting or excising the transaction or event triggering the hallmark
10. Consider what you have done to backup the file to support your filing position

Areas of Uncertainty

- Many examples of uncertain situations – just a small selection of examples
- Carveout for arm's length sales where parties are “related” within the meaning of the income tax act but act on commercial terms
- Reporting obligation for professional corps which bills an LLP but is not itself a member
- What is a pre-sale tax liability?
- Check guidance often
- If uncertain report / remove offending hallmark?

