

In this issue

4

Ontario estate administration: partial tax relief coming

7

More digital tax administration means more risks for boards to consider

12

Taxpayer's severe anxiety disorder qualified her for the disability tax credit

15

Publications and articles

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Fertility expenses: tax credits for current and past years

Candra Anttila, Toronto, and Gael Melville, Vancouver

TaxMatters@EY is a monthly Canadian bulletin that summarizes recent tax news, case developments, publications and more. For more information, please contact your EY advisor.

¹ Note that there are certain provincial credits that need to be considered such as the Manitoba fertility treatment tax credit.



An increasing number of individuals are turning to reproductive technologies, such as in-vitro fertilization, for assistance in conceiving a child. The costs associated with receiving this type of medical treatment can often be high, running into the thousands of dollars.

In general, families seeking out these treatments must bear much of the related expenses, since fertility-related medical expenses are not covered by most provincial health insurance plans and coverage under private health insurance plans or other forms of assistance (such as healthcare grants) may be limited. However, certain expenses related to medical fertility treatments may be eligible for the medical expense tax credit (METC).¹

In recent years, the *Income Tax Act* (the Act) has been amended to clarify the eligibility of fertility-related expenses for the METC. In light of these amendments, the Canada Revenue Agency (CRA) recently reminded taxpayers, in comments made in a technical interpretation (CRA document 2018-0753891E5), that an individual may request an adjustment to a tax return filed for a previous taxation year to claim fertility-related expenses eligible for the METC within the 10-year limitation period for requesting a reassessment and obtaining a refund.

Overview of the medical expense tax credit

The federal METC is a non-refundable credit computed by applying the lowest marginal tax rate (currently 15%) to eligible medical expenses in the year that exceed the lesser of

- 3% of net income
- \$2,352 (2019 amount)

The provinces and territories provide a comparable non-refundable credit.

An individual, or their spouse or common-law partner, may claim eligible medical expenses in respect of the couple. As such, it may be more beneficial for the lower-income spouse or partner to make the claim (due to the 3% net income threshold).

Use of reproductive technologies unrelated to a medical condition

To better support families using reproductive technologies, the 2017-18 federal budget announced a measure to clarify the application of the METC in circumstances where the medical treatment received by an individual to conceive a child is not directly related to a medical condition. This measure was enacted in subsection 118.2(2.2) of the Act, generally applicable for 2017 and subsequent taxation years, subject to retroactive application as discussed below.

Under subsection 118.2(2.2), the METC may be claimed for certain medical expenses paid for the purposes of enabling an individual to conceive a child, even if the individual is not medically infertile, provided the expenses are otherwise eligible for the tax credit. The introduction of this provision was intended to remove the requirement that eligible medical expenses in relation to fertility treatments must be incurred due to a pre-existing medical condition or illness.

By removing this restriction, all individuals requiring medical intervention to conceive a child that incur otherwise eligible expenses may claim the METC, regardless of whether they suffer from medical infertility, thereby enabling families that use reproductive technologies for other reasons to benefit from the credit.

Retroactive application of subsection 118.2(2.2)

Although subsection 118.2(2.2) was introduced for 2017 and subsequent taxation years, an application rule allows eligible fertility-related medical expenses to be claimed for taxation years prior to 2017 if an individual makes a request to amend a previously filed return within the relevant limitation period. Under subsection 152(4.2) of the Act, an individual may make an application for a reassessment within 10 years after the end of a taxation year. Upon making a reassessment, the minister may issue a tax refund pursuant to subsection 164(1.5).

Consequently, an individual who incurred fertility-related medical expenses for which they did not claim the METC may be able to ask the CRA to amend a previously filed return in order to claim the METC and receive a tax refund. For example, in 2019, an individual may make a request to amend a return filed for 2009 or a later taxation year.

Other conditions for claiming eligible medical expenses

While subsection 118.2(2.2) was intended to clarify the requirements for claiming the METC in relation to medical fertility treatments, it was not intended to broaden the scope of medical expenses eligible for the METC. As well, this provision does not alter the condition that the expenses be incurred for medical services provided to a qualifying patient in relation to the individual claiming the credit.

Depending on the nature of the treatment received, expenses incurred in relation to fertility treatments may be eligible for the METC under various provisions, including paragraphs 118.2(2)(a), 118.2(2)(n), or 118.2(2)(o) of the Act, provided that the conditions set out in these provisions are otherwise met.

Under paragraph 118.2(2)(a), expenses eligible for the METC include amounts paid to a medical practitioner, dentist, nurse or public or licensed private hospital for medical services. In relation to reproductive medical technologies, this may include, for example, fees paid to a qualifying medical practitioner, nurse or hospital in respect of a patient undergoing artificial insemination or in-vitro fertilization.

In addition, paragraphs 118.2(2)(n) and 118.2(2)(o) extend eligibility for the METC to certain amounts paid for drugs, medicaments or other preparations prescribed by a medical practitioner and used in medical treatments, as well as for laboratory or other diagnostic procedures or services prescribed by a medical practitioner to assist in diagnosis or treatment. In respect of medical fertility treatments, this may include, for example, amounts paid for various lab procedures performed as part of the in-vitro fertilization process, daily ultrasound or blood tests after in-vitro fertilization has begun, cycle monitoring fees and fertility-related drugs.

A recent CRA technical interpretation² provides a good example of how subsection 118.2(2.2) can offer expanded access to the METC for same-sex couples undergoing fertility treatment. In a case where a male individual in a same-sex couple was the taxpayer, the CRA confirmed that costs associated with freezing embryos for future surrogate implantation may be an eligible medical expense, provided the requirements of paragraph 118.2(2)(o) are otherwise met. However, note that any fees paid for the services of a surrogate mother are currently not eligible for the METC.³

² CRA document 2018-0763791I7.

³ CRA document 2018-0753891E5.

It should be noted that certain other conditions apply for expenses to be eligible for the METC under each of these provisions, including a requirement that the expenses be incurred in respect of a qualifying patient. In this context, a qualifying patient includes the individual and the individual's spouse, common-law partner or dependant. This is an important qualification to bear in mind when reviewing which medical expenses may be eligible for the METC in relation to assisted conception.

For example, in a recent technical interpretation,⁴ the CRA noted that certain expenses paid in relation to egg or sperm donations (such as reimbursement of the donor's medical expenses) would not be eligible medical expenses for an individual pursuing assisted conception, unless the donor was the individual or the individual's spouse, common-law partner or dependant.

Don't lose the benefit of unclaimed eligible medical expenses

If you've incurred medical expenses in the past 10 years in relation to the use of reproductive technologies to conceive a child but have not claimed a tax credit for these expenses on previous tax returns, you should review the eligibility of the expenses for the METC and the requirements for making a T1 return adjustment request. In situations involving surrogacy, or gamete donation, taxpayers should review each type of expense carefully to determine whether or not they meet the criteria for an METC claim.

You can apply for a T1 adjustment to claim the METC for a prior taxation year by completing form T1-ADJ, *T1 Adjustment Request*, or through My Account on the CRA's website. If the minister accepts your request for reassessment and grants a tax credit, you may receive a refund for an overpayment of tax. This can help offset the expense of medical fertility treatments and provide assistance for newly expanded families.



⁴ CRA document 2018-07518917.

Ontario estate administration: partial tax relief coming

Andrew Rosner and Alan Roth, Toronto



Probate fees (or in Ontario, estate administration taxes) are generally imposed, under provincial or territorial statutes, on the assets of a deceased taxpayer's estate where letters of probate, an estate certificate or letters of administration must be issued by a court to prove the validity of the will (when there is one) and an estate representative's (generally an executor's) authority to deal with the assets of the estate.

Most provinces and territories levy probate fees based on an estate's gross value. Additional flat fees (e.g., court filing fees) may also apply. In most cases, it is necessary for the executors of an estate to obtain probate to efficiently carry out the administration of the estate.

Certain assets are excluded from the value of an estate that is subject to probate, such as jointly held property that passes on to a survivor and property that passes to a named beneficiary outside a will (e.g., the proceeds of a life insurance policy). In some provinces, probate taxes for large estates may be substantial. At the present time, Ontario has the second-highest rates of probate/estate administration tax in Canada.

Under the current rules, Ontario estate administration tax does not apply if the value of an estate is \$1,000 or less. Ontario Bill 100⁵ has recently amended the *Estate Administration Tax Act, 1998* to increase this exemption to the first \$50,000 of the value of an estate, effective for estate certificates applied for on or after 1 January 2020. This change will eliminate the current lower rate of tax of \$5 for

⁵ *Protecting What Matters Most Act (Budget Measures)*, 2019; the corresponding enacting legislation for most of the proposed tax measures announced in the 2019 Ontario budget.

every \$1,000, or part thereof, applicable on the first \$50,000 of the estate's value. Therefore, the estate administration tax will be \$15 for every \$1,000, or part thereof, of the value of the estate exceeding \$50,000 (what is now the upper rate of tax). For example, an estate valued at \$1 million will be subject to \$14,250⁶ of estate administration tax under the amended legislation. This measure will result in savings of \$250 in estate

administration tax for each estate whose value exceeds \$50,000 (\$5 for every \$1,000, or \$5 x 50).

In Ontario, an executor must also file an estate information return (Form 9955, *Estate Information Return*) with the Ministry of Finance no later than 90 days after an estate certificate (a certificate of appointment of estate trustee) is issued. Ontario

announced in its 2019 budget that it intends to extend the deadline for filing this return from 90 days to 180 days, and the deadline for filing an amended return from 30 days to 60 days. No effective date for this proposal was provided.

The table of probate fees summarizes the current probate tax rates by province and territory.

Appendix: Probate fees

Probate fees in Canada (current as of June 1, 2019)

Province/Territory	Fee/Tax ¹	Statute/Regulations
Alberta	<ul style="list-style-type: none"> ▶ \$35, where property's net value does not exceed \$10,000 ▶ \$135, where property's net value exceeds \$10,000 but not \$25,000 ▶ \$275, where property's net value exceeds \$25,000 but not \$125,000 ▶ \$400, where property's net value exceeds \$125,000 but not \$250,000 ▶ \$525, where property's net value exceeds \$250,000 	Surrogate Rules, Schedule 2 under the <i>Judicature Act</i>
British Columbia	<ul style="list-style-type: none"> ▶ \$6 for every \$1,000 or portion thereof by which estate's value exceeds \$25,000, where value exceeds \$25,000 but not \$50,000 ▶ \$150 + \$14 for every \$1,000 or portion thereof by which estate's value exceeds \$50,000 ▶ There is an additional \$200 flat fee for estates exceeding \$25,000. 	<i>Probate Fee Act</i> s. 2, Supreme Court Civil Rules (Appendix C) under the <i>Court Rules Act</i>
Manitoba	<ul style="list-style-type: none"> ▶ \$70, where property's value does not exceed \$10,000 ▶ \$70 + \$7 for every additional \$1,000 or portion thereof by which value exceeds \$10,000 	<i>The Law Fees and Probate Charge Act</i> s. 1.1, Schedule; <i>Law Fees and Probate Charge Regulation</i>
New Brunswick	<ul style="list-style-type: none"> ▶ \$25, where estate's value does not exceed \$5,000 ▶ \$50, where estate's value exceeds \$5,000 but not \$10,000 ▶ \$75, where estate's value exceeds \$10,000 but not \$15,000 ▶ \$100, where estate's value exceeds \$15,000 but not \$20,000 ▶ \$5 per \$1,000 or portion thereof, where value exceeds \$20,000 	<i>Probate Court Act</i> s. 75.1, Schedule A
Newfoundland and Labrador	<ul style="list-style-type: none"> ▶ \$60, where estate's value does not exceed \$1,000 ▶ \$60 + \$0.60 for every additional \$100 of estate's value over \$1,000 	<i>Services Charges Act</i> s. 4
Northwest Territories	<ul style="list-style-type: none"> ▶ \$30, where net property value does not exceed \$10,000 ▶ \$110, where net property value exceeds \$10,000 but not \$25,000 ▶ \$215, where net property value exceeds \$25,000 but not \$125,000 ▶ \$325, where net property value exceeds \$125,000 but not \$250,000 ▶ \$435, where net property value exceeds \$250,000 	<i>Court Services Fees Regulations</i> , Schedule A, Part 2 under the <i>Judicature Act</i>

⁶(1,000,000 - 50,000)/1,000 x \$15.

Province/Territory	Fee/Tax ¹	Statute/Regulations
Nova Scotia	<ul style="list-style-type: none"> ▶ \$85.60, where estate's assets do not exceed \$10,000 ▶ \$215.20, where estate's assets exceed \$10,000 but not \$25,000 ▶ \$358.15, where estate's assets exceed \$25,000 but not \$50,000 ▶ \$1,002.65, where estate's assets exceed \$50,000 but not \$100,000 ▶ \$1,002.65 + \$16.95 for every \$1,000 or portion thereof by which estate's assets exceed \$100,000 	<i>Probate Act s. 87(2), Fees and Allowances under Part I of the Costs and Fees Act</i>
Nunavut	<ul style="list-style-type: none"> ▶ \$25, where net property value does not exceed \$10,000 ▶ \$100, where net property value exceeds \$10,000 but not \$25,000 ▶ \$200, where net property value exceeds \$25,000 but not \$125,000 ▶ \$300, where net property value exceeds \$125,000 but not \$250,000 ▶ \$400, where net property value exceeds \$250,000 	<i>Court Fees Regulations s. 4, Schedule C under the Judicature Act</i>
Ontario ²	<ul style="list-style-type: none"> ▶ Nil, where estate's value is \$1,000 or less ▶ \$5 per \$1,000 or portion thereof of the first \$50,000 of an estate's value ▶ \$250 + \$15 per \$1,000 or portion thereof by which estate's value exceeds \$50,000 	<i>Estate Administration Tax Act s. 2</i>
Prince Edward Island	<ul style="list-style-type: none"> ▶ \$50, where estate's value does not exceed \$10,000 ▶ \$100, where estate's value exceeds \$10,000 but not \$25,000 ▶ \$200, where estate's value exceeds \$25,000 but not \$50,000 ▶ \$400, where estate's value exceeds \$50,000 but not \$100,000 ▶ \$400 + \$4 per \$1,000 or portion thereof by which estate's value exceeds \$100,000 	<i>Probate Act s. 119.1(4)</i>
Quebec	<ul style="list-style-type: none"> ▶ No probate fee or tax³ 	<i>Tariff of judicial fees in civil matters s. 15(8)</i>
Saskatchewan	<ul style="list-style-type: none"> ▶ \$7 per \$1,000 of the estate's value or portion thereof 	<i>The Administration of Estates Act s. 51(2)</i>
Yukon	<ul style="list-style-type: none"> ▶ Nil, where estate's value is \$25,000 or less ▶ \$140, where estate's value exceeds \$25,000 	<i>Rules of Court for the Supreme Court of Yukon, Appendix C under the Judicature Act</i>

¹ Additional flat fees (e.g., filing fees) may apply.

² In accordance with Ontario's 2019-20 budget implementation legislation, the *Estate Administration Tax Act* was amended with respect to estates for which an application for an estate certificate is made on or after 1 January 2020. The probate tax exemption will apply to the first \$50,000 of the value of an estate, thereby eliminating the current lower rate of \$5 for every \$1,000, or part thereof, of the first \$50,000 of an estate's value. Therefore, the probate tax will be \$15 for every \$1,000, or part thereof, of the value of an estate exceeding \$50,000.

³ Quebec charges a flat fee of \$205, irrespective of whether a natural person or legal person files a request for a will verification with the Superior Court.

More digital tax administration means more risks for boards to consider

Originally published on ey.com



As tax authorities demand more data, faster, companies may have unpleasant results, including disruption, operational risks and "surprise" audits.

Tax authorities are going digital: why boards and senior executives should understand the risks

Today, new, digitally enabled business models can be activated overnight – a complete sea change from how business has traditionally been conducted.

A startup company can sell into more than 100 markets within 24 hours. Likewise, established businesses in all sectors are finding new ways for digital to create innovative new revenue streams and support their global brand efforts.

Tax administrations around the world are going digital at a rapid pace, too. More and more often, they are creating new capabilities to interact with taxpayers at source, instead of relying on historical information from the tax return.

In some cases, they are actually demanding taxpayer data even before a transaction has occurred, turning the whole model of tax compliance on its head. When combined with the global revolution in tax transparency, companies old and new are finding that revenue authorities everywhere are forging ahead at a pace that has the potential to outstrip their ability to keep up.

The results can be unpleasant and include internal disruption, operational risks, "surprise" tax assessments or audits, financial penalties and reputational risk. Boards and senior executives may not be aware of quite how high the new risks may be.

Governments are reaping significant returns on their investment in digital. Starting in 2015, for example, Russian taxpayers were required to submit value-added tax (VAT) transactional data along with their electronic VAT returns. That year, domestic VAT revenues increased by more than 12%, the equivalent of around US\$4 billion (RUB267 billion). Mexico reports a 38% increase in tax revenues without an increase in headline corporate tax rate, while Brazil reported a 42% increase over plan for 2017 audit and penalties collected after implementing a series of new digital reporting requirements.

What is digital tax administration?

Digital tax administration has come far in recent years. Indeed, the electronic filing of tax returns is now more than three decades old in many jurisdictions. In some nations, tax returns are now automatically pre-populated for taxpayers to approve, taking in information from banks, brokers and other third parties, almost fully automating a process that for many previously represented a burdensome review of physical documents.

Although not the initial focus of attention, corporate business taxes are now experiencing their time in the spotlight. "We clearly started this journey with personal taxpayers. I think the next wave will be the business side,"¹ says Hans Christian Holte, Commissioner of Norway's tax authority and Chair of the Organisation for Economic Co-operation and Development's (OECD) Forum on Tax Administration, a collection of more than 50 tax commissioners who regularly share ideas and insights with one another.

So what does digital tax administration look like, and what exactly are revenue authorities trying to achieve?

Tax authorities have many reasons for their journeys into digitalization. The first was out of necessity – only by applying digital techniques could tax authorities start to address the shadow economy. Second was efficiency, as at a broader level all government departments have found that they need to do more with less. Shrinking internal budgets while still under pressure to deliver revenue was a key driver.

Chiefly, collecting more tax revenue (and earlier) heads the list, and data matching and advanced data analytics can be used not only to identify tax fraud and evasion, but also to tackle what they consider to be aggressive tax planning.

Key characteristics

While there is no one-size-fits-all approach, there are two common characteristics playing out within every tax authority:

First, governments are requiring more and more source accounting and transactional data to be submitted in digital form, creating a "web" of taxpayer data to which data matching and data analytics routines can be applied. The types of data requirements – which tend to be layered upon one another in quick succession once a tax authority decides to go digital – vary widely, but include:

- ▶ Electronic invoices (e-invoices) are a common requirement, and an early sign that a revenue authority is digitalizing more widely. E-invoices are typically generated on a per-transaction basis and, in many emerging markets, often require tax authority approval before the transaction can commence. Formats and transmission modes vary from country to country, and this can pose a real and ongoing challenge to international taxpayers.

▶ Electronic accounting information includes a broad range of accounting and financial information, including general ledgers, trial balances and journal entries as examples. These are typically submitted to a tax authority in prescribed formats, on a periodic basis, with many countries requiring monthly or quarterly submission. Again, formats differ around the world, with no common standard anywhere in sight.

▶ Standard Audit File for Tax (SAF-T) can be described as pre-defined audit files that must be submitted to a national tax authority. SAF-T typically addresses all tax types, as well as also incorporating many of the electronic accounting data types. While some countries may only require SAF-T to be submitted on demand (e.g., at the outset of a tax audit), others may require scheduled submission. While SAF-T adoption started (around 2009) in Europe, it has been adopted more widely recently. While there is a suggested standard, many countries deviate from it quite substantially.

Second, tax authorities are becoming far more advanced in their use of data matching and data analytics. All of the data sources noted thus far – along with many others, including a company's country-by-country reports – are combined to form a complete corporate tax profile. Data analytics and data matching are then utilized, often right across a company's supply chain, highlighting errors (intentional or not), data inconsistencies, systemic fraud and compliance risks.

The OECD, in fact, published a handbook of 19 tests that it thinks all tax authorities should be running across the data submissions for large multinational companies.² But many tax authorities go far further. As Jeremy Hirschhorn, Deputy Commissioner for Groups in the Australian Taxation Office, said in a recent interview with us, "We have approximately 100 risk factors that we apply to international dealings, and the aim is to make these transparent over time. That way taxpayers can consciously decide whether they want to take a low- or a high-risk position. We call this 'setting out the flags' at the beach."³

¹ An interview with Hans Christian Holte, EY, May 2018. [ey.com/Publication/vwLUAssets/ey-a-discussion-with-the-hans-christian-holte/\\$FILE/ey-a-discussion-with-the-hans-christian-holte-issue-22-june-2018.pdf](http://ey.com/Publication/vwLUAssets/ey-a-discussion-with-the-hans-christian-holte/$FILE/ey-a-discussion-with-the-hans-christian-holte-issue-22-june-2018.pdf).

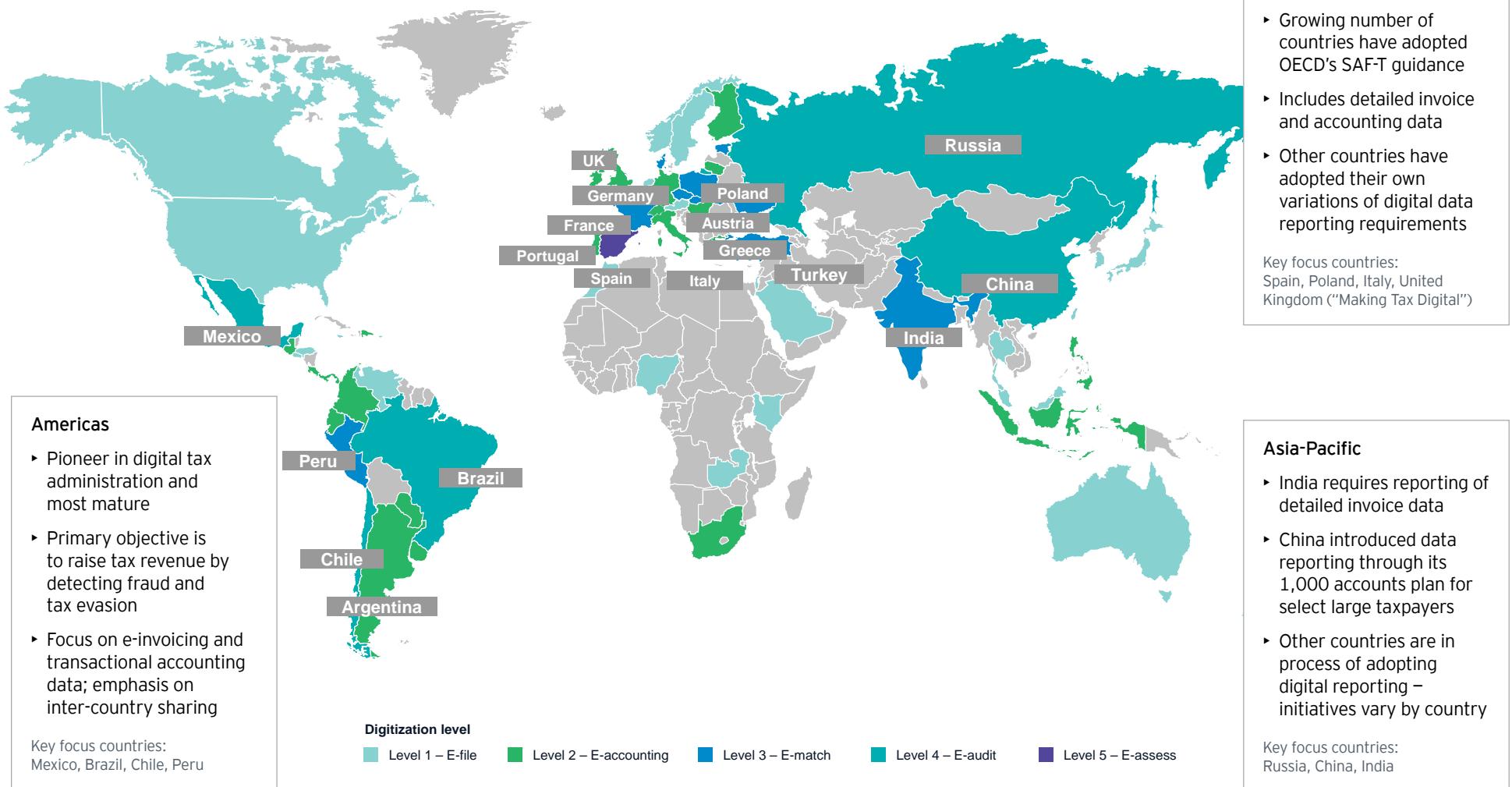
² OECD publishes two handbooks on Country-by-Country reporting, EY Global Tax Alert, 3 October 2017. ey.com/gl/en/services/tax/international-tax/alert--oecd-publishes-two-handbooks-on-country-by-country-reporting.

³ An interview with Jeremy Hirschhorn, EY, November 2017. ey.com/gl/en/services/tax/ey-an-interview-with-jeremy-hirschhorn.

Key global trends

Graphic 1 illustrates the current state of digital tax administration, with each of the country's digital maturity levels (1-5). Below are some key points, regionally:

GRAPHIC 1: GLOBAL TAX AUTHORITY DIGITIZATION MATURITY



Moving to real-time analysis

As well as increasing their overall levels of data acquisition and data analytics, tax authorities are moving to real- or near-real-time tax compliance, demanding data immediately after (and in some cases, even before) a transaction has occurred, instead of capturing and analyzing transactions that occurred months or even years ago. This completely disrupts the traditional tax compliance lifecycle and, in turn, the tax department, which must now deal with a compliance timeline that has changed from several years to just 90 days, and often shorter.

Moreover, digital tax administration presents a major organizational challenge; while the finance department may submit some of the electronic accounting information, the tax department is then responsible for submitting the balance and also then addressing incoming tax authority inquiries – and, in time, tax audits.

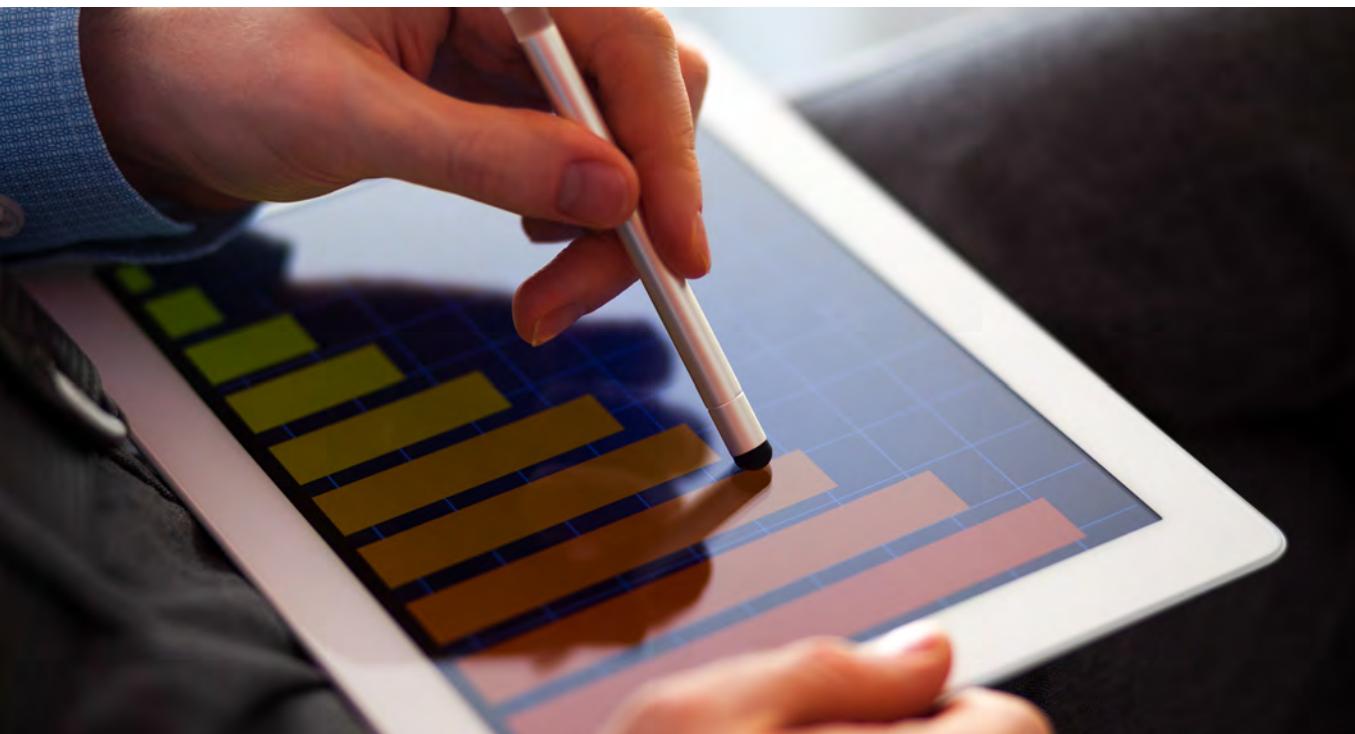
Four key areas of risk

Such significant change also brings significant risk. With more countries moving data acquisition “upstream” (i.e., closer to the point where a transaction originally occurred), unless changes are made companies will be submitting data that has not tax sensitized, checked for errors and generally prepared for final submission (i.e., as it would be for a tax return).

As a result, there is a growing friction between taxpayers and taxing authorities in countries that are going digital. Audit notices tend to increase, and companies find that they have to respond to incoming inquiries in a far more efficient and timely manner, creating a litter of penalties if they fail to keep up. In some unfortunate cases, requests for refunds may be rejected should the taxpayer be deemed to be noncompliant in other areas.

But these are not the only dangers. Broadly speaking, digital tax administration risks tend to span four key areas:

1. **Operational risks** – A common example is where e-invoicing requirements are in place, clearance may be needed from the government before moving forward with a specific transaction. In effect, what should be a relatively simple task to complete has the potential to bring business to a complete halt.
2. **Internal disruption** – Meeting digital tax administration requirements requires close coordination between tax, finance and IT departments, particularly when data submission requirements are rapidly changing. But where such coordination is not planned in advance and companies find themselves in a reactive state, IT projects become mission critical and finance processes must be re-engineered without warning. This causes internal disruption and the inability to execute previously planned projects. Likewise, many companies may experience duplication of efforts, with both the tax and finance departments working on identical efforts and solutions.
3. **Financial risks** – Many countries impose automatic penalties in the hundreds of dollars for every single transactional mistake, however small. This includes data quality issues such as missing required fields on invoices, incorrect formats and other seemingly minor infractions. With some companies making hundreds of thousands of transactions, the penalties can quickly amount to millions of dollars.
4. **Audit aggressiveness** – Alongside shifting data submission requirements, many tax authorities are also demonstrating higher levels of audit aggressiveness in this area. They are implementing higher levels of data analytics and data matching, generating a greater number of incoming inquiries – many of which are electronically generated without human intervention. And where an incoming inquiry triggers an audit, such audits tend to be quite aggressive in nature.



How the leaders are responding

Preparing for digital tax administration today is relevant and necessary. When forming a response, a key first question companies are asking themselves is, "Who owns this in our organization, and who has visibility into how we are complying with these new and ever-changing requirements?"

Next, companies are asking themselves whether they should adopt a global (or regional) approach or develop point solutions in each and every country. Generally speaking, while formats and delivery schedules may be very different, all countries do in fact have some level of consistency in what they are asking taxpayers to deliver. A global or regional response is therefore a more efficient and cost-effective proposition.

Companies must then assess their readiness, define an enterprise-wide strategy and assess data integrity and quality before finding ways to both pre-test the data they are submitting and then streamline data submissions and the ways in which the company will respond to any incoming inquiries.

One of the hardest challenges to overcome may be developing a globally integrated operating model; getting tax, finance and the IT function all involved and working together to define roles and responsibilities is critical to building the right model.

Final thoughts

Digital tax administration is a rapidly evolving topic, and progress is not necessarily linear. Many countries are only beginning their journey, while others are far ahead, already experimenting with the possibility of reaching directly into corporate enterprise resource planning (ERP) systems or connecting directly to point-of-sale cash registers to track sales. Some countries (emerging markets especially) may leapfrog from zero to advanced in a very short period of time. Others may be struggling with legacy systems, and the forward progress may be slower. But for most multinationals, the truth is that they will need to deal with revenue authorities right across the digital maturity spectrum. That means working hard to get onto the front foot, driving efficient operating models and building change management and flexibility into finance processes.

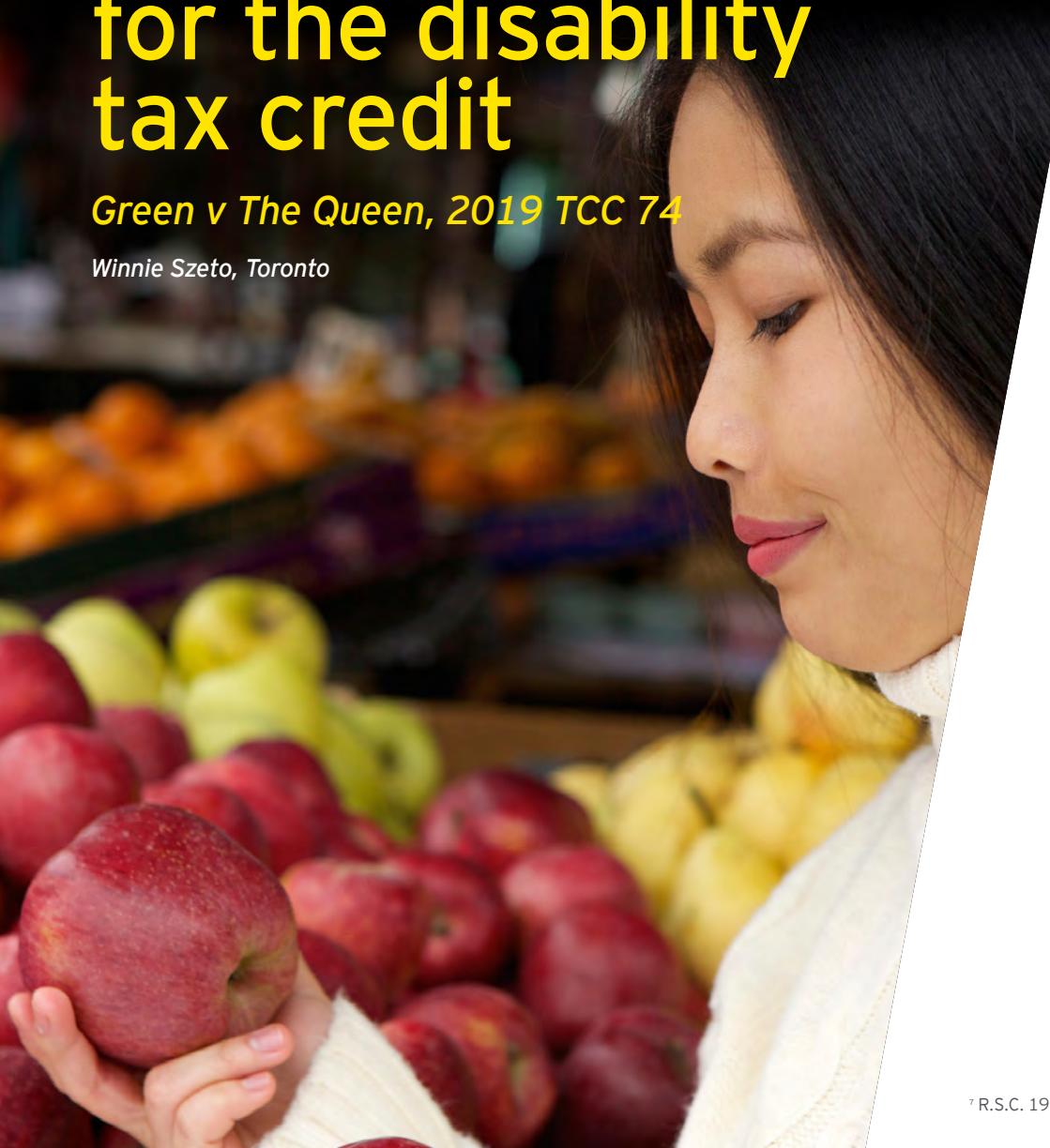
Questions the board should be asking

1. Do we have the proper governance and global operating model, demonstrating risk aversion, visibility and cost effectiveness?
2. Is our approach to digital and technology keeping pace with that of the tax authorities?
3. How are we monitoring global changes to submission requirements and preparing for new mandates?
4. Are we confident that our data quality and governance is sufficient?
5. Do we have visibility and understanding of what the tax authorities are doing with our data?
6. How do we integrate digital audit defense activities into our tax team's daily processes?

Taxpayer's severe anxiety disorder qualified her for the disability tax credit

Green v The Queen, 2019 TCC 74

Winnie Szeto, Toronto



In this informal procedure case, the Tax Court of Canada (the TCC) considered whether the taxpayer's severe anxiety disorder qualified her for the disability tax credit (the DTC) under sections 118.3 and 118.4 of the *Income Tax Act*⁷ (the Act).

Facts

The taxpayer was a woman who had been diagnosed by a psychiatrist as suffering from severe social anxiety disorder, severe panic disorder with agoraphobia, and chronic and moderate to severe generalized anxiety disorder. A second psychiatrist had also diagnosed her with persistent depressive disorder.

The taxpayer had always suffered from anxiety and depression, but these illnesses had not outwardly affected her until high school, when her marks began to fall. She did graduate from high school and enrolled in university, but by 2006 she was asked to withdraw due to poor performance.

The taxpayer had lived in an apartment on her own for approximately five and a half years. She was able to prepare her own meals, dress and bathe herself, and was usually able to shop at her local grocery store. However, she was unable to shop at other retail stores unless she was accompanied by her mother or a close friend. Her mother usually did her banking and tax filings, made her medical and other appointments, and took care of all third-party communications. The taxpayer was unable to attend medical appointments without her mother. She had difficulty coping socially, including participating in social and recreational activities, and working. Her family doctor was of the view that she was markedly restricted in performing the mental functions necessary for everyday life.

The taxpayer was employed at different jobs between 2009 and 2012, such as retail sales, cashier and call centre work, but she described the experiences as "absolutely terrifying." She did not last very long in those positions. The taxpayer was employed at her mother and stepfather's auto repair shop doing office work from 2012 to 2015, but she did not do well there either, because she was unable to interact with customers.

The taxpayer applied for the DTC for the 2010 to 2017 taxation years, but the minister of national revenue (the minister) determined that she was not eligible for the DTC for those years. The taxpayer appealed to the TCC.

Eligibility for the DTC

To be eligible for the DTC, a taxpayer must satisfy three conditions:

1. The taxpayer must have one or more severe and prolonged impairments in physical or mental functions.
2. The severity and prolonged duration of the impairment must be certified by a medical practitioner on Form T2201, *Disability Tax Credit Certificate*.
3. The effects of the impairment must markedly restrict the individual's ability to perform a basic activity of daily living, all or substantially all of the time.

The minister did not dispute the first two conditions, and agreed that those conditions were satisfied.

However, the Minister argued that the taxpayer was not eligible for the DTC for the 2010-17 taxation years because her mental impairments did not affect her ability to perform the necessary basic activities for everyday life, all or substantially all of the time. The minister contended that the taxpayer was able to do many things on her own, such as bathing, dressing, cooking, grocery shopping and taking the bus. The minister acknowledged that her primary difficulty was

working with or interacting with people other than her family and friends. However, the Act expressly states that: working, housekeeping, and social or recreational activities are not considered basic activities of daily living.

TCC decision

According to the Court, whether a taxpayer qualifies for the DTC is mainly a question of fact. As a result, the Court's decision in this case must be based on the facts as they related to the taxpayer. However, in applying the law to the facts, the Court was also guided by the principles enunciated in earlier cases.⁸

On the one hand, the Court acknowledged that the taxpayer's social anxiety, depression and phobias had a significant effect on her ability to function in the way society expects of adults. On the other hand, despite the taxpayer's long-term mental illness, the Court recognized that she was somewhat able to attend school, work and social gatherings, at least prior to 2015.

In assessing whether the taxpayer was able to perform the mental functions necessary for everyday life, the Court considered whether the taxpayer's mental illness was so severe that it affected and permeated her life to such a degree that she was unable to perform the mental functions that would enable her to function independently and with reasonable competence in everyday life. The Court noted that in this context, three elements of mental functions necessary for everyday life are to be considered separately:

- ▶ Her memory
- ▶ Her adaptive functioning
- ▶ Her problem-solving, goal-setting and judgment (to be considered together)

Based on the evidence presented at trial, the Court was satisfied that the taxpayer had no problem with her memory.

With respect to the taxpayer's adaptive functioning, the Court stated:

[54] In my view, assessing [the taxpayer's] adaptive functioning is not a tallying exercise whereby one isolates what she can do and compares it to what she cannot. Rather, it is an exercise in assessing whether the taxpayer's mental illness markedly impacts her adaptive functioning as an overall matter. Does her mental illness impair her abilities related to self-care, health, safety, social skills, and common simple transactions in life (i.e., the mental function necessary for daily living) and her independence to do so? Based on the evidence, I am satisfied, on a balance of probabilities, that it does and that, at least since 2015, it has done so all, or substantially all, of the time.

Based on the above finding, the Court did not need to address the third element of mental functions necessary for daily living (i.e., problem-solving, goal-setting and judgment). Nevertheless, the Court decided to consider it anyway, due to the difficulty of the case. Giving the taxpayer the benefit of the doubt, the Court determined that her mental illness affected and permeated her life to a significant degree all of the time and therefore affected her problem-solving, goal-setting and judgment abilities as they related to everyday life.

Finally, while the Court was satisfied that the taxpayer suffered with mental illness for many years prior to 2015, it was not convinced that before 2015 the taxpayer's mental illness markedly restricted her mental functions for everyday life all or substantially all of the time. As a result, the appeal was allowed for the 2015-17 taxation years.

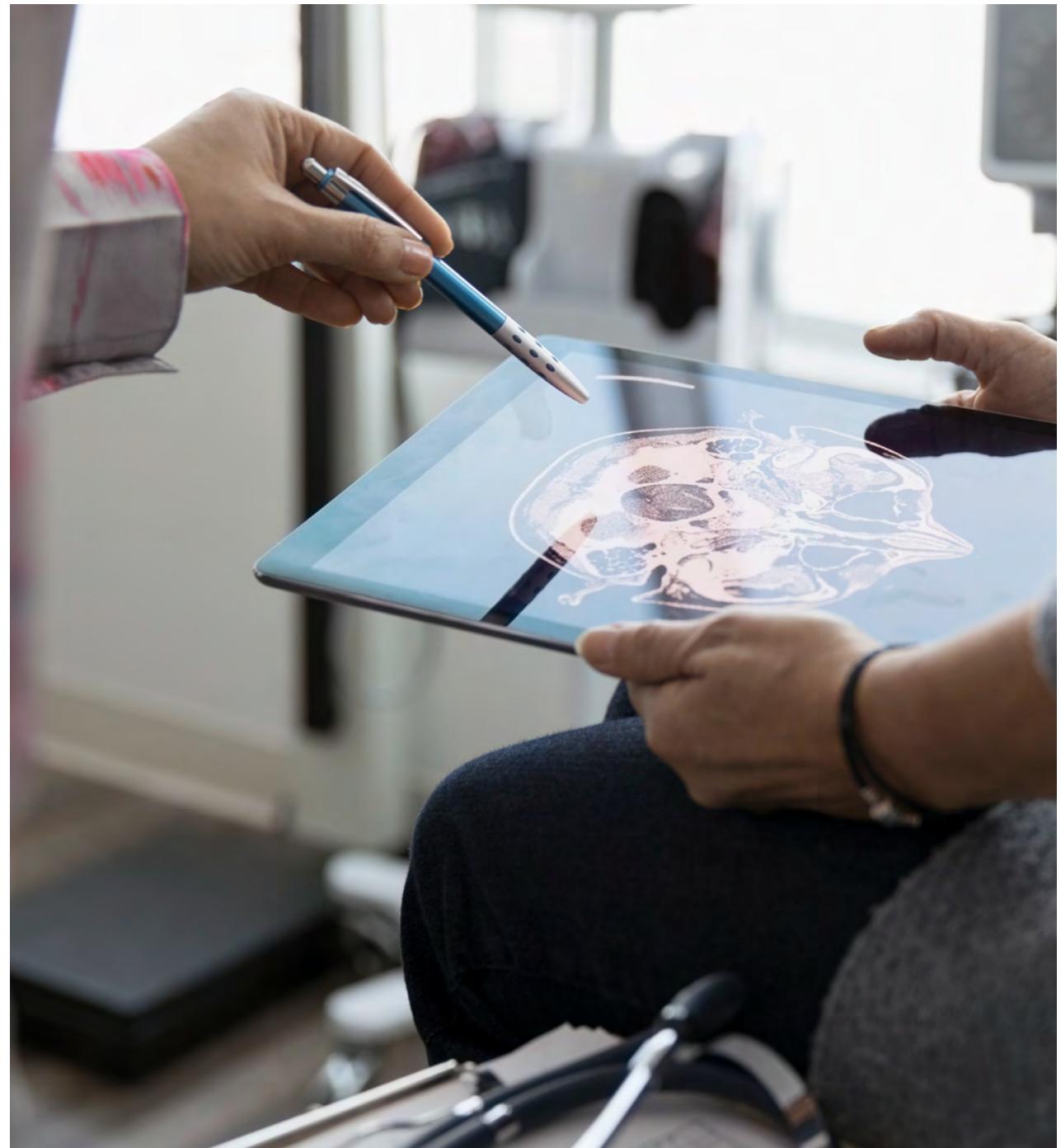
⁸ See *Johnston v The Queen*, 98 DTC 6169 (FCA) and *Radage v The Queen*, [1996] 3 CTC 2510 (TCC).

⁹ *Radage, ibid*; and *Gibson v The Queen*, 2014 TCC 236.

Lessons learned

It's a common perception (and perhaps rightly so) that the eligibility criteria for the DTC are overly restrictive, especially when the underlying disability relates to mental illness. In our view, this case is particularly interesting, because it represents a win for those who are markedly mentally impaired by providing them with modest tax relief in the form of the DTC.

It should be noted that because this is in an informal procedure case, it "shall not be treated as a precedent for any other case."¹⁰ Technically, this means that the results of this case are not binding on the Canada Revenue Agency or any other court, even where the facts are very similar. Having said that, informal procedure decisions often influence the decisions of other judges.



¹⁰ Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 18.28.

Publications and articles

Tax Alerts - Canada

Tax Alert 2019 No. 20 – Finance announces final steel safeguards

On 26 April 2019, the federal Department of Finance announced that it will enact final safeguards on heavy plate and stainless-steel wire originating from countries other than the US, Mexico, Israel, South Korea, Panama, Peru, Colombia and Honduras, and countries whose goods are eligible for General Preferential Tariff treatment.

Tax Alert 2019 No. 21 – Canada/US remove surtaxes/tariffs

On 17 May 2019, Canada and the US announced that an understanding has been reached on eliminating the US Section 232 tariffs imposed on Canadian steel and aluminum and Canada's retaliatory surtaxes.

Tax Alert 2019 No. 22 – Canada imposes final steel safeguards: update

Effective 13 May 2019, Canada will apply final safeguard orders on imports of heavy steel plate and stainless-steel wire imported from all countries except for:

- ▶ Goods originating in Canada
- ▶ Goods originating in Chile, Colombia, Mexico, Panama, Peru, South Korea, the US or Israel or another Canada-Israel Free Trade Agreement beneficiary
- ▶ Goods originating in a World Trade Organization member country that is a beneficiary of the General Preferential Tariff.

Tax Alert 2019 No. 23 – New disclosure requirements and penalties in Quebec

On 17 May 2019, the Québec Ministry of Finance released Information Bulletin 2019-5, "Measures designed to protect the integrity and fairness of Québec's tax system."

This bulletin announces new measures to oppose aggressive tax planning by imposing significant new penalties and disclosure requirements on both taxpayers and tax advisors and promoters.

Tax Alert 2019 No. 24 – ETA holding corporation proposals: update

On 17 May 2019, the Department of Finance (Finance) released a package of draft legislative proposals and explanatory notes relating to the holding corporation rules contained in section 186 of the Excise Tax Act (ETA). These proposals would extend the application of the rules to include holding partnerships and trusts. Finance indicated that it had considered submissions from industry stakeholders and other interested parties relating to the original legislative proposals released on 27 July 2018, as well as a consultation paper released on the same day.

In addition to the proposed changes to the holding corporation rules, Finance has released draft amendments to the ETA that would:

- ▶ Extend the application of the drop shipment rules to commercially interchangeable or fungible goods
- ▶ Treat virtual currency as a financial instrument for GST/HST purposes
- ▶ Expand the definition of a freight transportation service so that zero-rated international freight transportation services would include international driving services

Interested parties are invited to provide comments on these legislative proposals by 17 June 2019.



Publications and articles

Publications and articles

EY's Global Capital Confidence Barometer

The 20th edition of EY's Global Capital Confidence Barometer describes how 76% of Canadian respondents expect to pursue M&A in the next 12 months, the second-highest ever (behind April 2018) and the fifth consecutive year above the historical average of 50%.

EY's Worldwide Personal Tax and Immigration Guide 2018-19

This guide summarizes personal tax systems and immigration rules in more than 160 jurisdictions, including Australia, Brazil, Canada, France, Germany, Mexico, the Netherlands, the Russian Federation, the UK and the US.

EY's Worldwide Capital and Fixed Assets Guide 2018

The *Worldwide Capital and Fixed Assets Guide* helps our clients navigate the rules relating to fixed assets and depreciation. It summarizes the complex rules relating to tax relief on capital expenditures in 29 jurisdictions and territories.

EY's Worldwide Estate and Inheritance Tax Guide 2018

EY's Worldwide Estate and Inheritance Tax Guide summarizes the estate tax planning systems and describes wealth transfer planning considerations in 39 jurisdictions around the world, including Australia, Canada, China, France, Germany, Italy, the Netherlands, the UK and the US.

Worldwide Corporate Tax Guide 2018

Governments worldwide continue to reform their tax codes at a historically rapid rate. Chapter by chapter, from Afghanistan to Zimbabwe, this EY guide summarizes corporate tax systems in 166 jurisdictions.

Worldwide VAT, GST and Sales Tax Guide 2019

This guide summarizes the value-added tax (VAT), goods and services tax (GST) and sales tax systems in 124 jurisdictions, including the European Union.

Worldwide R&D Incentives Reference Guide 2018

The pace at which countries are reforming their R&D incentives regimes is unprecedented. This EY guide summarizes key R&D incentives in 44 countries, and provides an overview of the European Union's Horizon 2020 program.

2018-19 Worldwide Transfer Pricing Reference Guide

Transfer pricing rules and regulations around the world continue to grow in number and complexity. Practitioners need to have current knowledge of a complex web of country tax laws, regulations, rulings, methods and requirements. This guide summarizes the transfer pricing rules and regulations adopted by 124 countries and territories.

Board Matters Quarterly

The April 2019 issue of *Board Matters Quarterly* provides a preview of the proxy season, a look at newly-elected Fortune 100 board members and highlights the top five priorities for the SEC this year.

EY Trade Watch

EY Trade Watch is a quarterly communication prepared by EY's Customs & International Trade Practice. This edition includes Argentina's temporary duties on exports of services, Brazil's single-window product database and Costa Rica's draft resolution regulating inclusion of royalty payments in an import's customs value.

Publications and articles

Websites

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Online tax calculators and rates

Frequently referred to by financial planning columnists, our mobile-friendly calculators on ey.com/ca let you compare the combined federal and provincial 2018 and 2019 personal tax bills in each province and territory. The site also includes an RRSP savings calculator and personal tax rates and credits for all income levels. Our corporate tax-planning tools include federal and provincial tax rates for small business rate income, manufacturing and processing rate income, general rate income and investment income.

Tax Insights for business leaders

Tax Insights provides deep insights on the most pressing tax and business issues. You can read it online and find additional content, multimedia features, tax publications and other EY tax news from around the world.

The Worldwide Indirect Tax Developments Map

Updated monthly, our interactive map highlights where and when changes in VAT, global trade and excise duties are happening around the world. The map can be filtered by tax type, country and topic (e.g., VAT rate changes, compliance obligations and digital tax).

CPA Canada Store



EY's Guide to the Taxation of Mining Operations

Editors: Lee Boswell, Irene Chan, Craig Hermann, André Lortie, Jim MacLean, Michael Sabatino

This guide is designed to help Canadian mining businesses interpret and apply the rules under the federal *Income Tax Act*, as well as under provincial and territorial legislation.



EY's Guide to Capital Cost Allowance, 6th Edition

Editors: Allan Bonvie, Susan Bishop, Brett Copeland, Krista Robinson

Takes you through the capital cost allowance and eligible capital expenditure rules in Canada with commentary and illustrative examples. Unique CCA lookup tables (by class and by item) are included.



EY's Federal Income Tax Act, 2019 Edition

Editors: Albert Anelli, Warren Pashkowich and Murray Pearson

Complete coverage of Canada's *Income Tax Act* and Regulations. Included with this edition:

interactive online features and purpose notes for selected provisions. Purchase of a print book includes access to an online updated and searchable copy of the federal *Income Tax Act* as well as the PDF eBook. This edition contains amendments and proposals from the 19 March 2019 federal budget, the 15 January 2019 proposed amendments to the *Income Tax Act* (salary overpayments) and 2018 legislation as passed and proposed.

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