

## QUEBEC: NEW CONSEQUENCES WHERE GAAR OR SHAM RULE APPLIES

### GAAR PENALTY

Revenu Québec may impose monetary penalties on taxpayers or their promoters if they are subject to an assessment under Quebec's general anti-avoidance rule (GAAR). An assessment based solely on the federal GAAR is not subject to these penalties. A taxpayer who takes part in an abusive avoidance transaction is liable to a penalty equal to 50 percent of the tax benefit denied, while the promoter may be assessed a penalty equal to 100 percent of the fees received in respect of the transaction targeted by the GAAR («the GAAR penalty»). Preventive disclosure of the transaction through form [TP-1079.DI-V](#) allows taxpayers and promoters to avoid the GAAR penalty.

It is important to note that the characterization of a promoter under Quebec's [Taxation Act](#) (TA) differs from that under the federal Income Tax Act. More specifically, the promoter of an avoidance transaction is any person, including a partnership, that meets all of the following criteria:

- it has promoted the avoidance transaction or otherwise supported its development or the interest it has generated;
- it (or a person or partnership associated or related to it) has received or is entitled to receive, directly or indirectly, a consideration for such commercialization, promotion, or support; and
- it is reasonable to consider that it has assumed an important role in such commercialization, promotion, or support.

### SHAM TRANSACTION PENALTY

Quebec's [Bill 42, An Act to give effect to fiscal measures announced in the Budget Speech delivered on 21 March 2019 and to various other measures](#), includes, in particular, new penalties for taxpayers participating in sham tax schemes, as well as for the advisers or promoters involved in such schemes. More specifically, the taxpayer will incur a penalty equal to the greater of \$25,000 and 50 percent of the additional tax that would have been payable for that year had the taxpayer not participated in a sham transaction. The promoter or adviser of the sham transaction is subject to a penalty equal to 100 percent of the fees received in connection with such a transaction («the sham transaction penalty»). Unlike the GAAR penalty, the sham transaction penalty also extends to «advisers.» This term refers to a person or partnership that provides help, assistance, or advice regarding the design or implementation of the transaction, or that commercializes or promotes it.

It should be noted that the term «sham transaction» is not defined in the TA. It is therefore important to refer to the definition developed in the relevant case law. However, the intention to deceive the tax authorities is generally common to all parties to the transaction and is one of the characteristics of sham transactions. Incidentally, and contrary to the GAAR penalty, it will not be possible to avoid the sham transaction penalty through any disclosure of the transaction.

## REGISTER OF INELIGIBLE ENTERPRISES

In addition to the above, with [Bill 37, An Act mainly to establish the Centre d'acquisitions gouvernementales and Infrastructures technologiques Québec](#) and Bill 42, the Quebec government intends to register taxpayers, as well as promoters or advisers, as applicable, subject to a final assessment based on one of the aforementioned penalties, on the register of enterprises ineligible for public contracts (REIN). This register is governed by the [Act respecting contracting by public bodies](#) (ACPB). A taxpayer, promoter, or adviser, as applicable, registered in the REIN will not be able to bid for a public contract, conclude such a contract, or conclude a public subcontract. This ineligibility lasts for five years. A final assessment is an assessment regarding which all rights of objection have expired or, if an objection or an appeal has been made to a court of competent jurisdiction, the objection or the appeal, as applicable, has been permanently settled.

Generally, public contracts include the service or construction contracts of government departments and agencies; organizations in the education, health, and social services networks; state-owned corporations; and cities and municipal organizations. This list is far from exhaustive since there were [288 public organizations](#) subject to the ACPB as at March 31, 2018.

The commission of a prescribed offence subject to registration in the REIN by a taxpayer, promoter, or adviser, as applicable, has consequences for associates (as defined in the ACPB) of the taxpayer, promoter, or adviser. If a director or officer of a company is found guilty of a prescribed offence subject to registration in the REIN, and the offence was committed in the course of the individual's duties, the company is also entered in the register. Also, when a member of a partnership or one of its other officers is registered in the REIN because of his or her involvement in a transaction that is subject to either penalty, the partnership is also prohibited from participating in public contracts. In addition, if a person exercising de jure control of a company is found guilty of a prescribed offence, that company is also registered in the REIN, regardless of whether the offence was committed in the course of his or her duties. Moreover, following the refusal or revocation of an entity's authorization to contract, any companies over which it exercises de jure control are also registered in the REIN.

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